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# CALIFORNIA REPORTER

COVERING CASES REPORTED IN

## PACIFIC REPORTER
## SECOND SERIES

23 P.2d – 24 P.2d

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# CALIFORNIA REPORTER

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SECOND SERIES

218 Cal. 316

## MEYERS v. RAILROAD COMMISSION.

S. F. 14653.

Supreme Court of California.
June 1, 1933.

**1. Commerce 🔑12.**

State may enact reasonable police regulations to govern local operations of instrumentalities engaged in interstate commerce, but may not under guise of police regulations place unreasonable burdens on interstate commerce (Gen. Laws 1931, Act 5129, § 9).

**2. Commerce 🔑61(1).**

To deny certificate of public convenience and necessity to interstate carrier other than in interest of public health, security, safety, convenience, and general welfare is to place unreasonable burden on interstate commerce contrary to Federal Constitution (Gen. Laws 1931, Act 5129, § 9).

**3. Commerce 🔑61(1).**

That person engaged exclusively in interstate or foreign commerce does not leave state does not give state right to require him to desist until he obtains certificate of public convenience and necessity (Gen. Laws 1931, Act 5129, § 9).

**4. Commerce 🔑33(1).**

Origin and destination of a shipment determine its character, and once the interstate character attaches, it remains throughout the movement of the goods (Gen. Laws 1931, Act 5129, § 9).

**5. Commerce 🔑61(1).**

Railroad Commission's order requiring person engaged exclusively in interstate and foreign commerce within state to desist until he should have obtained certificate of public convenience and necessity *held* direct burden on interstate and foreign commerce and void (Gen. Laws 1931, Act 5129, § 9).

WASTE, C. J., and LANGDON and SHENK, JJ., dissenting.

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Petition by Alex Meyers, doing business as the Western Transportation Company, to review a decision of the Railroad Commission of the State of California, finding that petitioner was operating a trucking service in the vicinity of Los Angeles as a common carrier and directing him to cease and desist such operations until he shall have obtained a certificate of public convenience and necessity.

Order of commission annulled.

Sanborn & Roehl and Frank B. Austin, all of San Francisco, for petitioner.

Arthur T. George, Ira H. Rowell, and Roderick B. Cassidy, all of San Francisco, for respondent.

PRESTON, Justice.

Petition to review a decision of the Railroad Commission which finds that petitioner is operating a trucking service, in the vicinity of Los Angeles, as a common carrier, and directs him to cease and desist such operations until he shall have obtained a certificate of public convenience and necessity. Conceding that he operates as a common carrier, petitioner attacks the order on the sole ground that the operation is in interstate and foreign commerce; hence it is not subject to regulation by the commission. The evidence shows that petitioner is engaged only in the business of transporting goods from the docks of Los Angeles harbor to points in and around Los Angeles or from such points to the docks, all of which goods have been shipped in from or are consigned to destinations outside the state. A local trucking service, formerly carried on as a small part of petitioner's business, has, he avers, been discontinued.

**[1, 2]** The order of the commission was made pursuant to the Auto Stage and Truck Transportation Act (Deering's Gen. Laws, 1931, vol. 2, Act 5129, p. 2534), section 9 of which provides that it shall not be construed to apply to interstate or foreign commerce save as permitted by the Federal Constitution and acts of Congress. The commission, however, is given power to prescribe reasonable regulations in aid of public health, security, safety, convenience, and general welfare. This provision is in accord with the law as set forth in recent years by the United States Supreme Court. A state may enact reasonable police regulations to govern the local operations of instrumentalities engaged in interstate commerce but may not, under the guise of police regulations, place undue and unreasonable burdens upon interstate commerce. To withhold a certificate of public convenience and necessity is to prohibit or limit the right to engage in commerce; hence to deny such a certificate to an interstate carrier, other than in the interest of public health, security, safety, convenience, and general welfare, is unreasonably to burden interstate commerce, and such action by a state commission is in violation of the Federal Constitution. Buck v. Kuykendall, 267 U. S. 307, 45 S. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 286; Bush & Sons Co. v. Maloy, 267 U. S. 317, 45 S. Ct. 326, 327, 69 L. Ed. 627; People v. Yahne, 195 Cal. 683, 235 P. 50.

**[3, 4]** It is urged that the principle above announced should not be applied here as, although petitioner operates exclusively in the transportation of goods in interstate or foreign commerce, he does not himself travel outside, but remains wholly within, the boundaries of the state of California. On principle, as well as authority, no such distinction will apply by reason of that fact. A link in the travel of goods in interstate commerce may be wholly within a state or partially within and partially without it. The origin and destination of the shipment determine its character and once the interstate character attaches, it remains throughout the movement of the goods, though the point of destination be within, yet very far removed from the boundaries of, another state. The identical point here raised was before the federal District Court in the case of Galveston Truck Line Corporation v. Allen, 2 F. Supp. 488, 489. There a distinction was contended for between trucks traveling from a point within to a point without the state of Texas and trucks moving wholly within that state, all engaged in interstate commerce. The court held that no such distinction existed and, in so doing, used the following language: "* * * No difference in principle can, we think, be drawn between a link in interstate commerce which operates wholly within a state, and one which crosses the state line. Since, therefore, the refusal by the commission to issue a permit is based, not upon considerations, of traffic safety, or of the protection of the highways from injury to them, or from congestion thereof, but only of the commerce itself and the business of those who transport it, that is, of whether there is already adequate provision for handling such commerce and the effect upon those engaged in it which the granting of the permit will have, the ruling necessarily operates as a burden on interstate commerce and may not stand." This decree was affirmed by the Supreme Court of the United States on May 15, 1933 (53 S. Ct. 694, 77 L. Ed. ——), in a per curiam decision citing the two federal cases first hereinabove noted as well as many other opinions of said court. In fact, in the recent case of Bradley, etc., v. Public Utilities Commission of Ohio, 53 S. Ct. 577, 77 L. Ed. ——, decision rendered April 10, 1933, the United States Supreme Court incidentally, if not directly, approves this holding.

[5] As already pointed out there is involved in the instant case no question of local regulation in the interest of public health, security, safety, convenience, and general welfare, the question presented being solely as to the power of the Railroad Commission to determine who shall engage in the business of facilitating the transportation of goods in interstate commerce within the state of California. Clearly, in such a situation, the action of the commission operates as a direct burden on such commerce.

The order of the commission here involved is annulled.

We concur: CURTIS, J.; IRA F. THOMPSON, J.; SEAWELL, J.

LANGDON, Justice.

I dissent. The general principles that a state may not unreasonably burden interstate commerce, and that the requirement of a certificate of public convenience and necessity of an interstate carrier is such a burden, are, of course, well settled. The point at issue in this proceeding is, however, simply one of fact, whether the mere carriage of goods which are in the course of interstate and foreign shipment makes petitioner a carrier engaged exclusively in interstate and foreign commerce. In my opinion it does not. In the cases cited in the majority opinion, with one exception, the actual physical operations of the carriers were interstate; that is, their trucks moved between states. In the Galveston Truck Line Corporation Case (D. C.) 2 F. Supp. 488, no facts appear in the opinion to show precisely what type of transportation was involved, although the phrase "link in interstate commerce" indicates that it was part of some system of carriers which operated between states. In the instant case, petitioner operates a common carrier system independently of any other creditor of those same goods. His trucks do not go outside the borders of the state. His operations are therefore intrastate. The goods, it is true, are in the course of interstate and foreign transportation, but no attempt is being made to hinder or regulate their movement. The action of the commission is directed at the carrier and not at the goods. No unreasonable burden is placed upon interstate commerce by regulation of a carrier whose physical operations are entirely within this state.

There is authority which is completely in accord with this view. In Stephenson v. Binford (D. C.) 53 F.(2d) 509, P. U. R. 1932A, 1, affirmed by the United States Supreme Court, 287 U. S. 251, 53 S. Ct. 181, 77 L. Ed. 288, the intervener made the identical contention that petitioner makes herein, namely, that "though he hauls between points entirely within the state of Texas, the goods which he hauls have moved into Texas interstate, and that he hauls them as part of their uncompleted movement." 53 F.(2d) 509, 511. The court said (page 516): "We do not * * * agree with the intervener Finnegan that he is an interstate carrier. His contract is made in Texas; his carriage is in Texas. Whether the goods which he is carrying have really come to rest before he picks them up, or are in the course of continuous transit, the record does not show. But, if it did show the facts to be as he contends, we think it would be a straining of the point to say, because the goods he handles intrastate have come from outside of it, that the requirement that the carrier who contracts wholly in Texas, and who carries wholly there, procure a permit to do so, and submit himself to the regulations which the state requires, constitutes a burden on interstate commerce." It is to be noted that the United States Supreme Court, in affirming the judgment, made no criticism of this language, and presumably the intervener Finnegan is now under regulation as a result of that decision. The Ohio Public Utilities Commission expressed itself to the same effect in the case of In re Railway Express Agency, Inc., P. U. R. 1931A, 177, 193: "* * * the operation of the truck proposed in the present case is purely intrastate, regardless of the fact that it may handle shipments that are in interstate commerce. The various decisions such as the Daniel Ball Case and others cited by applicant apply simply to the questions as to whether or not a certain shipment is an interstate movement and do not in any way affect the fact that the proposed operation herein is an intrastate operation of a truck governed by the Ohio Motor Transportation Law and the rules of this commission."

I am satisfied that the decision of the respondent commission properly characterizes petitioner's business, and I think that the order should be affirmed.

We concur: WASTE, C. J.; SHENK, J

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218 Cal. 300

## PEOPLE v. FLEMING.

Cr. 3609.

Supreme Court of California.

June 1, 1933.

**1. Homicide 🔑244(1).**

Evidence *held* sufficient to support conviction of first degree murder as against contention that it showed self-defense.

**2. Homicide 🔑231.**

Evidence *held* sufficient to justify jury's implied finding of malice warranting conviction of first degree murder.

**3. Homicide 🔑231.**

To sustain conviction of murder, personal enmity of defendant against deceased need not be shown.

**4. Homicide 🔑157(1).**

Evidence of present and pending, as well as previous, difficulties between defendant and deceased is admissible in murder trial to show malice.

**5. Homicide 🔑115.**

Killing of unarmed man by one whom he pushed out of way and through door *held* not justifiable; killer not being in peril of death or bodily injury.

**6. Homicide 🔑14(2).**

No appreciable time between formation of intention to kill and act of killing need be shown to prove premeditation justifying conviction of first degree murder; it being necessary only that killing be preceded by concurrence of slayer's will, deliberation, and premeditation.

**7. Homicide 🔑253(3).**

Evidence *held* sufficient to show premeditation or deliberation justifying conviction of first degree murder.

**8. Homicide 🔑145.**

Presumption is that one assaulting another violently with deadly weapon and taking latter's life intended death or great bodily harm.

**9. Homicide 🔑145.**

Presumption is that one assaulting another in manner reasonably certain to produce, and actually causing, death intended to kill person assailed.

**10. Homicide 🔑230.**

Evidence in murder trial *held* to show defendant's intent to take deceased's life.

**11. Homicide 🔑253(1).**

Evidence *held* not to warrant reduction of conviction of first degree murder to one of lesser offense included in murder charge (Pen. Code, § 1181, subd. 6).

**12. Criminal law 🔑1036(2).**

Defendant not objecting to admission of his testimony on cross-examination in murder trial that he had no permit to carry gun and had filed off number of gun he carried cannot complain thereof on appeal.

**13. Criminal law 🔑1169(11).**

Admission of defendant's testimony on cross-examination in murder trial that he made two notches on gun in evidence as his *held* not prejudicial error.

**14. Homicide 🔑165.**

Exclusion of testimony of deceased's widow in murder trial as to when and where she married deceased *held* not error.

LANGDON, J., and TYLER, Justice pro tem., dissenting.

In Bank.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

John C. Fleming was convicted of murder in the first degree, and he appeals.

Affirmed.

Paul Peipers and R. E. O'Neill, both of Los Angeles, for appellant.

**U. S. Webb**, Atty. Gen., **William F. Cleary**, Deputy Atty. Gen., and **Stanley Mussell**, Dist. Atty., of San Bernardino, for the People.

CURTIS, Justice.

Defendant was accused of the crime of murder, together with three prior convictions. The first prior conviction of which defendant was charged was burglary; the second, robbery; and the third, assault with intent to commit murder. All of said convictions were under judgments rendered in this state. Defendant admitted the prior convictions, but pleaded not guilty to the charge of murder. He was tried by a jury which rendered a verdict of guilty of murder in the first degree without fixing the punishment for said crime. The court thereupon rendered judgment imposing the death penalty. From this judgment and from an order denying his motion for a new trial the defendant has appealed. Appellant in his brief has set forth thirty-two specifications wherein he claims that error was committed, and upon which he relies for a reversal of the judgment. These specifications are discussed quite fully in a lengthy brief in which each is given attention in detail. The argument of appellant may be properly divided into four general divisions in which the following contentions are respectively made:

(1) That the evidence is insufficient to support a verdict of guilty in that it shows that defendant took the life of the deceased in defense of his own.

(2) That the evidence is insufficient to support a verdict that defendant was guilty of the crime of murder, or any other or greater crime than manslaughter.

(3) Misconduct on the part of the district attorney which was prejudicial to the rights of the defendant.

(4) That the court erred in the admission and rejection of evidence.

[1] The contention of the defendant that the evidence is insufficient to support a verdict of guilty against the defendant, in that it shows that he acted in self-defense in the killing of the deceased rests upon the claim of defendant that the deceased, at the time defendant drew his gun, held in his hand an automobile crank, and that he was then in the act of striking defendant over the head with said automobile crank when the defendant shot the deceased to protect himself from death or great bodily injury. This claim is unsupported except by the uncorroborated testimony of the defendant. It is inconsistent with the evidence of all the other witnesses in the case present at the shooting. Mrs. Leece, the wife of the deceased, Amos Leece, was the only eyewitness to the shooting other than defendant and deceased. She was in deceased's machine, and the shooting took place on the opposite side of the machine in which she was sitting. She was evidently in a greatly agitated and excited state of mind due to the tragic death of her husband, and her account of the affair was conflicting, incomplete, and exceedingly indefinite. Her testimony will be referred to later. At the time of the shooting four people were in the Midway Gas Station, in front of which the deceased was killed. One of them, Peggy O'Day, was so intoxicated that she was in no condition to give any account of what happened, and she did not attempt to do so. The other three persons in the building, Charles Adcock, the proprietor of the station, Marie Young, his housekeeper, and Angus Kerr, a patron at the station, immediately rushed out of the building on hearing the shots from defendant's gun onto the front porch of the building where the shooting took place. They saw nothing of any automobile crank in the hands of the deceased or on the floor of the porch, or in the vicinity of the porch. Adcock and Kerr had seen deceased as he left the front room of the building and went out onto the porch just prior to the shooting, and neither of them saw any automobile crank in his hand. The defendant himself, who came into the room from the porch just as the deceased turned to leave the room, also says that he saw no weapon of any kind in Leece's hand as the latter walked toward the door to go out onto the porch. The defendant's testimony is that he was standing some two steps within the room in front of the door, and that the deceased pushed him backwards through the door, and then followed him onto the porch, and that, as soon as he (the defendant) recovered himself, "Mr. Leece had this crank in his hand coming toward me with it." But how or where Leece secured the crank the defendant does not attempt to show. The whole affair happened within a few seconds of time. The shots were fired, according to Adcock, a couple of seconds after the men went through the door onto the porch. Angus Kerr testified that "they had scarcely disappeared out of the door when two shots rang out; just as they disappeared out of the door two shots went off." The testimony of the defendant that deceased assaulted him with an automobile crank taken by itself is not at all convincing, and, when we consider it in connection with the other evidence in the case, we are of the opinion that it is completely overcome and discredited. The facts immediately preceding the shooting will be given in detail in discussing another phase of the case. It is not necessary to state them here. The verdict of guilty, therefore, finds ample support in the evidence.

In connection with the automobile crank, however, it should be said that Mrs. Leece, after denying that her husband had any such crank that evening, testified that, when her husband came out to the machine after paying his bill in the station, he went to the rear of the machine where the crank was kept and took it out of the machine for the purpose of cranking his machine. She did not, however, see what her husband did with the crank when he re-entered the building. Some hours after the killing the crank was found on the floor of Leece's machine. If we disregard the testimony of the defendant, as the jury evidently did, and we think properly so, then the only reasonable construction to place upon the acts of Leece is that, when he decided to return to the barroom, he returned the crank to the machine, where it remained until found there some hours later. This construction harmonizes with all the evidence in the case, including that of the defendant that Leece did not have the crank with him when he was last in the front room of the station.

[2-5] We now pass to the consideration of the second general contention of the defendant that there is no evidence in the case that justified a verdict finding defendant guilty of murder, or any crime greater than manslaughter. In support of this phase of the case, the defendant contends that the evidence is insufficient to show either malice, premeditation, or an intent to kill on his part before or at the time he fired the shots which resulted in the death of Amos Leece. A consideration of this contention will require a somewhat more extended reference to the events leading up to the shooting than has, heretofore, been given.

The Midway Service Station is about a mile north of the town of Red Mountain on the highway from Atolia to Randsburg. At the time in question it was conducted by Charles Adcock, who lived at the station. There was also living there at the time Marie Young, who acted as his housekeeper, and Peggy O'Day. The latter had been brought by the defendant from Long Beach, her home, to the Midway Service Station some time in the month of January, 1932. The homicide occurred on May 21, 1932. Peggy O'Day was stopping at the station, ostensibly for her health, although the evidence shows that she was engaged in prostitution during her stay at the station. The Midway Service Station was located on the westerly side of the highway. The main building consisted of a large front room generally referred to as the front or barroom. Across the northerly end there extended a counter or bar. There was a cement porch in the front part of the building with solid walls, except an eight-foot opening in the center through which entrance from the driveway was gained to the porch. A door opposite this entrance opened from the porch into the front or main room of the building. There was a kitchen and some four bedrooms in the building. Besides gas and oil, Adcock kept for sale at the station soft drinks, tobacco, cigars, and other small articles of merchandise. The gasoline pump was located in front of the eight-foot opening in the porch, and between the pump and the porch was a driveway. After bringing Peggy O'Day to the station in January, the defendant had visited her on two or three occasions. The last of these visits was on the day of the tragedy. He arrived late in the morning, and, after having "breakfast" with Charles Adcock and Marie Young at 12 o'clock, he and Peggy O'Day left for Red Mountain, where they visited friends and imbibed rather freely of intoxicating liquors, with the result that, when they returned to the station in the evening, Peggy O'Day was in an intoxicated condition, and the defendant was not far from that state. They returned to the station at about 7:10 in the evening and entered the building through the rear door. Some fifteen minutes before their return to the station, the deceased, Amos Leece, and his wife drove up to the station for the purpose of getting some gasoline and making other minor purchases. Leece was in charge of the pump of the Randsburg Water Company at its plant some six or seven miles distant, where he lived with Mrs. Leece. On the evening in question he drove into the station, and stopped his machine in front of the building with the rear of his car near the gasoline pump. After securing a supply of gasoline, he and Mrs. Leece went into the front room of the building where Mrs. Leece made some small purchases, and Mr. Leece paid his bill. He was standing in front of the counter or bar settling the bill when Peggy O'Day entered the room through the rear entrance of the building. She immediately approached Leece, and asked him to buy her a drink, and on his refusal began to abuse him and apply vile epithets to him. Leece seemingly disregarded her, but, as he turned to leave, he remarked to her, "I think you are a cheap, chippy whore," and left the room through the front door for his car. Mrs. Leece had preceded him and was sitting in the front seat of the car as Leece came out of the room. As Leece was leaving the room, the defendant entered through the rear door. He had heard the remark which Leece had made to Peggy O'Day. He followed Leece out to the latter's car, and there demanded of Leece that he apologize to Peggy O'Day for the remark just made to her. Leece declined to do so, and reiterated in substance to the defendant the remark which he had previously made to Peggy O'Day. He then returned to the barroom, and complained to Charles Adcock, who was behind the counter, that if he could not come to the station without being insulted he would quit trading there. After making this complaint to Adcock, he turned to leave the room again through the front door. As he approached the door, the defendant was standing in the room about two steps in front of the door. Deceased pushed defendant out of his way, and in doing so pushed him through the door, and then stepped through the door himself, when the three shots were fired as already stated. Adcock, Marie Young, and Angus Kerr immediately rushed to the porch, where they found the defendant standing over the deceased. He had hold of his gun by its handle and the two men were struggling for its possession. The deceased was down on the porch either on his knees, or, as one witness described his position, "he was lying on his right hip with his left hand down on the cement and his right hand up over the hammer of the gun, shut down tight." Adcock and Marie Young joined in the struggle for the gun. Adcock finally succeeded in securing possession of it. He gave it to Marie Young, who hid it. The defendant in a few minutes left in his machine, but returned after an absence of four or five minutes. He asked Marie Young for his gun, but she refused to give it to him. He then lay down in one of the clothes closets of the house, where he was found and taken into custody by officers upon their arrival. After the shooting, the deceased, without changing his position, lay on the floor some ten minutes. He died later without making any statement regarding the shooting. He did not speak after he was shot. Upon the examination of his body after his death, it was found that he had one wound in the upper part of his body, evidently made by a bullet, which entered his right armpit and ranging downward left the body about eight inches below the point of entrance. The other wound was in his abdomen, the bullet entering the body about one inch to the left of his navel, ranging backward and downward, and leaving the body through the left buttock. In its course the bullet perforated the muscles of the stomach and the small intestines as well as other parts of his body. There were large hemorrhages of blood from this wound, and in the opinion of the doctor who performed an autopsy on the body of the deceased it was a fatal wound. Holes were also found in one of the legs of deceased's trousers which evidently had been made by the third shot. The pistol used by the defendant was a .45-caliber revolver. There was also found on the porch recent evidence of bullets striking the cement floor of the front porch and then glancing off and embedding themselves in the wall of the porch, showing that evidently two of the bullets fired by the defendant, after going through the body of the deceased, had force enough to plow holes in the cement floor and then bury themselves in the adjoining wall of the porch. The occupation of the defendant for some months prior to and at the time of the shooting was acting as floor manager on the Rose Isle, one of the gambling boats anchored on the high seas off of the coast of Long Beach. He also acted as guard on Friday and Saturday night in taking the cashier of the boat to his home. He was an intimate friend of Peggy O'Day. In fact, he testified that they were engaged to be married.

We think that a mere recitation of the foregoing facts shows that there was ample evidence to justify the implied finding of malice. While it is the law of this state that, in order to sustain a conviction of murder it is not necessary to show personal enmity on the part of the defendant against the deceased (People v. Sainz, 162 Cal. 242, 121 P. 922), we think the evidence is sufficient in this case to show that the defendant at and just prior to the deadly assault did entertain a strong feeling of resentment against the deceased. In the first place, it plainly appears that the defendant took offense at the remark made by the defendant to and concerning Peggy O'Day, as the deceased left the counter or bar to go to his machine. This is shown by the defendant following the deceased to the front porch and there demanding of the deceased that he apologize to Peggy O'Day. Not only did the deceased refuse to make such an apology, but he reiterated his statement to the defendant, and later pushed the defendant out of his way as he (deceased) left the front room through the door opening out onto the porch. It was then that the defendant drew his pistol and fired the fatal shots. Evidently the defendant keenly resented the conduct of the deceased toward Peggy O'Day and towards himself, and, acting under the spell of this resentment, shot the deceased. Evidence of previous difficulties between the parties is always admissible to show the state of mind of the defendant and that he acted with malice. People v. Bradfield, 30 Cal. App. 721, 159 P. 443. With much greater force would evidence of present and pending difficulties show the presence of malice on the part of the defendant toward the deceased. While the conduct of the deceased in pushing the defendant out of his way and through the door was uncalled for, it afforded the defendant no justification in taking the life of the deceased. The deceased was unarmed at the time, and defendant was not in peril either of death or bodily injury. His act in taking the life of the deceased under these circumstances was, therefore, not justifiable. As before observed, however, the pushing or shoving of the defendant through the door by the deceased evidently added to the resentment of the defendant already aroused in him by the remarks of the deceased concerning Peggy O'Day. Smarting under what the defendant evidently felt was a twofold injury, he drew his gun and killed the deceased. The jury was justified under this state of facts in drawing the inference that the defendant acted with malice in taking the life of Amos Leece.

**[6, 7]** Under the contention that the evidence fails to show premeditation or deliberation on the part of the defendant in the killing of the deceased, appellant in his brief says, "there is an entire lack of evidence either direct or circumstantial in nature consisting of facts proven from which the jury might have reasonably or logically inferred that the killing was wilful, deliberate or premeditated." With this statement we cannot agree. It is true that no great interval of time elapsed from the time the deceased pushed the defendant through the door until the defendant drew his gun and shot the deceased. But this court has said on innumerable occasions that in order to prove premeditation in one charged with murder it is not necessary to show that any appreciable space of time elapsed between the intention to kill and the act of killing. It is only necessary to quote from People v. Hunt, 59 Cal. 430, 435, the following statement of the law on this subject: "There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, and if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing." The precise language of this decision has been repeated on numerous occasions by this court, and the principle there enunciated is irrevocably established as a part of the law of this state. People v. Bellon, 180 Cal. 706, 710, 182 P. 420. In the instant case, while the testimony, already quoted shows that the defendant shot almost, if not immediately, after the two men went through the door, still there was time for the defendant to think before he acted, to deliberate between the intention to kill and the act of killing. Defendant had time to draw his gun and fire the shots. He formed the intention to draw his gun, and then acted upon that intention. He drew his gun with some intention—either to defend himself, to frighten the deceased, or to kill the deceased. After forming the intention, whatever it was, he acted upon it by firing his gun. He thus had time to think and to act. This is all that is necessary in order to show premeditation.

[8-10] If the intention thus formed was to kill the deceased, he is guilty of murder in the first degree. Appellant contends that the evidence fails to show any such intention. This contention is based almost wholly upon defendant's version of the shooting. In addition to his evidence as heretofore given, he also testified that he drew his gun and hit the deceased over the head with it; that the deceased grabbed the gun and in the struggle for its possession it was discharged three times. There was a wound on the side of deceased's head about three or four inches above the left ear. This could have been made in the manner described by the defendant. On the other hand, Angus Kerr, who was standing by a window opening out onto the front porch, testified that on hearing the shots he looked out of the window, and the deceased was down on the floor of the porch and defendant was striking him over the head with his gun. The wound on deceased's head could, therefore, have been caused by the defendant striking deceased on the head after the shots were fired. Then again we think that both the element of time and the quick succession in which the shots were fired render defendant's testimony highly improbable. As stated already, those in the room at the time the shots were fired testified that two shots were fired in quick succession immediately after the two men went through the door, which were followed in a slightly longer interval of time by a third shot. This testimony would appear to refute the testimony of the defendant that the shots were fired in a struggle for the possession of the gun after he had hit the deceased over the head with it. Then if the two first shots were fired in quick succession, followed almost immediately by the third shot, as was shown by the evidence, it is not likely that they were discharged as a result of a struggle over the possession of the gun. In support of defendant's contention that he hit the deceased over the head with his gun, and that the deceased was on his knees when the gun was first discharged, defendant further relies upon the location and courses of the wounds found upon the deceased's body and testified to by the autopsy physician. Defendant contends that the wound in the right armpit was made by the first shot, and that as it ranged downward and left the body some eight inches below the point of entrance, the course taken by the bullet causing the wound would sustain the theory that it was fired while the deceased was on his knees and the defendant was standing over him. There is nothing, however, to show which wound was inflicted by the first shot. If we take the wound in the deceased's abdomen as inflicted by the first shot, it could well have been made while the two men were standing facing each other. In fact it could hardly have been made with the men in any other position. The direction of this wound was to the rear and slightly downward. It was undoubtedly a fatal wound and caused the defendant to fall to the floor and either while in the act of falling or after he had fallen, the wound in his armpit was received as the result of either the second or third shot. The nature of the wounds on the deceased's body and their courses through the body do not, in our opinion, help the cause of the defendant. On the other hand, the evidence regarding these wounds, taken in connection with that given by those in the room at the time the shots were fired may well have indicated to the jury that the shots were fired by defendant intentionally and as soon as the defendant was able to draw his gun after being pushed through the door by the deceased. Where one assaults another vio-

lently with a deadly weapon and takes his life, the presumption is that the assailant intended death or great bodily harm. 13 Cal. Jur., p. 683. And where, as in this case, the assault was made in a manner that was reasonably certain to produce death, and which actually did cause death, the only rational presumption to be drawn therefrom is that the assailant intended to take the life of the person assailed. We have already referred to the deadly character of the weapon used by the defendant. The circumstances of the killing show that defendant deliberately fired a bullet from this .45-caliber gun into the vital organs of the deceased, causing almost instant death. This evidence plainly shows an intent on his part to take the life of the deceased, and thus a clear case of murder is made out against the defendant.

[11] Defendant seeks to compare this case with the case of People v. Kelley, 208 Cal. 387, 281 P. 609, and People v. Howard, 211 Cal. 322, 295 P. 333, 71 A. L. R. 1385, and asks that in its decision this court should follow the course pursued in those cases and reduce the judgment of murder in the first degree to one of a lesser offense included in the charge of murder. We see no similarity between the instant case and the two cited cases. It is not necessary to occupy space here in order to show wherein the difference exists. A reading of the two cases cited we think will show that they can be readily differentiated from the case now before us, and that they furnish no true test for the determination of the instant case.

[12, 13] The claim of defendant that the judgment should be reversed by reason of misconduct on the part of the district attorney prosecuting the case rests upon certain questions propounded by the district attorney on cross-examination to the defendant while the latter was a witness in the case. By these questions it was brought out that the defendant had no permit to carry a gun; that he had filed off the number of the gun which he was carrying on his visit to the Midway Service Station, and that he had filed two notches on the barrel of said gun. No objection was made to any of the questions eliciting this evidence, nor was any motion made to strike out this evidence. The defendant claims that he was prejudiced by the evidence that he had no permit to carry a gun and that he had filed off the number on his gun, for the reason that being a former convict it was unlawful for him to own or have in his possession a firearm like the gun in evidence, and also that it was unlawful for anyone to have in his possession a pistol or revolver the number of which had been obliterated. The position of the defendant is that by the introduction of this evidence the prosecution was permitted to prove other crimes than the one of which he was charged and which were unconnected with the crime charged. But this evidence came in without objection on defendant's part and it is now too late to raise the point that it was inadmissible. The defendant admits this, but claims that it was misconduct on the part of the district attorney to elicit such evidence in the presence of the jury. The point is without merit—if we concede that the evidence was inadmissible—for the defendant had it within his power by proper objection to exclude this evidence. Failing to do so at the time, it is now too late for him to complain. The criticism of the district attorney in asking the defendant whether he had made the two notches on the gun is equally without merit. The gun was in evidence as belonging to the defendant, and we must assume that the two notches were apparent to the members of the jury. Whatever inferences prejudicial to the defendant the jury might draw from the presence of these two notches on the gun might arise as readily without the admission of the defendant that they were made by him as with such evidence. Naturally the jury, if they were disposed to draw any prejudicial inferences from the fact that two notches had been made on the defendant's gun, in the absence of any evidence as to how the notches came to be there, would assume that the defendant was responsible for their existence, and his admission to that effect would not materially aggravate their state of mind in that respect. We are therefore of the opinion that the defendant was not in any way prejudiced by any act of the district attorney in the prosecution of the case.

[14] The final claim of defendant is that the judgment should be reversed by reason of errors on the part of the trial court in the admission and rejection of evidence. The evidence which the defendant contends was improperly admitted concerns those matters which we have already alluded to, and relates to the notches on defendant's gun and that he had no permit to carry the same. We have sufficiently discussed these matters under the claim that the eliciting of this evidence was improper and that the district attorney was guilty of misconduct in bringing it to the attention of the jury. It is not necessary to reiterate what we have already said upon this subject. The evidence which defendant claims was erroneously excluded was attempted to be brought out by the defense on the cross-examination of Mrs. Leece, the wife of the deceased. She was asked by counsel for the defendant when and where she was married to Mr. Leece. The court sustained an objection to the question, and the defendant now contends that this action of the court was error. Although the defendant has devoted a number of pages of his brief in attempting to show that the court err-

ed in refusing to permit Mrs. Leece to answer this question, we fail to discover one good reason stated in all these pages for upholding this claim of the defendant. Mrs. Leece's evidence was not of vital importance to the case, and, even if it were, we cannot perceive how the place or date of her marriage to Mr. Leece, or whether she was married to him at all, would either aid or detract from the defendant's defense. Ordinarily a point of such slight merit as the one now before us would hardly deserve any discussion whatever, but, due to the seriousness of the charge of which the defendant stands convicted, we did not feel warranted in ignoring the point altogether. The same may be said of a number of other points relied upon by the defendant. After fully considering them and all other grounds advanced by defendant for the reversal of the judgment, we find no reason which would justify us in disturbing the judgment of the trial court. We are therefore of the opinion that it should be affirmed.

The judgment and order denying motion for a new trial are affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; SEAWELL, J.

LANGDON, Justice (dissenting).

I dissent. The facts which appear from the record do not, in my opinion, justify a judgment of murder in the first degree. I can find no evidence from which it may be inferred that there was premeditation. The defendant and deceased were strangers, and their contact consumed but a few minutes. The deceased, it is clear, was the aggressor; as he passed through the barroom door, he pushed the defendant. The shooting commenced almost immediately afterwards. The only direct testimony concerning the shooting was given by the woman who called herself the wife of the deceased, and, as the majority opinion points out, "her account of the affair was conflicting, incomplete and exceedingly indefinite." It was, moreover, decidedly different from that given previously at the coroner's inquest. The "gas station" in front of which the deceased was killed was a combination of a bootleg place and house of prostitution, and all of the characters involved in this case, either as witnesses or principals, were frequenters of the place.

Under these circumstances, I think it probable that the jury permitted the criminal record of the defendant to warp its judgment, and that the proper verdict, and the only one justified by the evidence, would have been murder in the second degree. The absence of premeditation seems to me so obvious that a judgment of murder in the first degree is unwarranted.

I am of the opinion that the judgment should be modified, under our statutory power (Pen. Code, § 1181, subd. 6; People v. Kelley, 208 Cal. 387, 281 P. 609), to murder in the second degree, and that the defendant should be sentenced therefor as prescribed by law.

I concur: TYLER, Justice pro tem.

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218 Cal. 375

## In re FARROW'S ESTATE.

## ALLEN v. ADKINS et al.

L. A. 14119.

Supreme Court of California.

June 21, 1933.

**1. Executors and administrators ⚷314(12).**

Administrator's appeal from order of distribution must be dismissed, where there is no contest between distributees concerning their proportions of estate and appellant has no interest therein.

**2. Executors and administrators ⚷314(12).**

Administrator's appeal from order determining heirs' interests in estate on his petition and directing distribution of funds thereof among them *held* not justified because of court's failure to order notice to them under statute respecting petitions for distribution of nonresident decedents' estates (Code Civ. Proc. §§ 1664, 1668).

**3. Executors and administrators ⚷314(12).**

Administrator's appeal from order of distribution on ground that notice was ordered given to distributees under wrong statute *held* without merit, in view of order establishing due notice and adjudging default of persons not appearing within time required (Code Civ. Proc. §§ 1664, 1668).

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

In the matter of the estate of Sabrina L. B. Farrow, deceased. From an order, directing W. S. Allen, administrator of the estate, to distribute funds in his possession to Dewitt Adkins, administrator of the estate of William J. Farrow, deceased, and others, Allen appeals. On respondents' motion to dismiss the appeal.

Appeal dismissed.

Lawrence W. Allen, of Los Angeles, for appellant W. S. Allen, Administrator.

Charles H. Adkins, of Los Angeles, for respondent Dewitt Adkins.

Bicksler, Smith, Parke & Catlin, of Los Angeles, for respondents Fred Morris et al.

Lawler & Degnan, of Los Angeles, for respondents Elbridge R. Green et al.

IRA F. THOMPSON, Justice.

The respondents, heirs of the deceased Sabrina L. B. Farrow, have made a motion to dismiss the appeal herein, on the ground that the same is frivolous, and also on the ground that no order that this court might make could affect the interest of the appellant administrator. On July 15, 1930, the appellant filed a petition in the probate court to have ascertained and declared the rights of all persons to, and their interests in, the estate of the deceased. Subsequently the court made an order requiring notice to be served upon all persons claiming any interest in the estate, in accordance with the provisions of section 1664 of the Code of Civil Procedure. Thereafter the court made its order determining the interests of the respondents in the estate and ordering the appellant to distribute the funds in his possession to the respondents, the final account of appellant having theretofore been filed and approved.

The appellant contends that the petition to determine the interest of heirs having been filed by the administrator and not by one claiming to be an heir, the court should have ordered notice to be given under section 1668 of the Code of Civil Procedure, and not under section 1664 of said Code. The appellant further contends that the court should have made a written order establishing proof of the service of such notice, and that it should have entered an order adjudging the default of all persons who did not appear. Since the appeal herein, and on the 31st day of January, 1933, the probate court removed the appellant herein as administrator of said estate, and appointed a special administrator for the purpose of making distribution.

[1-3] It is apparent from the foregoing recitals that the appeal should be dismissed. First, there is no contest between the respondents concerning their proportion of the estate, and appellant has no interest therein; second, we find no provision in section 1668 of the Code of Civil Procedure relating to a petition for a decree determining heirship, that section referring to the petition of an executor or administrator, or any other person interested in the estate, for distribution of the estate of a decedent who is not a resident of this state at the time of his death; third, it does appear from the transcript that the court made an order establishing that due and legal notice had been given, and made an order in open court adjudging the default of all persons who had not appeared within the time required by section 1664 of the Code of Civil Procedure and the notice given thereunder. Consequently the appeal is without any merit.

The appeal is dismissed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.

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132 Cal.App. 454

## PATTERSON v. CLIFFORD F. REID, Inc., et al.

Civ. 4882.

District Court of Appeal, Third District, California.

June 6, 1933.

**1. Vendor and purchaser 🔑16(1).**

Where prospective purchaser signed land contract and other instruments on printed form with material portions left blank, and it was agreed instruments would not become effective until purchaser gave approval, and purchaser subsequently communicated intention not purchase, there was no contract; there being no acceptance or meeting of minds (Civ. Code, § 1585).

**2. Contracts 🔑16.**

To make contract, there must be express or implied offer which must be accepted according to its tenor (Civ. Code, § 1585).

**3. Contracts 🔑22(1).**

Intention to accept offer must be expressed in positive terms (Civ. Code, § 1585).

**4. Contracts 🔑39.**

Writing is incomplete as agreement, where blanks as to essential matters are left therein.

**5. Cancellation of instruments 🔑4.**

Where signed land contract never became valid contract, and note and trust deed executed by prospective purchaser on own property were allegedly sold to innocent third party, prospective purchaser *held* entitled to bring equitable suit for cancellation of contract and recovery of amount of note (Civ. Code, § 3412).

Prospective purchaser was entitled to invoke provisions of Civ. Code, § 3412, which provides that written instrument, in respect to which there is reasonable apprehension that, if left outstanding, it may cause serious injury to person against whom it is void or voidable, may upon his application be so adjudged and ordered to be delivered up or canceled.

**6. Cancellation of instruments ⚷37(5).**

Prospective purchaser's complaint alleging facts showing signed land contract was never valid, and alleging that defendant sold plaintiff's note and trust deed to innocent third party, *held* to state cause of action for cancellation of contract, though not alleging reasonable apprehension of serious injury (Civ. Code, § 3412).

**7. Courts ⚷472(6).**

Prospective purchaser's suit for cancellation of signed land contract which never became valid, and for recovery of $900, amount of note and trust deed of plaintiff sold to third party, *held* properly brought in superior court; municipal court having no jurisdiction because relief sought under statute was equitable (Civ. Code, § 3412; Const. art. 6, § 11).

**8. Cancellation of instruments ⚷24(1).**

In suit to cancel signed land contract which never became valid, brought under statute authorizing cancellation of instrument in respect to which there is reasonable apprehension that it might cause serious injury if left outstanding, statute requiring party rescinding to do so promptly and restore property received *held* inapplicable (Civ. Code, § 1691, subds. 1, 2; and § 3412).

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Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Annie L. Patterson against Clifford F. Reid, Incorporated, and another. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Gibson, Dunn & Crutcher, of Los Angeles (Robert F. Schwarz, of Los Angeles, of counsel), for appellants.

Marshall Stimson and Noel Edwards, both of Los Angeles, for respondent.

TUTTLE, Justice pro tem., delivered the opinion of the court.

This action was brought to cancel a written instrument and to recover the sum of $900. This relief was granted, and defendants appeal from the judgment.

The complaint alleged and the trial court found the following facts:

That defendant bank, through its agent defendant Reid, negotiated for the sale of a lot to plaintiff, who was a widow without previous experience in business matters and especially in relation to the execution of deeds of trust; that as a result plaintiff signed a contract for the purchase of said lot for the sum of $3,725, payable $900 down and the balance in monthly installments; that the agreement and the note and the deed of trust were on printed forms, and when plaintiff signed these documents, the date, description of the property, and amount and terms of payment were not filled in; that the deed of trust covered real property owned by plaintiff, and it was represented to plaintiff by Reid that it would be accepted as the first payment on the purchase price; that after signing these documents, plaintiff informed Reid that she would consider the matter; that plaintiff did not accept the agreement; that Reid stated to her that unless she accepted said offer, the papers signed by her would not be used, but would be returned to her; that three or four days later plaintiff informed Reid that she did not intend to accept the offer and for them not to go ahead with the transaction; that falsely and fraudulently and in contravention to its said agreement with plaintiff, defendant Reid caused the blanks in said papers to be filled in and the agreement to be signed by defendant bank, and caused the note and trust deed to be sold for the sum of $900 to an innocent purchaser, who now holds the same and threatens to cause the same to be foreclosed, and that plaintiff has been obliged to pay the interest on said trust deed; that plaintiff was induced to sign said documents through the false and fraudulent representations of defendant Reid, the agent of defendant bank.

[1-4] It is at once apparent that the purported agreement of sale is not a contract as plaintiff never accepted the offer of defendant bank. There must be an offer expressed or implied and this offer must be accepted according to its tenor, before a binding contract is formed. "The intention to accept must be expressed in positive terms. Thus a statement by the offeree that he would think over the matter, or that he would like to accept, or a promise to 'take up the matter' at a later time or that he would see what he could do and give notice later, are none of them equivalent to acceptance." 1 Page on Contracts, § 44.

"An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal." Civ. Code, § 1585.

According to the record, plaintiff here testified that the signing of the papers was tentative and that she told Reid "they were not to be used." She further told him that "they must notify me and see if it met with my requirements—my approval. I told him that my approval meant if the terms were agreeable to me." From the foregoing it is clear that the essential element of a valid contract, a meeting of minds on all essential elements, was lacking and therefore the writing has no binding effect upon either party. Although plaintiff signed the documents, it was distinctly agreed that they were not to be effective until she gave her approval at some later date, when the "blanks" were to be filled in. "A writing is incomplete as an agreement where blanks as to essential matters are left in it." 13 C. J. p. 308, par. 133.

Appellants agree that the pleadings are framed upon the theory that no contract was ever entered into between the parties. They also cite the cases of Chas. Brown & Sons v. White Lunch Company, 92 Cal. App. 457, 268 P. 490, and McElhaney v. W. E. Moyer & Co., 101 Cal. App. 53, 281 P. 87, wherein it is held that an action for rescission must, of necessity, rest upon the existence of a contract to be rescinded, and where there is no meeting of the minds there can be no contract and hence there is nothing which can be rescinded. Therefore, they contend, the action is merely one to recover a money judgment for an amount less than $2,000 and that it should have been brought in the municipal court. Article 6, § 11, Const.; St. 1925, p. 658, § 29, as amended by St. 1931, p. 1717.

[5] The solution of the questions here presented depends upon the nature of the action. Appellants contend that it is one at law. Respondent contends that it is a suit in equity, authorized by section 3412 of the Civil Code, which reads as follows: "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled."

The instrument here involved is on its face a completed contract, signed and executed by all parties thereto. It could be placed upon record any time by defendants or assigned by them to a third party. That such recordation or assignment might cause serious injury to plaintiff is not open to question. We are of the opinion that the facts of this case entitled respondent to invoke the provisions of the Civil Code above quoted.

[6] It is contended that the complaint does not state a cause of action under the provisions of section 3412 of the Civil Code, in that it does not allege that "there is a reasonable apprehension that * * * it [the outstanding instrument] may cause serious injury" to plaintiff, nor does it allege facts upon which a finding of reasonable apprehension could be based. The complaint alleges that defendants had sold the note and deed of trust which were provided for in the purported contract. This indicated conclusively that appellants were claiming rights under the purported contract. In the case of Prichard v. Kimball, 190 Cal. 757, 214 P. 863, 865, the court used the following language in considering the sufficiency of a complaint under this section of the Civil Code: "Whether the appellants were using the document vexatiously or not was immaterial. *If they were claiming rights under it, and their claim was groundless*, respondents had the *right to a decree that as to them the instrument was void, whether appellants' claim was bona fide or for purpose of vexation.*" This section has been applied to an action to cancel a deed upon the ground that it had never been delivered and the essential allegations of a complaint for such relief are clearly set forth in the case of Keele v. Clauser, 101 Cal. App. 500, 281 P. 1073. In the instant case there was no contract executed, nor was there any delivery of the same, according to the allegations of the complaint. We therefore hold that the complaint states a cause of action under the section of the Civil Code above quoted.

[7] The municipal court had no jurisdiction because the relief under this section of the Code is clearly equitable. Angus v. Craven, 132 Cal. 691, 64 P. 1091.

[8] It is contended by appellant that the action is "barred" by section 1691, subdivisions 1 and 2, of the Civil Code. These sections do not "bar" anything, nor should they be pleaded and treated as statutes of limitation. They simply lay down certain rules which should guide the trial court in determining whether or not a rescission has been accomplished. In any event, they have no bearing upon the issues here presented, as the action was not brought under those sections of the Code authorizing a rescission.

Other points made by appellants have been considered, but they do not warrant further discussion.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

132 Cal.App. 532

## WEISS v. POLICY HOLDERS' LIFE INS. ASS'N.

Civ. 821.

District Court of Appeal, Fourth District, California.

June 9, 1933.

Hearing Denied by Supreme Court, Aug. 7, 1933.

1. **Insurance 🔑827.**

In action upon benefit certificate, judgment against insurer *held* supported by findings of fact (Civ. Code, §§ 452a–453).

> Findings of fact were that insured was unable to read; that application was not read to her; that she was not asked any of questions contained in application as to her past or present condition of health; that all answers were written in application by insurer's agent; that insured prior to signing application was affected with disease, but was unaware of nature of disease, and had no knowledge that she was suffering from any illness, and did not know that any of answers in application related to her health.

2. **Insurance 🔑724(2).**

Insurer was estopped from setting up defense of fraud or negligence on part of insured in answering application questions for benefit certificate, where such fraud or negligence was on part of insurer's agent (Civ. Code, §§ 452a–453).

3. **Insurance 🔑817(2).**

Insurer had burden of proving that at time insured signed application for benefit certificate she knew she was suffering from physical disease and answered falsely (Civ. Code, §§ 452a–453).

4. **Insurance 🔑791(1).**

Beneficiary of mutual benefit certificate was entitled to money judgment on insured's death and not limited to proceeds of assessment, where certificate provided for general fund which must first be resorted to before assessment was possible (Civ. Code, §§ 452a–453).

5. **Insurance 🔑141(4).**

Rule that insured retaining policy is estopped from setting up fraud of agent who took application did not apply to insured who was illiterate.

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Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Harry Weiss against the Policy Holders' Life Insurance Association. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hugh Martin Young, Thomas W. Hughes, and Charles D. Warner, all of Los Angeles, for appellant.

W. O. Watters and Fred J. Rogers, both of Fresno, for respondent.

CAMPBELL, Justice pro tem.

This is an action to recover upon a benefit certificate issued by the defendant on the life of Theresa Weiss. Plaintiff had judgment from which the defendant appeals. The benefit certificate, dated February 18, 1930, and delivered to Mrs. Weiss, was admitted in evidence; also a copy of her application dated February 18, 1930, and proof of death of insured, dated the 11th day of October, 1930. It is conceded by counsel that the signatures on the several documents are true and correct and that all assessments and dues required to be paid under the policy had been paid. Defendant, by its answer, sets up an affirmative defense based upon the provision set forth in the application for the certificate and the condition thereto affixed, and particularly averred that the insured warranted the answers made by her in the application as to her health. Defendant further alleges that each of said statements were false and were known by the insured to be false. The trial court found in favor of the plaintiff on his complaint, and found further: "That it is true that endorsed on the back of said policy of insurance, is a copy of the application for membership signed by the said Theresa Weiss; that the said Theresa Weiss, at the time of the signing of said application, was an illiterate person, unable to either read or write. That said application was not read by her or by anyone else for her benefit, prior to her signing the same. That said application was prepared and all answers and statements therein given, were entered thereon by the appointed, qualified and acting soliciting agent of defendant. That at the time said application was prepared, the following questions were therein contained, and the answers appearing thereafter were then inserted, to-wit: 'Q. Have you consulted a doctor for any illness or ailment during the past three years? Answer on reverse of this blank—No. Q. Are you now in good health? A. Yes. Q. Have you ever had tuberculosis? A. No. Q. Have you knowledge that any physical or mental disease exists in your system? A. No.' That each and all of the answers given to said questions were not given by the said Theresa Weiss directly or indirectly, and none of said questions were asked of her by said agent or any other representative of defendant, and that said agent negligently failed and neglected through no fault of the insured, to ask said questions, and without the assistance or knowledge of the insured, entered therein all of said answers thereto negligently. That the said Theresa Weiss was not familiar with the nature of said application and did not know the objects therefor, and never knew that said false statements had been entered in said application. That none of said questions were asked and none of said answers thereto given by the said Theresa Weiss, and at the time of the signing of said application, she did not know the nature of said questions or answers thereto given, and she never thereafter learned the nature of any of said questions or answers."

And the court further finds: "That it is true that on or about the 26th day of September, 1930, the said Theresa Weiss died from natural causes and not by suicide; that plaintiff made due proof of death of the said member to the defendant, and at the time of said death, the said Theresa Weiss was in good standing under the terms of said policy and she had paid all sums due thereunder by her; and that she made no false statements, misrepresentations or concealment of any material fact in the application for membership, and at the time of her death, there was a sufficient number of policyholders in good standing in defendant's association, to pay said sum of $1,500.00 upon said death."

[1] There is no conflict in the testimony, and it fully and completely supports the finding to the effect that the insured was unable to read; that the application was not read to her; that she was not asked any of the questions contained in the application as to her past or present condition of health; that all answers were written in the application by the agent of defendant, and that the insured did not know the nature of the contents of such questions or answers; that the insured, prior to signing the application was affected with a disease; that she was unaware of the nature of said ailment, and had no knowledge that she was suffering from any illness, and did not know that any of the questions and answers were in the application relating to the condition of her health.

This disposes of appellant's contention that the judgment was not supported by the findings of fact.

Appellant next contends that the written statements made by the deceased member in her application for membership in defendant association were warranties upon which the association had a right to rely, and a failure of the warranties invalidated the application and benefit certificate. The defendant association is a mutual benefit association organized under and by virtue of the provisions of sections 452a–453 of the Civil Code. The purpose of its organization is as stated in the sections noted: "Pay benefit to the nominee of a deceased member." Members can be received into the association under written application containing a brief questionnaire designed to elicit from the applicant true information as to the condition of the applicant's health and general physical condition, both past and present, as related to be on the date of the application. This application is an essential and vital part of the contract between the association and the member.

[2, 3] Appellant contends that the deceased, Theresa Weiss, warranted the Policy Holders' Life Insurance Association that the statements and answers to specific questions made in her application for membership in the association were truthful, whereas they were untruthful declarations concerning the matters about which they were made. Appellant cites a number of cases tending to support its contention. However, the cases cited by appellant are not authorities in the case at bar, for the reason that in those cases the fraud or negligence was on the part of the insured, or, if on the part of the agent, the insured was able to read and knew that the answers to the questions in the application were false. However, in the case at bar, the situation was reversed, and the fraud or negligence is not on the insured, but it is on the part of the agent of appellant company, and the insurer is estopped from setting up a defense of fraud or negligence of its own agent. In Pacific Employers' Insurance Co. v. Arenbrust, 85 Cal. App. 263, at page 266, 259 P. 121, 122, the court says: "When an insured in good faith makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake, or negligence of the agent filling out the application, are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy. The acts of the agent, whether he is a general agent with power to issue policies, a soliciting agent, or merely a medical examiner for the company, are in this respect the acts of the company, and he cannot be regarded as the agent of the insured, even though it is so stipulated in the application. [Citing cases.]" If it could be successfully maintained that the erroneous answer to a question contained in the application became warranties, it was incumbent upon the appellant to show that, at the time the insured signed the application, she knew she was suffering from physical disease that existed in her system. In the case of Chase v. Sunset Mutual Life Association, 101 Cal. App. 625, 281 P. 1054, 1055, the court says: "The material and controlling findings of the trial court in this case are those in which it is found that the insured was not in possession of knowledge as to his condition such as would lead him to apprehend that his life or his health was seriously endangered. The evidence in the record is such as to justify the conclusion that up to and including the time he made application for life insurance he considered himself a hale, hearty man. * * * It appears that the heart affection might have existed for some period without the patient being aware of any serious condition. * * * While the unlikelihood of a patient in the condition the insured was in at the time of the operation having reached

that stage of the disease without becoming aware of some serious ailment, is apparent, it is purely a matter of inference, as there is no direct evidence to support appellant's contention that the insured knowingly misrepresented his condition, or that the insurance company was misled by any conscious or intentional concealment on his part."

[4] Appellant next contends that the court erred in granting a money judgment to the plaintiff, and claims that under the by-laws and benefit certificate the beneficiary of the deceased, Theresa Weiss, was not entitled as of right to an absolute money judgment at law, but is entitled only to the pecuniary proceeds of an assessment levied in accordance with the terms of the by-laws upon the surviving members of the association, and cites a number of cases, the facts of which are foreign to the case at bar. In this case the contract between the parties was set forth in the certificate as follows: "This certificate is issued to Theresa Weiss by The Policy Holders Life Insurance Association, a corporation, hereinafter called the Association subject to the following terms and conditions: * * * The full amount collected on each death assessment shall be placed in the Benefit Fund and can be used only in payment of death claims. The death assessments can only be made upon the death of a Policy Holder in good standing, and then only when death claims have reduced the amount in the Benefit Fund below the sum of one dollar for each member in good standing in the Association. * * * It is understood and agreed that should more than the amount necessary to pay a claim be collected from an assessment, the excess above the amount required to pay the death claim for which the assessment was made, shall remain in the Benefit Fund and there accumulate to be used in payment of further or other death claims for which no assessment shall be made." This provision provides for the general fund, which fund must first be resorted to before an assessment is possible. In the cases cited by appellant, there was no provision for a general benefit fund. The question as to whether or not there is anything in the fund available for payment of this death claim is peculiarly within the knowledge of the appellant. Under the pleadings in this case the question of assessment is not material.

[5] Appellant, in its reply brief, raises another point to the effect that respondent is estopped, by reason of the insured having received and retained the policy, from setting up the fraud or negligence of the agent who took the insured's application. The case at bar does not come within the strict rule of the authorities cited by appellant for the reason that the insured, being an illiterate person, could not read the English language. In McGuire v. Hartford Fire Insurance Co., 7 App. Div. 575, 40 N. Y. S. 300, 304, the court says: "We are unable to assent to it as a proposition of law, and much less as a principle of equity, that an insurance company may relieve itself from responsibility for the fraudulent representations of its agent by imposing upon a blind or illiterate person the obligation of seeing to it, at his peril, that the agent has fulfilled his duty to himself and to the company by making out the policy according to the terms and conditions agreed upon." When it is shown that the applicant is unable to read and write, the case does not come within the strict rule of Layton v. New York Life Insurance Co., 55 Cal. App. 202, 202 P. 958, and other cases cited and relied upon by the appellant, for the rule does not compel the insured to do something which he cannot do.

For the reasons above stated, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

132 Cal.App. 573

## TRACY v. STOCK ASSUR. BUREAU et al.

Civ. 792.

District Court of Appeal, Fourth District, California.

June 14, 1933.

**1. Corporations 🔑123(7).**

Where stock was pledged to secure loan, that pledgor executed assignment of stock contemporaneously with contract *held* not to transfer general property in stock to pledgee so as to entitle pledgee to deal therewith as pledgee saw fit.

**2. Pledges 🔑21.**

As between pledgor and pledgee, general property in pledge remains in pledgor, notwithstanding apparent transfer of legal title to pledgee.

**3. Corporations 🔑123(15).**

That lender to which stock was pledged as security sold stock soon after execution of contract *held* not to constitute conversion, where contract expressly authorized lender to sell stock at any time it saw fit.

> Written contract expressly authorized lender, at any time it saw fit, to sell, assign, pledge, hypothecate, or collect whole or any part of securities or any substitute therefor at public or private sale without demand, advertisement, or notice, such demand, advertisement, and notice being expressly waived by borrower.

**4. Corporations 🔑123(22).**

Where contract required borrower, as condition precedent to return of stock pledged as security, to repay loan within certain period, and borrower did not tender repayment within such time, lender's refusal to return stock or its equivalent or to pay market value on demand *held* not conversion.

**5. Pledges 🔑59.**

Where collateral is placed with pledgee as security for payment of debt, pledgee selling collateral under power of sale must pay surplus to pledgor.

**6. Pledges 🔑59.**

Where collateral is pledged for debt, surplus resulting from sale of collateral is recoverable by pledgor in action for money had and received.

**7. Corporations 🔑123(14).**

Where stock was pledged as security for loan under contract giving pledgee power to sell stock whenever it saw fit and pledgee sold stock at early date, pledgor *held* entitled to recover only actual surplus, not greater surplus which would have resulted if pledgee had delayed sale.

**8. Pleading 🔑49.**

Complaint alleging that defendant lender sold pledged stock for specified sum in excess of indebtedness *held* to entitle plaintiff borrower to recover surplus, though complaint improperly stated cause of action for conversion, where it contained prayer for such relief as might be equitable and just.

**9. Pleading 🔑49.**

Plaintiff may recover if complaint, though based on wrong theory, states any cause of action which entitles him to any relief at law or in equity.

> It is not essential that complaint state cause of action for relief which plaintiff seeks, provided facts stated show some right of recovery, and party cannot be thrown out of court merely because he may have misconceived form of relief to which he is entitled.

**10. Corporations 🔑123(14).**

Where pledgee, under power of sale, sold pledged stock soon after loan, pledgee *held* not chargeable with interest on sale surplus prior to final date when pledgor, under contract, was required to repay loan as condition precedent to return of stock, but was chargeable with interest thereafter.

> Pledgor was not entitled to interest on surplus from date of sale of stock, since, under contract, pledgor's right to demand return of stock depended on repayment of amount of loan and on demand for return of pledged stock within 30-day period after a certain date which was subsequent to date of sale, and since pledgee was therefore not in default until expiration of such period.

**11. Statutes 🔑236.**

Remedial statute should be construed with greatest liberality.

**12. Pleading 🔑235.**

Trial court may permit amendment to pleadings before, during, or after trial (Code Civ. Proc. § 473).

**13. Appeal and error 🔑959(3).**

Court's action in permitting pleading to be amended after trial should be disturbed on appeal only when trial court has clearly abused discretion (Code Civ. Proc. § 473).

**14. Pleading 🔑248(4).**

In action to compel return of stock pledged for loan or recover market value thereof, on ground that plaintiff had tendered repayment of loan, amendment of complaint, omitting repayment allegation and alleging sale of stock by defendant and subsequent rise in market value, *held* not to change cause of action; hence permitting such amendment after trial without jury was not abuse of discretion (Code Civ. Proc. § 473).

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by Charles W. Tracy against the Stock Assurance Bureau and A. M. Keene and others, copartners doing business under the fictitious name and style of the Stock Assurance Bureau, and against the Stock Assurance Bureau, a voluntary association. From a judgment in favor of defendants, plaintiff appeals.

Reversed, with directions.

R. W. Henderson and W. C. Dorris, both of Bakersfield, for appellant.

Coker F. Rathbone, of Taft, for respondents.

JENNINGS, Justice.

The plaintiff instituted this action to compel the defendants to return to him shares of stock of a certain corporation or if return of said stock could not be had, to recover the market value of the stock, which was alleged to be the sum of $1,400. The original complaint filed in the suit set forth a cause of action for conversion of the stock. It alleged that on October 10, 1928, the plaintiff and defendants had entered into a written contract, which was attached to the pleading as an exhibit and by reference made a part thereof, and that in accordance with the contract and contemporaneously with its execution the defendants had delivered to the plaintiff the draft of the defendant Stock Assurance Bureau for the sum of $996.96 and as security for the repayment of said sum plaintiff delivered to defendants 20 shares of stock of the Inland Steel Company. It was further alleged that the written contract of the parties provided that upon demand by the plaintiff within 30 days after the expiration of 12 months from the date of the execution of the contract the defendant Stock Assurance Bureau agreed to return the shares of stock or their equivalent in like certificates together with dividends or interest paid or accrued thereon or at the option of either party the market value of said stock, provided that, as a condition precedent to plaintiff's right to demand the return of the stock or its market value, plaintiff was required to redeliver to the defendant the aforesaid draft unnegotiated or if the draft had been negotiated to obtain the same by paying the bank upon which it was drawn or the said defendant the amount received thereon. The complaint alleged that within 30 days from the expiration of the 12-month period, plaintiff secured the return of the draft from the bank on which it was drawn and appointed the bank as his agent to return the draft to defendant Stock Assurance Bureau and to demand and receive from defendants the shares of stock or their equivalent in like certificates or at the option of defendants the then market value of said stock and that thereafter and within the 30-day period the bank, acting as plaintiff's agent, tendered and offered to return the draft to the defendant Stock Assurance Bureau, but that the defendants refused to return the pledged certificates or equivalent certificates representing shares of stock in the aforesaid corporation or to pay to plaintiff any part of the market value of the stock. The answer filed by the defendants contained a denial that the plaintiff had secured the return of the draft from the bank on which it was drawn or that he had appointed the bank his agent to redeliver the draft to defendant Stock Assurance Bureau, and to demand and receive from said defendant the shares of stock mentioned in the complaint. For a further defense to the complaint the answer alleged that at the time the written contract mentioned in the complaint was executed the plaintiff sold, assigned, and transferred to the defendants all his right, title, and interest in and to the 20 shares of stock of the Inland Steel Company by an instrument of absolute and final assignment and transfer which was attached to the answer and by reference made a part thereof. The answer also alleged that the plaintiff had failed to comply with the terms of his written contract within the time specified therein and had consequently forfeited all rights thereunder. The answer denied that, at any time prior to the commencement of the action, plaintiff had tendered or offered to return the draft for $996.96 to any of the defendants and further denied that defendants had refused, before the commencement of the action, to return the stock certificates or their equivalent or to pay the market value thereof and alleged that they were at all times willing to comply with the terms of the contract upon performance by the plaintiff on his part of all conditions and covenants required of him. Upon the issues thus framed by the pleadings the action proceeded to trial.

During the trial evidence was submitted to the court which showed that on or about November 24, 1928, the defendants made an absolute sale and transfer of the 20 shares of stock which had been deposited with them by plaintiff contemporaneously with the execution of the written contract of October 10, 1928, and received therefor the sum of $1,520, and that subsequent to such sale and transfer they had not acquired or held any stock of the Inland Steel Company. It further appeared from the evidence submitted during the trial that the plaintiff did not during the 30-day period immediately following October 10, 1929, secure the draft for $996.96 from the bank on which it was drawn and tender the same to the defendants or either of them.

After the trial of the action was concluded plaintiff moved the court for permission to file an amendment to his original complaint. The motion was granted and the pleading was accordingly filed.

This amendment to the complaint purports to set forth a second cause of action. New matters which are alleged therein consist of the following: That the defendants made an absolute sale and transfer of the stock on November 24, 1928, and received therefor the sum of $1,520, which was the market value of the stock at that time; that neither at the time the sale was consummated nor at any time subsequent thereto have the defendants held or acquired any stock of the Inland Steel Company other than the certificate representing the 20 shares of said stock which was deposited with said defendants by the plaintiff on October 10, 1928; that subsequent to the sale of said stock by the defendants on November 24, 1928, the market value of the stock increased to $2,100; that the defendants have not paid to plaintiff any sum whatever for or on account of the said stock and the sum of $1,103.04 is due, owing, and unpaid from the defendants to plaintiff. The pleading concludes with a prayer for judgment in plaintiff's favor for the sum of $1,103.04 and costs and for such other and further relief as may be equitable and just.

Upon the conclusion of the trial of the action and after the amendment to the complaint had been filed as aforesaid the court made its findings of fact from which it drew the legal conclusion that the plaintiff was not entitled to recover anything from the defendants. Judgment was accordingly rendered that the defendants have and recover from plaintiff their costs incurred in the action. The plaintiff thereafter presented to the court a motion for a new trial, which was by the court denied. Thereupon the plaintiff appealed from the judgment rendered in favor of the defendants as aforesaid.

In entering upon a consideration of the various matters which are presented by this appeal, certain preliminary contentions advanced by each of the opposing parties may properly first be discussed.

[1, 2] It is a fundamental contention of respondents on this appeal, and apparently the contention was successfully advanced during the trial of the action, that the separate instrument of assignment executed by appellant contemporaneously with the execution of the written contract of October 10, 1928, conveyed to respondent Stock Assurance Bureau all right, title, and interest of appellant in the 20 shares of stock. In other words, it is confidently urged that an outright sale and transfer of the stock to said respondent was consummated and the said respondent thereupon became the owner of the stock free from any lien or claim of appellant and could therefore deal with the stock as it saw fit. Manifestly if this contention is correct the judgment of the trial court was proper and this appeal is entirely lacking in merit. We entertain the opinion, however, that the contention of respondents in this regard may not prevail. The written contract entered into between appellant and respondent Stock Assurance Bureau discloses the nature of the transaction between the parties and their rights with respect to the shares of stock are fixed and determined by the provisions of this agreement. No more than a casual examination of the instrument is required to discover that the stock was deposited by appellant with the respondent Stock Assurance Bureau, to secure the repayment to said respondent of the sum of $996.96 advanced by respondent to appellant. In other words, the stock was pledged to secure repayment of a loan of money. It is an established principle in this state that, as between a pledgor and pledgee, the general property in a pledge remains in the pledgor, notwithstanding an apparent transfer of legal title to the pledgee. Shattuck & Desmond, etc., Co. v. Gillelen, 154 Cal. 778, 784, 99 P. 348; Sparks v. Caldwell, 157 Cal. 401, 403, 108 P. 276; Golden v. Fischer, 27 Cal. App. 271, 149 P. 797.

[3] Equally unmeritorious, in our opinion, is the contention of appellant that the sale of the stock by the pledgee was unauthorized and constituted a conversion of the pledged property. The written contract relied upon by appellant as the very basis of his right to recover from respondents expressly authorizes the pledgee "at any time it so sees fit to sell, assign, pledge, hypothecate or collect the whole or any part of said securities or any substitute therefor at public or private sale without any demand, advertisement or notice, such demand, advertisement and notice being expressly waived by the assured," appellant herein. It is doubtful if language more apt to confer upon the pledgee a power of sale could have been used. Since the sale of the pledged stock by the pledgee was so specifically authorized by the pledgor, such sale could not amount to a conversion. Hyatt v. Argenti, 3 Cal. 151.

[4] We also entertain the opinion that appellant may not successfully maintain, under the circumstances presented by the record herein, that respondents were guilty of conversion in having failed to return to him the pledged stock or its equivalent, or in having refused to pay him its market value upon demand and repayment by him to respondents of the sum of money originally advanced by them within the time provided in the written contract for the reason that we cannot discover from the record that appellant complied with the necessary condition precedent of repayment of the sum advanced within a period of 30 days subsequent to October 10, 1929. The trial court found that appellant at the time this action was instituted on November 27, 1929, "had failed to do or to perform any of the covenants and agreements incumbent upon him, by reason of the contract sued upon." It is obvious that the language of the finding is sufficiently broad to

warrant the implication that the court found that appellant had not tendered repayment of the sum advanced to him which, under the terms of his contract, he was obligated to do in order to entitle him to demand the return of the pledged stock or its equivalent and the record contains ample evidence to support such a finding.

[5] The record also shows, however, that respondents sold the pledged stock and received therefor the sum of $1,520. It is a fundamental principle of the law with respect to pledges that the relation existing between parties to a transaction whereby collateral is placed in the hands of a pledgee as security for the payment of a debt, is in the nature of a trust relation and that, if disposition is made of the pledged property under a power of sale, the pledgee is under the responsibility of paying to the pledgor any surplus which may remain after deducting the amount of the indebtedness. Sparks v. Caldwell, 157 Cal. 401, 403, 108 P. 276; Hudgens v. Chamberlain, 161 Cal. 710, 715, 120 P. 422.

[6, 7] The sale of the stock pledged with respondent Stock Assurance Bureau by appellant, for a sum in excess of the amount of indebtedness which the pledge was given to secure imposed upon the pledgee the duty to pay over to appellant the surplus remaining in its hands after the indebtedness was satisfied. The right of appellant to recover the surplus could have been readily enforced by appropriate action, e. g., an action for money had and received. Appellant, however, having granted to the pledgee the broad power to sell the stock at any time the pledgee might see fit could not complain that the pledged stock was sold for a smaller sum than might have been realized had the pledgor delayed the sale to a later date when a larger sum might have been obtained. Hudgens v. Chamberlain, supra; Williams v. Parker, 30 Cal. App. pages 71, 74, 157 P. 550. Appellant was not therefore entitled to recover the amount specified in the prayer of his amendment to the original complaint which was the difference between the amount of the indebtedness and the amount which could have been realized if the pledgee had delayed the sale to a time when the market value of the stock was $105 per share instead of $76 per share, the figure at which the sale was made.

It must be observed that appellant herein did not, in his original complaint, bring an action to recover the surplus. This pleading was framed on the theory that proper tender and demand was made within the period specified in the elaborate contract made by the parties and that respondents were liable for the market value of the stock in an action for conversion. The amendment to the complaint permitted to be filed after the case was fully tried sought recovery of the surplus under the mistaken theory that the pledgee was under the duty to sell at the most favorable market. This latter pleading, however, was also framed on the theory of conversion. It is manifest that under the circumstances presented by the record, there was no conversion of the pledged property. This is obviously true because, in the first place, the written agreement of the parties expressly authorized the pledgee to sell the stock at any time it should see fit and, in the second place, the evidence showed that appellant did not comply with the provisions of the contract which required him, within a limited time, to make repayment of his indebtedness and demand the return of the stock or payment to him of the then market value of the stock.

[8, 9] We entertain the opinion, however, that appellant was not foreclosed by the form of the action from recovering whatever amount the evidence showed he was entitled to receive. Inasmuch as there is but one form of civil action in this state, a plaintiff may recover if his complaint states any cause of action which entitles him to any relief at law or in equity. Zellner v. Wassman, 184 Cal. 80, 87, 193 P. 84, 87; Hayden v. Collins, 1 Cal. App. 259, 261, 81 P. 1120. "It is not essential that a complaint state a cause of action for the relief which plaintiff seeks, provided the facts stated show some right of recovery, and a party cannot be thrown out of court merely because he may have misconceived the form of relief to which he is entitled." Zellner v. Wassman, supra. We think that the amendment to the complaint which contained allegations that the stock was deposited by appellant to secure repayment of the sum advanced to him and that it was later sold by respondents for a specified sum which was in excess of the amount of the indebtedness sufficiently exhibited facts which entitled appellant to relief. The pleading contained a prayer for such relief as might be equitable and just in the premises. We entertain the opinion that the trial court might properly have allowed to appellant recovery of such surplus as remained in respondents' hands after the amount of appellant's indebtedness was subtracted therefrom. We are also of the opinion that this court may from the record herein presented make appropriate findings and direct that judgment be entered for the correct amount. The following findings of fact are therefore made from the record herein presented which are to take the place of the findings heretofore made by the trial court:

(1) That each and all of the allegations contained in paragraphs I, II, III, and IV of plaintiff's amendment to complaint are true.

(2) That in accordance with the provisions of the written agreement entered into between plaintiff and defendant Stock Assur-

ance Bureau, on October 10, 1928, said defendant covenanted and agreed that it would, upon demand of the plaintiff made within 30 days after October 10, 1929, return to plaintiff the pledged property consisting of 20 shares of stock of the Inland Steel Company, a corporation, or the equivalent thereof in like shares or at the option of either plaintiff or said defendant, pay to plaintiff the market value of said stock at the time of the demand, provided that, as a condition precedent to the return of said stock or its equivalent or the payment of the market value of said stock, plaintiff should repay to said defendant the amount of money advanced to plaintiff by said defendant on October 10, 1928.

(3) That plaintiff did not within the time provided in said written agreement pay or offer to pay to defendant Stock Assurance Bureau the amount advanced to plaintiff, or any part thereof.

(4) That the sale of plaintiff's stock by defendants on or about November 24, 1928, was in accordance with the authority expressly granted to defendant Stock Assurance Bureau by the terms of the written agreement entered into between plaintiff and said defendant on October 10, 1928.

(5) That upon the expiration of the 30-day period after October 10, 1929, plaintiff was indebted to defendant Stock Assurance Bureau in the amount of $1,072, which amount the said defendant was entitled to retain from the proceeds of the sale of said stock.

(6) That after deducting the sum of $1,072 from the proceeds realized from the sale of said 20 shares of stock deposited with defendant Stock Assurance Bureau as security for the repayment to said defendant of the sum of money advanced to plaintiff by said defendant, together with interest thereon at the rate of 7 per cent. per annum, the said defendant had a surplus amounting to the sum of $448.

From the findings thus made this court draws the following conclusions of law, which are to replace the conclusions of law heretofore drawn by the trial court:

**[10]** That the plaintiff is entitled to recover from the defendants the sum of $448, together with interest on said sum at the rate of 7 per cent. per annum from November 10, 1929.

Appellant's counsel maintains that respondents should be charged with interest at the rate of 7 per cent. per annum upon the excess in their hands on November 24, 1928, the date on which the stock was sold for $1,520. This contention entirely overlooks the fact established by the evidence submitted in the action, viz.: That respondents were obligated under their contract to return the stock or its equivalent or pay to appellant the market value of the stock at any time within the 30-day period after October 10, 1929, when appellant should repay the amount of his loan and demand the return of the pledged property. The evidence showed that he did not prior to the institution of this action comply with the conditions precedent to his demanding return of the property. Respondents were not therefore in default in failing to return the stock or pay its market value at any time prior to November 10, 1929. On that date appellant's right to demand return of the pledged stock terminated. All that then remained to him was a right to recover from respondents whatever surplus remained after deducting from the proceeds of the sale the sum originally advanced, together with interest thereon at the rate of 7 per cent. per annum. Upon this date respondents were likewise under the duty of paying to appellant the aforesaid surplus. Since respondents were not until that time in default it follows that they are not chargeable with interest on any surplus in their hands prior to said date. Anderson v. Pacific Bank, 112 Cal. 598, 603, 44 P. 1063, 32 L. R. A. 479, 53 Am. St. Rep. 228.

**[11-14]** Respondents contend that the court erred in permitting appellant to amend his complaint after the trial of the action was concluded. Section 473 of the Code of Civil Procedure confers upon a trial court a very wide discretion in the matter of permitting amendments to pleadings. The statute contains no limitation as to the time when such amendments may be allowed. In view of the established policy of the law to construe remedial statutes with the greatest liberality we entertain no doubt that a trial court possesses the power to permit amendments to pleadings at any stage of the proceeding whether before, during or after trial. San Francisco, etc., Soc. v. Leonard, 17 Cal. App. 254, 266, 119 P. 405. It is only when an abuse of the very wide discretion vested in the trial court in this regard is clearly made to appear that the court's action in permitting a pleading to be amended should be disturbed on appeal. Sweet v. Hamilothoris, 84 Cal. App. 775, 258 P. 652. If it does not appear that the amendment permitted by the trial court sets up a new and entirely different cause of action and that the opposing party has been prejudiced thereby, no harm can be said to have resulted. On the contrary, the interests of justice are furthered in that multiplicity of actions is avoided and a more speedy termination of the matter in dispute is assured.

We think that it cannot be argued with any hope of success that the amendment to the complaint permitted by the trial court alleged a new cause of action. The most that can be said is that it contains a somewhat fuller explanation of the transaction set forth in the original complaint and that it was obviously drawn to conform to the proof made upon the trial of the cause. The amendment, for instance, omits any allegation of repayment by appellant of the indebtedness due to the respondent Stock Assurance Bureau and demand for return of the pledged securities or their equivalent or payment of the market value thereof. There is, however, an allegation of the sale of the stock by respondents for a specified sum of money and a further allegation that the market value of the stock had increased subsequent to the sale to a point where it had reached the sum of $2,100 for the 20 shares pledged. These latter allegations in no way changed the cause of action. They simply explained more fully the whole transaction which was the foundation of appellant's claim to recovery.

For the reasons stated the judgment is reversed and the trial court is directed to enter judgment in favor of appellant for the sum of $448 and interest on said sum at the rate of 7 per cent. per annum from November 10, 1929.

We concur: BARNARD, P. J.; MARKS, J.

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132 Cal.App. 486

## HILLIER v. MUTH et al.

Civ. 7813.

District Court of Appeal, Second District, Division 2, California.

June 8, 1933.

**1. Usury 🔑115.**

Contract in form of conditional sales agreement, naming one procuring loan as seller and borrower as buyer, and requiring payment to be made to certain corporation, was so ambiguous that parol and written evidence regarding transaction was admissible in action to recover usurious interest (Code Civ. Proc. § 1860).

**2. Usury 🔑142(3).**

In action to recover usurious interest payment, evidence that loan was made not by defendant but by another corporation *held* admissible under specific denials of answer.

**3. Usury 🔑141.**

In statute authorizing recovery of trebled usurious interest from one receiving it or his personal representative, words "personal representative" are used in sense of executor or administrator (Usury Law, § 3 [St. 1919, p. lxxxiii]).

[Ed. Note.—For other definitions of "Personal Representative," see Words & Phrases.]

**4. Usury 🔑142(4).**

In action to recover usurious interest payment, evidence showed defendant was agent of lender, who received usurious interest, and defendant was therefore not liable (Usury Law, § 3 [St. 1919, p. lxxxiii]).

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by William C. Hillier against Paul Muth and another. From a judgment for defendant, plaintiff appeals.

Affirmed.

Fred A. Shaeffer, of Santa Maria, for appellant.

M. A. Fitzgerald, of San Luis Obispo, for respondents.

ARCHBALD, Justice pro tem.

Action by plaintiff to recover of defendants alleged usurious interest payments made by him. From the judgment in favor of defendants, plaintiff has appealed.

On or about September 25, 1928, plaintiff made a written application to defendant Central Counties Finance Company, Inc., "for the purpose of obtaining a loan through you from the Mercantile Acceptance Corporation, or the Western States Acceptance Corporation," with his automobile as security. The amount of the loan applied for was $1,000 for twelve months, and in the application plaintiff agreed to pay said defendant company a commission of 7½ per cent. for its services in procuring it, "said commission to be deducted" from the loan. Defendant Paul Muth was the manager of defendant Central Counties Finance Company, and was the one with whom plaintiff conducted his negotiations. Plaintiff was informed by Muth that the latter's company did not make such loans, but that it would procure one for him from the Mercantile Acceptance Corporation, and that such corporation would require plaintiff to place insurance on his car with it. The insurance amounted to $84.10, the brokerage to be paid defendant Central Counties Finance Company, Inc., $66.31, and Muth appraised the car as good for $800 in cash net to plaintiff. To the aggregate of such net cash, insurance, and brokerage was added $57.59 for interest, making a total of $1,008. A conditional sale agreement was executed by defendant company as "seller" and plaintiff as buyer, covering plaintiff's automobile, which agreement was dated September 28, 1928, and called for the payment of $84 per month, beginning one month after the date of said contract and continuing for twelve months, a total of $1,008, any unpaid balance to bear interest after maturity of 12 per cent. per annum, and all payments of principal and interest to be made "at the office of Mercantile Acceptance Corporation of California, 142 Sansome St., San Francisco." The contract was then assigned by Central Counties Finance Company to said Mercantile Acceptance Corporation. Evidence was admitted over objection of plaintiff to show that while the $800 net was advanced to plaintiff by defendant company, said defendant was repaid such amount plus the brokerage charge agreed to be paid by plaintiff, by a check of the Mercantile Acceptance Corporation for $866.31, and that all payments received by said defendant from plaintiff were turned over to said Acceptance Corporation.

The court found in effect that plaintiff applied to defendant company requesting it to obtain such loan from said Acceptance Corporation, and agreed to pay the commission named for so doing; that pursuant to such request the loan was obtained; that for the purpose of securing the same the lease contract above mentioned was executed and conveyed to the Acceptance Corporation; that said loan was not made by defendant company but by said Acceptance Corporation; and that all payments made by plaintiff under it were taken and received by that concern.

Appellant urges that inasmuch as the evidence shows without dispute that defendant Central Counties Finance Company, Inc., paid him the $800 and accepted certain payments from him on the loan, or charges in connection with it, and took possession of his car when he was in default, stored it, and ordered certain repairs made, and as the contract is signed by said defendant, any evidence showing that the payments were made to the Mercantile Acceptance Corporation is immaterial and tends to vary the terms of a written contract, and to prove something not set up in the answer as a defense.

[1, 2] As a part of his case plaintiff introduced in evidence the conditional sale agreement. This on its face purported to evidence the conditional sale of an automobile, and did not show a loan, although introduced as showing a loan and a provision for usurious interest. Both sides agreed that there was no sale involved, but that the instrument was security only for a loan. The monthly payments were required by the contract relied upon to be made at the offices of the Acceptance Corporation, and there is so much ambiguity in the instrument that parol as well as written evidence as to the entire transaction was clearly admissible. Section 1860, Code Civ. Proc. Such evidence showed without question that the loan was made exactly as found by the court—not by defendant Central Counties Finance Company, Inc., but by the Mercantile Acceptance Corporation. Under the circumstances such evidence was properly admitted under the specific denials of the answer.

[3, 4] Section 3 of the Usury Law (Stats. 1919, p. lxxxiii; vol. 2, Deering's Gen. Laws, p. 1908), on which the complaint herein is based, gives the right to recover trebled usurious interest to the person paying such interest, "against the person, company, association or corporation who shall have taken or received the same, or his or its personal representative." In other words, it is a personal action against the party exacting the usurious interest. The words "personal representative" do not mean "agent," but are used in the sense of "executor" or "administrator"; and as the evidence shows that the Central Counties Finance Company was simply the agent of the real party in interest, the findings and judgment in favor of defendants are supported by the evidence.

There would seem to be no doubt but that the finding that the interest paid was at the rate of 7.01 per cent. is in error. The interest of $57.59 charged in the conditional sale agreement was just within the law, and the finding of the court that in addition thereto there was collected the further sum of $20.90 "as interest on delinquent payments" shows that the loan was in fact usurious; but that is immaterial so long as the party who took and received such payments was not before the court.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

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132 Cal.App. 526

## CRESPI & CO. v. GIFFEN et al.

Civ. 813.

District Court of Appeal, Fourth District, California.
June 9, 1933.

Hearing Denied by Supreme Court Aug. 7, 1933.

**1. Corporations 🔑646, 648.**

Corporation engaged solely in interstate commerce need not comply with statute requiring payment of filing fee and appointment of process agent, as condition precedent to doing business in state (St. 1915, p. 422, § 1, as amended by St. 1923, p. 1034, § 1).

**2. Bankruptcy 🔑435.**

In action on note in which defendant pleaded discharge in bankruptcy, evidence that money for which note was given was obtained by fraud *held* admissible to avoid defendant's plea, though fraud was not pleaded (Code Civ. Proc. § 462).

**3. Bankruptcy 🔑436(3).**

Evidence in action against partners on note sustained finding that money for which note was given was obtained by fraud, so that partner's liability was not released by discharge in bankruptcy (Bankr. Act, § 17(2), 11 USCA § 35(2).

The evidence showed that the plaintiff had agreed to purchase cotton and to make advances on account of the purchase price to partnership to be disbursed to the grower in accordance with grower's needs. After receiving the proceeds of the advances, the partnership disregarded the agreement and understanding and withdrew funds from bank to pay partnership indebtedness, without using any of the money for purpose of financing grower's farming operations.

4. Bankruptcy ⚷423(1).

Innocent partner's discharge in bankruptcy will not release him from liability for fraud of copartner committed within scope of partnership business, especially where partnership benefited thereby (Bankr. Act, § 17 (2), 11 USCA § 35(2).

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Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Crespi & Co. against L. F. Giffen and others. From an adverse judgment, defendant named appeals.

Affirmed.

See, also, 125 Cal. App. 440, 13 P.(2d) 936.

Irvine P. Aten, of Fresno, for appellant.

G. L. Aynesworth, of Fresno, for respondent.

CAMPBELL, Justice pro tem.

This action was begun by plaintiff, a Texas corporation, against Giffen-Troutt Company, a copartnership comprised of L. F. Giffen and W. L. Troutt, and L. F. Giffen and W. L. Troutt, individually. Service was had on the copartnership and L. F. Giffen, but W. L. Troutt was not served. Judgment was rendered against the copartnership and defendant L. F. Giffen. From this judgment Giffen has appealed. The action is upon a promissory note which was executed by the defendants in favor of plaintiff for the sum of $12,500. Appellant pleaded his discharge in bankruptcy, but respondent claims the money was obtained by the defendant, copartnership, by means of misrepresentation and fraud of appellant's partner, and that such misrepresentation and fraud prevented his discharge in bankruptcy on this debt.

The points urged by appellant are: (1) That respondent was a foreign corporation doing business within this state without having complied with the statute relative to foreign corporations; (2) that appellant was discharged in bankruptcy from this debt; and (3) that the alleged misrepresentation and fraud are not within the exception of discharges of debtors in bankruptcy.

The facts may be summarized briefly as follows: Respondent, at all times during the negotiations for the loan, was a Texas corporation with its principal place of business at Waco, Tex. Defendants were residents of Fresno, Cal. The defendants, through W. L. Troutt, one of the partners, telephoned to respondent, stating that the defendants had a contract with one Anderson of Tulare county, Cal., for the purchase of seven hundred bales of cotton for the year 1926, which purchase required that $12,500 be advanced to Anderson, as required by him during the farming season of 1926, to enable Anderson to properly farm, harvest, and deliver the seven hundred bales of cotton to be sold. Respondent agreed to purchase such cotton, and to advance, on account of the purchase price, $12,500 to be disbursed during the season by Giffen-Troutt Company to Anderson in accordance with his needs. The moneys were to be repaid to respondent by way of deduction from the purchase price of cotton as the same was delivered after arrival, and, as further security for the repayment of the advancement, respondent required Giffen-Troutt Company to assign to respondent the contract which it had with Anderson, and also Anderson's note and crop mortgage for $12,500 in addition to the execution and delivery of the note of Giffen-Troutt Company for a like amount to respondent, and to deliver to respondent a cotton sales contract for seven hundred bales of cotton. This was done, and the various papers were executed and assignments made. The instruments were deposited in the First National Bank of Fresno, Cal., by defendants and transmitted to respondent. Respondent then wired to said bank from Waco, Tex., $12,500, less indebtedness due the respondent from the defendants amounting to $2,900 (which was deducted at the request of the defendants). The money was to be credited to the account of defendants on delivery of the instruments referred to. On receipt of the money, the bank credited the money to the account of defendant Giffen-Troutt Company, and transmitted the various instruments to the respondent at Waco, Tex. In the course of the negotiations over the telephone and by telegraph, defendant W. L. Troutt, representing the defendants, had informed and agreed with respondent, that the money to be forwarded should be used solely for the purpose of financing the farming operations of Anderson's cotton crop in Tulare county; that the money was not to be used in defendants' business and was not a personal loan to the defendants. They disregarded this agreement and understanding, and, within three days after the funds were deposited, defendants withdrew all these funds from the bank and used them to pay the indebtedness of Giffen-Troutt Company. Not 1 cent of this money was used for the purpose of financing Anderson's farming operations. The evidence shows that the respondent had previously had cotton contracts with defendants, and that shipments of cotton were evidenced by bills of lading, offered in evidence by respondent, showing shipments from California points to Galveston, Tex.

Relative to the interstate character of the transactions, the trial court made the following findings:

"* * * That at the time of the transaction herein involved, the plaintiff was engaged solely and only in interstate and not in intrastate commerce. * * *

"Which seven hundred bales of cotton the said Anderson had agreed and promised to sell to plaintiff, which said agreement had been made by plaintiff through its agent, L. F. Giffen, said cotton to be delivered by said Anderson free on board cars, at California shipping points, to be shipped to plaintiff in Texas. * * *

"That plaintiff was not, at any time in the year 1926, engaged in intra-state business in California, and was not doing business in California, and was not required to file with the Secretary of State copies of its Articles of Incorporation. * * *"

There is ample evidence to support the court's findings upon the subject.

In the case of H. K. Mulford Co. v. Curry, 163 Cal. 276, 282, 125 P. 236, 238, the Supreme Court said: "The admitted power of the state to regulate and prescribe terms under which a foreign corporation may engage in intrastate or domestic business is subject to this limitation that, where such foreign corporation is engaged in interstate, as well as intrastate, business, no such term, condition, or requirement will be constitutional, if it imposes any burden upon the interstate business of such corporation, whatever be its name or form. * * *"

[1] Appellant contends that section 1 of the act of 1915 (Stats. 1915, p. 422), specifying the conditions upon which a corporation may transact business in this state, as amended in 1923 (Stats. 1923, p. 1034, § 1), applies to this case. This act provides that any foreign corporation engaged in intrastate business must, as a condition precedent to doing business in this state, file with the secretary of state certain designated papers, pay a filing fee, and appoint a process agent, and that failure to comply with these conditions renders the foreign corporation subject to certain penalties.

Appellant cites numerous cases which he claims support his position, but in examining them we find, for the most part, that the cases relate to intrastate business.

This action is based upon a promissory note executed by the defendants. Appellant Giffen pleaded a discharge in bankruptcy releasing him from his obligation on the debt. The court made a finding as follows: "That at the time of said statement, representation and promise made for, on behalf of and by the defendants, defendants did not intend to hold, pay out or apply said money to the credit or for the use and benefit of said Anderson, but on the contrary intended to and did immediately pay out and use said money so deposited in paying creditors of defendants; that within three days after said funds were so deposited by plaintiff, the same had all been used by defendants for paying their debts, and none thereof was ever delivered over or paid to said Anderson; that defendant Giffen did not know of the statements, representations and promises made by defendant Troutt."

[2] Appellant contends that the proof of misrepresentation and fraud was admitted in evidence, over his objection, when it had not been pleaded. In the instant case the original obligation is on a promissory note. Fraud was included and incidental to the creation of that obligation. That incident was properly urged without pleading, to avoid the plea of discharge in bankruptcy. Section 462 of the Code of Civil Procedure provides: "Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true; the statement of any new matter in the answer in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party."

This is a sufficient answer to appellant's contention.

[3, 4] Appellant next contends that the discharge in bankruptcy was a complete defense. Subdivision 2 of section 17 of the Bankruptcy Act, section 35 (2), title 11 USCA, provides that a discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as are liabilities for obtaining property by false pretenses or false representations. It is claimed the defendants obtained the money by false representations. The court found that the defendants promised and represented that "they would hold said money as agents of plaintiff and pay the same to said Anderson from time to time during the year 1926, in accordance with the needs of his farming operations; that plaintiff believed and relied upon said statements, representations and promises; that because of said representations and promises, the plaintiff, on the 18th day of January, 1926, forwarded said money by telegraph to the First National Bank in Fresno to be deposited to the credit of defendants, and the same was on said day deposited to the credit of said defendants. * * *" The evidence shows that the defendants obtained the money from the respondent by false statements and representations that the funds would be used and applied in advances to Anderson during the farming season of 1926, and is sufficient to support the finding. Misrepresentation and

fraud being excepted from the discharge of a debtor in bankruptcy when proven, and a partner being responsible for the acts of another partner, if done within the scope of the partnership business, a discharge in bankruptcy will not release the innocent partner in such a case as this, especially where the fruits of the wrong were received and used by and for the benefit of the partnership. Strang v. Bradner, 114 U. S. 555, 5 S. Ct. 1038, 29 L. Ed. 248.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

132 Cal.App. 601

## FRANCESCHINI v. SOLIS et al. (four cases).

Civ. 1060–1063.

District Court of Appeal, Fourth District, California.

June 15, 1933.

**1. Appeal and error 🔑428(2).**

Notice of appeal filed 65 days after order denying motion for new trial, and 26 days after notice of entry of such order was mailed to plaintiff *held* too late (Code Civ. Proc. § 939).

**2. Appeal and error 🔑784.**

Appeal *held* dismissed where notice of appeal was filed 65 days after order denying motion for new trial and no request to clerk to prepare transcript was filed, no bill of exceptions was settled or filed, no proceeding looking toward preparation of bill was pending, no such proceeding had been instituted, and time within which record might be prepared had expired (Code Civ. Proc. § 939).

Appeals from Superior Court, Imperial County; V. N. Thompson, Judge.

Two separate actions by Peter Franceschini against D. Solis and others, and actions by Bruno Franceschini and by Elsie Franceschini, a minor, by Peter Franceschini, her guardian ad litem against D. Solis and others. From the judgments, plaintiffs appeal. On motions to dismiss appeals.

Appeals dismissed.

Roger Marchetti and LeRoy Anderson, both of Los Angeles, and Frank L. Costland, for appellants.

Hickcox, Trude & Robertson, of El Centro, for respondents.

BARNARD, Presiding Justice.

A motion was made in each of the above cases to dismiss the appeal upon the ground that the notice of appeal was not filed within the time required by law, and upon the further ground that no steps have been taken toward the preparation and filing of a transcript or a bill of exceptions.

[1] It appears in each case, by affidavit, that an order denying a motion for a new trial was entered on September 23, 1932; that notice of the entry of said order was mailed on October 19, 1932, at El Centro, Cal., directed to the attorneys for the plaintiff and appellant at their office in Los Angeles, Cal.; and that notice of appeal was filed by the plaintiff on November 28, 1932. It thus appears that notice of appeal was filed too late. Section 939, Code Civ. Proc.; Lawson v. Guild, 215 Cal. 378, 10 P.(2d) 459.

[2] It further appears in each of these appeals, by certificate of the county clerk, that notice of appeal was filed on November 28, 1932; that no request to the clerk to prepare a transcript has been filed; that no bill of exceptions has been settled or filed; that no proceeding looking toward the preparation of a bill of exceptions or of a transcript is now pending in the trial court; that no such proceeding has ever been instituted; and that the time within which a record might be prepared under either method has expired. These facts require the granting of the respective motions [Steffey v. Standard Stations, Inc., et al. (Cal. App.) 20 P.(2d) 971].

In each of the cases named above, the appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J.

132 Cal.App. 609

## ARMSTRONG v. ARMSTRONG.

Civ. 9020.

District Court of Appeal, First District. Division 2, California.

June 16, 1933.

Hearing Denied by Supreme Court Aug. 14, 1933.

**1. Divorce 🔑245(1), 309.**

Award for alimony and for support of minor child, made in harmony with property settlement agreement, could be modified on proper showing where property agreement was not incorporated in either decree and not referred to therein (Civ. Code, § 139).

**2. Divorce 🔑245(1), 309.**

Court's power to modify decree for alimony and support of minor children is statutory and cannot be controlled by parties (Civ. Code, § 139).

**3. Divorce 🔑245(1), 309.**

Court's power to modify decree for alimony and support of minor child could not be denied where face of decree did not show property settlement agreement was adopted by trial court (Civ. Code, § 139).

**4. Divorce 🔑286.**

Reviewing court *held* not required to assume that trial court adopted property settlement agreement in divorce action, because trial court found allegations of complaint wherein agreement was incorporated true (Civ. Code, § 139).

**5. Trial 🔑396(1).**

Trial court's finding could not go beyond pleading.

**6. Divorce 🔑236.**

Where wife by contract cedes property rights to husband, and husband, though not at fault, agrees to pay fixed sum as alimony, incorporation of property settlement in divorce decree is merely confirmation of contract and not exercise of court's statutory power (Civ. Code, § 139).

**7. Divorce 🔑236.**

Where husband ceded to wife all community property except interest in automobile purchase contract, wife ceded only interest in such contract, and husband was at fault, husband's agreement to pay alimony was nothing more than agreement to comply with court's order (Civ. Code, § 139).

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Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Tillie M. Armstrong against George Nelson Armstrong. From an order modifying the decree relating to payment of alimony and support of the minor child, plaintiff appeals.

Affirmed.

Sparling & Teel, of Los Angeles, for appellant.

Fred O. Reed, of Los Angeles, for respondent.

NOURSE, Presiding Justice.

This appeal involves the simple issue whether an award of alimony made in harmony with a property settlement agreement may be modified upon a proper showing.

The complaint pleaded an action for divorce upon the ground of the husband's desertion. It alleged that, for the purpose of settling their property rights, and for making provisions for the support of their minor child, the parties had entered into a written agreement. This agreement was attached as an exhibit and incorporated in the complaint. The defendant permitted his default to be entered. The trial court found the allegations of the complaint to be true and entered an interlocutory decree awarding plaintiff alimony in the sum of $50 a month until she may remarry and directing defendant to pay plaintiff $50 a month for the support of their minor child. The final decree confirmed these awards. The property agreement was not incorporated in either decree and was not referred to in either. Thereafter the defendant moved to modify the decree in so far as it related to the payment of alimony and support of the minor child. This motion was granted as to both items and the plaintiff has appealed upon a bill of exceptions.

[1-3] The order must be affirmed for the following reasons: The power of the court to modify decrees of this character is statutory (section 139, Civ. Code) and cannot be controlled by the parties (Johnson v. Johnson, 104 Cal. App. 283, 287, 285 P. 902); if, by the terms of the property agreement, the rights of the parties are contractual, that is a matter which can be determined only in an action based upon the contract (Hughes v. Hughes, 68 Cal. App. 195, 197, 228 P. 675); as it does not appear from the face of either decree that the property settlement was adopted by the trial court, the statutory power of the court to modify cannot be denied (Hughes v. Hughes, supra; Johnson v. Johnson, supra).

[4, 5] Appellant argues that we must assume that the trial court adopted the contract because it found that the allegations of the complaint were true. The finding could not go beyond the pleading; it merely certifies the truth of the contract. There is nothing in the finding which indicates that the trial court adopted the contract as a part of its judgment.

[6, 7] Cases cited by appellant where the court awarded alimony against the innocent party (Parker v. Parker, 55 Cal. App. 458, 203 P. 420; Johnson v. Johnson, 104 Cal. App. 283, 285 P. 902) are not in conflict. Such awards do not find their authority in the Code sections, but are based upon the contract of the parties. Thus, where the wife has by contract ceded property rights to the husband, and the latter, though not at fault, has agreed to pay a fixed sum as alimony, the incorporation of the property settlement in the divorce decree is merely a confirmation of the contract and is not an exercise of the statutory power given the court. Here the husband ceded to his wife all the community property except an interest in a contract to purchase an automobile; the wife ceded nothing other than her interest in the automobile contract; the husband was the party at fault. His agreement to pay alimony was nothing more than an agreement to comply with the court's order.

No other point needs consideration.

The order is affirmed.

I concur: STURTEVANT, J.

132 Cal.App. 602

## GIOMETTI et al. v. ETIENNE.

Civ. 1223.

District Court of Appeal, Fourth District, California.

June 15, 1933.

Hearing Denied by Supreme Court Aug. 14, 1933.

**1. Usury ⊂⊃31.**

If real intent of parties was to effectuate sale, as distinguished from loan of money, or contract for forbearance for use of money, form of contract was immaterial as respects usury.

**2. Contracts ⊂⊃164.**

Deed absolute in form and passed as part of transaction for erection of ice plant and sale of entire property to grantors must be construed with other contract relating to transaction.

**3. Usury ⊂⊃31.**

Contract whereby realty was deeded to one who agreed to erect ice plant and convey entire property to grantors upon payment of purchase price, bonus and interest *held* sale contract and not usurious.

> Contract provided that full purchase price was to be $65,000, or which $15,000 was to be cash, balance, which was to bear interest at 8 per cent., was to be paid from sale of ice, and that the full purchase price should be computed from the price above stated, with the addition thereto of such sum as might be due on account of interest and bonus, and that purchasers should pay seller bonus of 75 cents per ton of ice manufactured until the full purchase price should be paid, provided that, if payment was completed by certain date, the provision as to bonus should be void.

**4. Usury ⊂⊃92.**

Where plaintiffs' theory was that the contract was affected by usury, and rights of parties were different from what they would be if no usury existed, plaintiffs were entitled to bring suit to determine rights of parties, notwithstanding their default of contract.

**5. Action ⊂⊃66.**

Equitable rights of parties should be determined in the suit, and not as a preliminary to bringing it.

**6. Appeal and error ⊂⊃1177(8).**

Case must be remanded to trial court where findings made do not enable appellate court upon reversal to dispose of all questions in controversy.

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Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by E. Giometti and others against Victor Etienne, Jr., who filed a cross-complaint. From judgment for plaintiffs, defendant appeals.

Reversed.

Peter tum Suden and Richard tum Suden, both of San Francisco, and Frank Kauke, of Fresno, for appellant.

Carl E. Lindsay, H. J. Carling, and Lindsay & Gearhart, all of Fresno, for respondents.

ANDREWS, Justice pro tem.

On December 12, 1927, the parties to this action entered into a contract whereby defendant was to erect, upon land which plaintiffs would deed to him, buildings, machinery, and equipment for the manufacture and sale of ice. Defendant was to sell this plant and equipment as finally completed to the plaintiffs for the purchase price of $65,000, of which $15,000 was to be cash, the balance to be paid from receipts for the sale of ice made in the plant. An accounting and payment was to be made each week. The balance due to defendant was to bear interest at 8 per cent. Then appears this provision: "The full purchase price shall be computed from the above stated price in paragraph IV, with the addition thereto of such sum as may be due on account of interest and bonus, if applicable and such other sums as may be due the seller on account of additional equipment."

Title was to remain in defendant until the purchase price was paid in full and in cash. Then follows this language: "Purchasers agree to pay seller a bonus of 75 cents per ton of ice manufactured in the plant until the full purchase price is paid to the seller. This bonus to be paid seller due to exceptionally favorable terms of purchase granted. Provided, however, if purchasers complete payment to seller of all sums of money due him prior to November 15, 1928, this provision as to bonus shall be null and void."

Other provisions related to insurance, patents, acceptance, delivery, rights on default, and special provisions as to cost of buildings. Pursuant to the contract the plant was erected and turned over to plaintiffs on the 27th day of April, 1928. Plaintiffs thereafter used the plant in the manufacture of ice and made payments from time to time on the contract.

On June 10, 1931, there was due defendant, according to his account, about the sum of $28,000. On that date he claimed to have discovered that plaintiffs had been guilty of dishonest violations of the contract by failing to account for and pay over several thousand dollars which had accrued from the sale of ice and which had not been reported. On July 10, 1931, defendant gave notice of default and demanded possession of the property. Thereafter on July 15, 1931, plaintiffs, claiming the contract to be usurious, brought this action to have the rights of the parties determined under the contract, for an accounting, for the settlement of adverse claims, for the conveyance of the property from defendant to themselves, and for other relief. Defendant interposed a cross-complaint setting out his rights under the contract, asked for possession of the property, confirmation to his title thereto, attorneys' fees, and damages. The trial court held the contract usurious and ordered the property conveyed to plaintiffs.

The controlling issue is whether the contract was usurious. That issue is presented as arising in two ways: (a) That the transaction to which the contract related was in reality a loan of money, or that the plan of payment adopted was designed to enable defendant to obtain a greater rate of interest than is permitted by law for the forbearance of money which was due under the contract; and that an ulterior purpose inspired the wording of the contract to disguise the true intent and the terms of payment purporting to relate to the conditions of sale were but subterfuge to conceal its unlawful purpose; (b) that the contract on its face, and according to necessary legal construction, imports the intent to exact more than the legal rate of interest for the forbearance for use of money.

A study of the pleadings, the record of the trial, and the findings of fact give no indication that any issue relating to an ulterior purpose or attempt at subterfuge in the formation of the contract was ever advanced or considered until raised in the brief of plaintiffs here, and that such contention by plaintiffs is not sustained in the record is a necessary conclusion.

The question of usury which is the issue of the case rests, therefore, upon the construction to be given to the contract. If the contract is one for the sale of property, and the method of payment was intended as one of the elements of the purchase price, there would be no usury, but, if the purchase price is fixed by the contract independently of the provisions for payment of interest and as a present fixed cash price payable at the option of the plaintiffs, the interest and bonus provisions having no purpose except to relate to the forbearance of payment, then usury might be found.

In the consideration of this contract, plaintiffs advance the contentions (a) that this language in the contract "that the purchasers * * * do hereby agree * * * to purchase and receive from the seller * * * and pay the seller as the purchase price thereof the sum of, * * *" indicates conclusively the intent to fix a purchase price, and that all other provisions relate to the forbearance for its immediate payment; (b) that the deed of land provided to be made by plaintiffs to defendant was intended as security for the payment of the purchase price thus fixed and was in legal effect a mortgage for that purpose.

Giving attention to the language of the contract for the purpose of determining what was therein expressed as to the entire purchase price of the property, it is found that subsequent to the first mention of the purchase price a paragraph was added which so completely covers this point that doubtless those who prepared the contract had in mind to settle this question. This is set forth in the first quotation in the résumé of the contract above and clearly shows the bonus and interest to be included in the meaning of purchase price.

[1] If the real intent of the parties was that of purchaser and seller, as distinguished from the loan of money or the forbearance for the use of money, it is immaterial what form or plan was adopted to accomplish that purpose. Pacific Finance Corp. v. Lauman, 95 Cal. App. 541, 273 P. 48; Lamb v. Herndon, 97 Cal. App. 193, 275 P. 503. It might provide a purchase price with deferred payments bearing 20 per cent. interest due at future dates, and the provision would not be usurious. This contract involved the expenditure of $65,000, with a cash payment of only $15,000, leaving a very large portion of the purchase price dependent upon the future conduct of the business which must carry with it the hazards incident to business such as fire or earthquake, the introduction of competitive service, honesty and skill in carrying on the enterprise, general prosperity, and available markets for the product and other factors. It may have been the hazards involved and the large amount at stake that led to the agreement for a bonus without which it would be difficult to finance such an enterprise. Leaving out of account for the moment the provision which would have rendered the bonus not collectible if the purchase price had been paid in November of 1928, the contract would then clearly be one where the bonus was a part of the purchase price, very considerable in amount, and which would inure to the profit of the seller due to the carrying on of the business and which could not have been avoided by the buyer under any provision of the contract enabling him to make payment in cash or in any other way.

What effect, then, shall be given to the provision of the contract set forth in the second quotation where the contract is described? The proviso does carry some implication of the right to make payment at any time prior to said date, which understanding would be increased by the knowledge of the parties that so large a sum would probably be impossible of payment from sales of ice, and therefore a reasonable construction of this provision would be that the parties intended that it might be paid in cash during the period covered by the proviso. The proviso had another possible bearing upon the contract illustrating its purpose. Due to the hazards which have been mentioned, it would be a pronounced incentive to a high degree of diligence in the conduct of the business and an early and continuous reduction of the unpaid balance which would assure to seller greater safety for his investment. Whatever may have been the reason which prompted the insertion of this proviso, it never became a factor in determining the rights of the parties due to the fact that the contract was not within the time paid in full. The only possible force it could have favorable to the purchaser was that it might lend some color to its claim that the sale was for a present payable cash price, and therefore all other provisions which enabled the seller to collect more than legal interest indicated the usurious character of the contract. But this contention cannot be sustained in the light of the obvious general understanding of the parties that payment was to be made, and was only contemplated to be made by the sale of ice which was carefully regulated, to be made weekly. Also, this option was only to pay the contract in full within a limited time and receive a discount by so doing, which brings the contract into the classification of sales where a larger price is exacted over the cash price as one of the terms of the sale with a conditional discount provision. This privilege or option, if construed to be such, was given to the purchasers to accomplish a deduction from the sale price if made on time and was not binding upon the buyer and, not having been taken advantage of, leaves the contract as if the proviso had never been inserted.

[2] Upon the question of the deed indicating a purpose to secure the purchase price and amounting in equity to a mortgage, if so regarded, it would merely affect the manner of enforcing the rights of the parties under the contract by foreclosure instead of forfeiture, inasmuch as if security, it was for the faithful performance of the contract according to its terms. This theory of a mortgage does not work out the real intent of the parties as shown by the contract. The deed was a part of the transaction. It was absolute in form. It is to be construed with the contract to which it related, both as parts of one instrument, and thus construed the contract becomes a condition subsequent as if inserted in the deed and the right of forfeiture growing out of this condition depended upon the faithful performance of the contract by the buyer and the determination of the rights of the parties by reason of that condition will be worked out by the result of this action.

[3] Upon the whole consideration of the contract it must be construed as one of sale and purchase, and so construed there is nothing in its provisions which renders it usurious.

[4, 5] It is urged that the suit was prematurely brought because the default in the contract was fraudulent and equity would not tolerate such an action. It is the theory of plaintiffs that the contract was affected by usury, the rights of plaintiffs worked out under that theory were so entirely different from the rights of the parties if no usury existed that the whole situation justified the bringing of an action by either party which would involve the question of usury and of default and of an accounting generally and a settlement of the rights involved in this contract. The question of the equitable standing of the parties should be determined in the suit, not as a preliminary to bringing it.

[6] Notwithstanding the fact that the findings have worked out the amount which would be due to defendant by reason of interest and of the bonus provision in event that no usury existed, there are other important issues to be settled by the trial court, such as a matter of attorneys' fees, damages claimed for the detention of the property, asserted fraudulent character of plaintiffs' default as bearing upon the rights of plaintiffs to retain the property upon payment of the amount due defendant as indicated by this decision, which render it necessary that a new trial be had.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

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132 Cal.App. 538

## BARRITT v. BARRITT et al.

Civ. 1220.

District Court of Appeal, Fourth District, California.

June 12, 1933.

**1. Trusts ⚷30½(1).**

Oral agreement between partners, at time partnership was terminated and assets divided, that mineral rights reserved from conveyances of partnership land title to which was taken in individual names of partners should be held in trust for different copartners, *held* "express trust."

[Ed. Note.—For other definitions of "Express Trust," see Words & Phrases.]

**2. Trusts ⚷17, 18(2).**

Agreement between partners, at time partnership was terminated and assets divided, that mineral rights reserved from conveyances of partnership land title to which was taken in individual names of partners should be held in trust for different copartners, could be created by parol (Civ. Code, § 852).

Such agreement could be created by parol, as against contention that it could not be created by parol, because Civ. Code, § 852, provides that a trust in relation to real property must be in writing, since the rights involved, although in their nature real estate, were at the time of the making of the agreement partnership property, and as between the partners, and in connection with any matter pertaining to the partnership business, regarded in law as personal property.

**3. Limitation of actions 🔑103(2).**

Until repudiation thereof by trustee, statute of limitations would not begin to run against claim of trust for different copartners in mineral rights reserved from conveyances of partnership land title to which was taken in individual names of partners.

**4. Limitation of actons 🔑83(1).**

Upon death of partner, four-year limitation statute began to run against claim of trust for different copartners in mineral rights reserved from conveyances of partnership land, title to which was taken in deceased partner's name.

**5. Limitation of actions 🔑175.**

Administratrix could not, by recognizing trust, waive running of statute of limitations against claim of trust for different copartners in mineral rights reserved from conveyances of partnership land, title to which was taken in deceased partner's name.

**6. Limitation of actions 🔑83(3).**

Trust for different copartners in mineral rights reserved from conveyances of partnership land, title to which was taken in individual names of two partners as tenants in common, did not survive upon death of one partner trustee, so as to preserve right of third partner against bar of limitations against deceased partner's interest (Civ. Code, § 2288).

**7. Limitation of actions 🔑180(1).**

Statute of limitations could not be tested on demurrer to complaint which did not disclose when cause of action arose.

**8. Equity 🔑87(1).**

Equity follows the law in matter of limiting time for commencing actions as provided by limitation statutes, unless, due to circumstances creating strong equitable considerations, plaintiff's right ought not to be recognized in equity.

**9. Trusts 🔑365(2).**

Partner's right to enforce trust in mineral rights reserved from conveyances of partnership land, title to which was taken in deceased partner's name, *held* not barred by laches; four years not having elapsed from date of death to time of action.

Partner who held mineral rights in trust did not repudiate trust to time of his death, and defendants charged with the administration of his estate attempted to recognize the trust, and the time and character of the claim were not such that any of defendants' rights would be seriously affected by the delay in bringing action.

**10. Limitation of actions 🔑180(1).**

Order sustaining, without leave to amend, demurrer to fourth amended complaint which showed upon its face that cause of action was barred by limitations, *held* proper where no application to amend was made, and no showing made as to nature of amendment, and plaintiff had been afforded ample opportunity to frame complaint to protect his rights.

**11. Appeal and error 🔑102.**

No appeal lies from order sustaining, without leave to amend, demurrer to fourth amended complaint.

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Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by C. W. Barritt against Susie F. Barritt, as administratrix with the will annexed of the estate of R. T. Barritt, deceased, and others. From an order sustaining, without leave to amend, a demurrer to the fourth amended complaint, and from a judgment of dismissal, plaintiff appeals.

Judgment affirmed in part, and in part reversed, with directions. Attempted appeal from order dismissed.

James P. Sweeney, of San Francisco (Frank F. Fontes, of San Francisco, of counsel), for appellant.

W. H. Stammer and H. E. Dwelle, both of Fresno, for respondent Susie F. Barritt.

Ernest Klette, of Fresno, for respondent Belle A. Herrick.

ANDREWS, Justice pro tem.

This appeal is from a judgment of dismissal following the sustaining of a demurrer to the complaint without leave to amend. The complaint sets forth that in the year 1916 the plaintiff and two brothers entered into a partnership for the purpose of dealing in cattle; that in the course of the business the partnership acquired certain real estate which was used in the business, the title to which was taken in individual names of different members of the partnership to be held in trust for the partnership; that the real estate thus acquired was during the course of the business from time to time sold and conveyed to purchasers, reserving, however, the mineral rights to the soil, the deeds conveying only the surface right. The active business of the partnership was brought to a close during the lifetime of the brothers and the assets of the company divided between them, except the mineral rights which had been reserved from the conveyances of the land.

It is alleged that at the time the assets were divided it was agreed that these mineral rights were to remain, so far as the title was concerned, undistributed and to be held in trust for the different copartners; each to be entitled to a one-third interest, conveyance to be made of such interest on demand. Subsequent to this settlement of the business one of the partners, R. T. Barritt, died on the 14th day of July, 1921, and on the 16th day of September, 1921, B. F. Barritt, one of the partners, was appointed executor of the estate. B. F. Barritt continued to act as executor of the estate up to the time of his death, the date of his death not appearing in the complaint nor in the record. Subsequent to the death of B. F. Barritt, his wife, Belle A. Barritt, was appointed executrix of his estate on December 23, 1927, and on said date Susie F. Barritt, widow of R. T. Barritt, was appointed administratrix of the estate of R. T. Barritt, deceased, and since that date these persons have been and now are administering these estates; that since the appointment of these persons to administer these estates they each admitted to plaintiff knowledge of the trust in the mineral lands and agreed that his one-third interest should be recognized and protected in the administration of the estates; that on the 20th day of June, 1930, they repudiated their trusts and denied plaintiff's right to any interest in the lands; that thereupon on July 12, 1930, this action was begun to enforce this trust and recover plaintiff's rights in said lands.

Defendants demur to the fourth amended complaint upon the general ground that it does not state a cause of action, and upon the further ground that it appears upon the face of the complaint that the statute of limitations has run against plaintiff's cause of action, if any is stated, and that the right of action has been lost through laches, if any existed. A special demurrer was also interposed for uncertainty, many specifications being set forth.

[1, 2] 1. The briefs discuss the nature of the trust attempted to be set forth in the complaint and consideration of that question leads to the conclusion that there is no constructive and no resulting trust but that the pleading and rights of the plaintiff depend upon an express, constructive, and continuing trust created by the agreement and acts of the partners. The defendants insist that the allegations of the complaint show only a trust created by oral agreement between the partners at the time of the final settlement of their partnership relations and that such trust could not be created by parol because of section 852 of the Civil Code, which provides that no trust of this character can be created except in writing. The answer to this contention on the part of plaintiff is that the rights here involved, although in their nature real estate, were, at the time of the making of the verbal contract creating the trust, partnership property, and as between the partners and in connection with any matter pertaining to the partnership business, regarded in law as personal property, and that such a trust as is here involved can be created orally in personal property. There is force in the contention that the oral contract alleged would sustain the trust contended for, but the facts alleged in the complaint justify a working out of the same result, the same relationship, and the same rights arising thereupon, in another view of the complaint. The existence of the partnership, the fact of its ownership of the lands in question, and the fact that the partnership was terminated and assets divided except as to these reserved mineral rights, present a case where, under section 2424 of the Civil Code, the partnership would still continue until these lands were finally disposed of and divided under the original trust created by the partnership relation. The conclusion reached is that the complaint states a cause of action except as affected by the other contentions.

[3, 4] 2. The trust set forth in the complaint would be a voluntary continuing trust against which the statute of limitations would not begin to run until a repudiation of the trust by the trustee. Upon the death of R. T. Barritt the character of the trust was changed, as to the interest which was in his name, from a voluntary trust to an involuntary trust. The heirs, devisees, or executor would after his death take the property subject to the trust, but immediately upon the death the statute of limitations would begin to run, and unless in some manner waived or asserted by action, the right of plaintiff would be lost after four years. Norton v. Bassett, 154 Cal. 411, 97 P. 894, 129 Am. St. Rep. 162. His death occurred some nine years before the commencement of this action and the right of action was therefore extinguished as appeared upon the face of the complaint unless the allegation of the complaint that the administratrix had recognized the trust and agreed to respect its provisions in the administration of the estate would operate to waive the effect of the statute.

[5] 3. The case above cited is also an answer to this contention, in that it is there held that no oral recognition of the trust by the successor to the property would operate to change the nature of the trust and that

no administratrix has authority to recognize the existence of a trust or to change its character. The result would be that as to that portion of the property which stood in the name of R. T. Barritt, the running of the statute of limitations had not been waived, and as to that particular portion of the land involved, the plaintiff had no right and the demurrer was properly sustained. The fact that for a portion of the time, which was within the four-year limitation, the executor was one of the partners and charged with knowledge of a recognition of the rights of plaintiff, would in no way affect his rights and duties as executor.

[6] A part of the lands was held by R. T. Barritt and B. F. Barritt jointly as trustees under the same deed. Section 2288 of the Civil Code provides that upon the death of one of several cotrustees the trust survives to the others. They were not cotrustees and the section could not have the effect of continuing this trust and enabling the surviving trustee to carry out its provisions, thereby preserving the right of plaintiff against the bar of the statute of limitations. The nature of the creation of the trust and the manner in which it must necessarily be executed, and the individual right given to each grantee by the deed which conveyed the land to them apparently as tenants in common requiring the separate individual action to overcome the legal effect of the apparent title held by each, make it apparent that each would be the separate trustee of the undivided portion of the property which he would receive by the deed and which would belong to him absolutely except for the trust.

[7-9] 4. A different situation may be presented as to the lands held in trust by B. F. Barritt at the time of his death. While the date of his death is not disclosed, and the statute of limitations could not be tested on demurrer, it is assumed for the purpose of this opinion that four years had not elapsed from the date of his death to the time of bringing this action. As to the lands held in his name, therefore, the statute of limitations would not have run at the time of the commencement of the action and the complaint would state a cause of action against such lands unless the plaintiff's right had been lost by laches. It is the rule that equity follows the law in the matter of limiting the time for commencing actions as provided by the statutes enacted for that purpose, unless due to some circumstances which are shown to create strong equitable considerations it can be seen that the right of plaintiff ought not be recognized in equity. The circumstances surrounding plaintiff's claim as against the lands standing in the name of B. F. Barritt at the time of his death, there having been no repudiation by him, and there having been attempted recognition of plaintiff's rights by defendants charged with the administration of his estate, and the time and character of the claim not being such that any of defendants' rights would be seriously affected by the delay, which was not impressive, it must be held that it is not a proper case for the application of the doctrine of laches.

5. The special demurrer presents twenty specifications which defendants consider important to a proper amplification of the complaint to the end that it may be tested as to its sufficiency, and to enable defendants to answer, and to an understanding of the issues which must be involved in the trial of the case. An examination of all of these specifications leaves the impression that none of them is necessary to the cause of action or useful in preparing to meet the issues raised by the pleadings.

6. The second cause of action including, as it does, the statement of the first cause of action differs in no way from that cause of action, the question of title being alike involved in both, and the same ruling involved in the demurrer to the first cause of action applies to the second.

[10] 7. The demurrer was sustained without leave to amend and as to the land in the name of R. T. Barritt, under the conditions as shown by the record, this was a proper order. No application to amend appears to have been made and no showing as to the nature of the amendment which was desired. An ample opportunity had been afforded in the handling of the case prior to this order, for framing the complaint upon such lines as plaintiff considered possible for the presentation and protection of his rights.

[11] The judgment is reversed, with directions to overrule the demurrer so far as the complaint relates to the lands held in the name of B. F. Barritt, and judgment is affirmed in so far as it relates to the lands held in the name of R. T. Barritt. The attempted appeal from the order sustaining the demurrer is dismissed as not being an appealable order.

We concur: BARNARD, P. J.; JENNINGS, J.

132 Cal.App. 546

## BEAM et al. v. DUGAN et al.

Civ. 8999.

District Court of Appeal, First District, Division 2, California.

June 13, 1933.

Rehearing Denied July 13, 1933.

Hearing Denied by Supreme Court Aug. 10, 1933.

**1. Mines and minerals ⚷79(1).**

Under conveyance transferring part of "landowner's royalty," consisting of rentals in "any and all oil, produced or saved from any wells to be drilled upon" land, grantees acquired perpetual interest in royalties out of any oil produced, irrespective of under what lease such oil was produced.

**2. Mines and minerals ⚷79(1).**

Conveyance of landowner's royalty must be strictly construed against grantor.

**3. Mines and minerals ⚷79(1).**

Where eight landowners executed community lease for 20 years embracing land owned by vendors of part of landowner's royalty in oil, reserving no right to any one of lessors to cancel lease or declare forfeiture, purchasers of part of landowner's royalty under lease were entitled to interest in all royalties paid for 20 years.

**4. Mines and minerals ⚷79(1).**

Reservation or sale by landowner of interest in royalty or rentals from land creates in purchaser right incident to land itself which cannot be defeated by act of landowner without purchaser's consent.

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Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Suit by S. K. Beam and Nora B. Beam against John Dugan and Lena J. Dugan and others. Judgment for defendants, and plaintiffs appeal.

Affirmed in part, and reversed in part.

A. E. Garten and Vern E. Garten, both of Long Beach, for appellants.

Koenig & Brunton, of Los Angeles, for respondents Dugan.

Wellborn & Wellborn, of Los Angeles, for respondents Doheny and Petroleum Securities Co.

NOURSE, Presiding Justice.

The plaintiffs sued to quiet title and for an accounting claiming under a sale and two assignments of portions of a landowner's royalty in oil aggregating 1 per cent. of the total royalty payable to their grantors. Defendants had judgment, and the plaintiffs appeal upon typewritten transcripts.

The conveyances to the plaintiffs and to their assignors were executed in March, 1923. In form and substance they are identical. The one to the plaintiffs, after describing the real property by metes and bounds, recites: "And whereas, said above described property, together with other property, has been leased for oil development under a lease, of date, July 18, 1922, between John Dugan and wife and others, as lessors, and Vern Dumas and wife, as lessees, * * * and it being provided among other things in said lease that the owners of said property, covered by said lease, shall receive a royalty of one-fifth (1/5) of all oil or kindred substances developed on said lease. * * *

"And whereas, S. K. Beam and Nora B. Beam, husband and wife, desires to purchase, and does hereby purchase a 3/5 of 1 per cent (1%) land owner's royalty in said above described property.

"Now, therefore, we * * * do hereby sell, transfer, convey, assign and set over to the said S. K. Beam and Nora B. Beam * * * out of our land owner's royalty, an undivided 3/5 of 1 per cent (1%) in and to any and all oil, gas or other hydro-carbon substances produced or saved from any wells to be drilled upon any of the land described in the lease heretofore mentioned * * * it being particularly understood and agreed that the royalty interest, herein assigned, affects all the land mentioned in said lease and is not limited to the land of said Dugans."

The final stipulation in the conveyance is thus explained: In July, 1922, prior to the date of the execution of these conveyances, the Dugans and six other landowners had executed an oil and gas lease to Vern Dumas and his wife; after the execution of that lease the Dugans conveyed a small portion of the land covered by the Dumas lease to others, and, therefore, in the conveyances to the plaintiffs and to their assignors, the Dugans made this stipulation that the interest in the royalty which they thus conveyed included oil or gas that might be obtained from wells covered by the Dumas lease, though outside of the lands then held by the Dugans in fee.

In January, 1928, the Dugans obtained quitclaim deeds from Vern Dumas and his wife and from numerous other persons claiming interests arising out of the Dumas lease, and soon thereafter executed a new oil and gas lease to Vern Dumas and wife covering a portion of the lands described in the conveyances to the Beams and their assignors. Acting under the lease of 1923, the lessees drilled a well on the premises to a depth of thirty-five hundred feet, but failed to develop oil or gas. This well was not working at the time the conveyances were made, and it does not appear that any further drilling was had under the original lease. Under the lease of 1928, new wells were drilled and production was obtained for which appellants demand an accounting.

The primary issue urged by appellants is whether the conveyances to them and to their assignors carried such an interest in the lands described therein as would entitle the grantees to a perpetual interest in the royalty paid to their grantors on any oil produced and saved from the premises. It has been frequently held that oil in place is a part of the realty and does not take on the character of personal property until severed from the realty (Taylor v. Hamilton, 194 Cal. 768, 774, 230 P. 656, and cases cited); that a contract for the sale of oil from the owner of the land does not create an interest in the real property, but is a plain contract for the sale of personal property if and when that property comes into the possession of the landowner (Richfield Oil Co. v. Hercules Gasoline Co., 112 Cal. App. 431, 435, 297 P. 73); and that until the oil has become personal property through severance from the land the title to the oil rests in the owner of the land. Black v. Solano Co., 114 Cal. App. 170, 174, 299 P. 843. The conveyances here in suit transfer "out of our land owner's royalty an undivided 3/5 of 1 per cent. in and to any and all oil * * * produced and saved from any wells to be drilled." The landowner's royalty was in the nature of a rental paid by the lessees for the privilege of drilling for and extracting oil from the land. Acme Oil & Mining Co. v. Williams, 140 Cal. 681, 684, 74 P. 296. Thus in selling a portion of their landowner's royalty in any and all oil produced or saved from any wells to be drilled upon "any of the land described," the vendors were selling an interest in their right as owners of the land to take and receive rental by way of a royalty upon all oil which might be produced. But the conveyances do not limit the rights of the vendees to the royalty paid under the first lease to Dumas. That lease seems to have been mentioned in the conveyances for the single purpose of conferring upon the vendees the right to participate in the royalties paid under that lease upon oil which might be produced from lands covered by the lease, but not held in fee by the grantors.

[1, 2] The evidence discloses without conflict that it was a well-recognized custom in the community to refer to "land owner's royalty" as a perpetual interest not limited to any particular lease, and that, when an interest in a royalty limited to a particular lease was dealt with, such interest was commonly referred to as "an overriding royalty." Adopting the well-known rule of construction that a conveyance of this character must be construed most strictly against the grantor, it would seem that the intention of the parties was that the conveyances covered royalties to be paid upon any oil produced from the land, irrespective of under what lease such oil may be produced; otherwise it would have been a simple matter for the grantors to follow the customary course of expressly limiting the rights of the vendees to the royalties to be paid under the existing lease.

But, if this is not a reasonable construction of the conveyances, the appellants are nevertheless entitled to relief under another theory which is advanced in Jones v. Pier, 124 Cal. App. 444, 12 P.(2d) 646, 647. In that case a lease was executed in 1922 for a term of twenty years, there being four joint lessors. Thereafter two of these lessors executed an instrument reciting that, "by virtue of a community lease dated October 10, 1922," they were owners of 12½ per cent. "of the total production of oil, * * *" and that they thereby sold to Jones 1 per cent. "of said total production." Thereafter the other joint lessors obtained a judgment in the superior court canceling the lease in respect to certain lots owned by them. Neither the plaintiff Jones nor his assignors were joined in that action. Thereafter all the lessors joined in an agreement canceling the lease in so far as it related to certain lots covered by the judgment mentioned. The plaintiff Jones was not a party to that agreement. Oil was produced in paying quantities under the second lease or agreement and Jones brought an action to quiet title to an undivided 1 per cent. of the royalties paid thereunder. Judgment went for the defendants, and on appeal this judgment was reversed by the District Court of Appeal of the Third Appellate District. A transfer to the Supreme Court was denied.

In reversing the case, the Appellate Court, relying on Jameson v. Chanslor-Canfield Midway Oil Co., 176 Cal. 1, 167 P. 369, held that, inasmuch as the right to terminate the lease for breach of covenants therein contained was specifically conferred upon the lessors jointly, therefore no less than all could either by agreement or by action in court cause a cancellation of the lease, and, also, that, by the terms of his assignment, Jones had acquired an undivided 1 per cent. interest in common with the lessors in all oil and gas produced upon the land described for the term of twenty years from the date of the original lease, regardless of who produced the same. It was said that the lease created a vested right in property, even though it was not accompanied by actual physical possession of a subterranean deposit of gas or oil, and that, because of the assignment to Jones of an undivided interest in common with the lessors in these deposits, no one of the lessors could terminate the interest thus vested in Jones without his knowledge or consent. For these reasons it was held that Jones was entitled to have quieted in him his individual 1 per cent. of all such deposits developed or produced from the property during the term prescribed in the original lease, and that any leases with relation to the land which may have been subsequently executed by the lessors were "subject to the plaintiff's prior vested right which was acquired by means of his assignment."

[3] The rule of Jones v. Pier would seem to determine the rights of the appellants in this action. When the conveyances were made to these appellants, eight landowners had executed a community lease embracing property owned by appellants' grantors. The lease was to run for a period of twenty years. It provided for the payment "as royalty and rent" for the premises one-fifth part of all oil, gas, and other hydrocarbon substances "produced and saved" from said premises, and allotted to appellants' assignors eight-tenths of said royalty. These parties then sold to the appellants and to their assignors 1 per cent. of the royalty allotted to them under the terms of the lease. The lease did not reserve to any one of the lessors the right to cancel it or to declare a forfeiture. Under the rule of Jones v. Pier the appellants purchased some vested interest which they were entitled to have quieted in this proceeding.

We purposely refrain from deciding at this time what interests the appellants acquired by their purchase, because that is an issue which the trial court must determine upon an interpretation of the instruments from the intentions of the parties in the light of the surrounding circumstances and the prevailing customs. Here the trial court found that the appellants acquired nothing. For the reasons which we have heretofore given, this finding was error. As the cause must be tried anew, it might be well to direct attention to the conflicting doctrines relating to interests of this character. There is a line of decisions found in West Virginia, Texas, and Kentucky holding that oil and gas in place are minerals subject to separate ownership, severance, and sale in like manner as coal and other solid minerals, and that a reservation, exception, or sale of royalties to be recovered from such products is in effect a reservation, exception, or sale of the corpus of the minerals—that a sale of the profits of land is a sale of a right in the land itself following the statement in Coke Litt. 4b, "For what is land but the profits thereof?" See Paxton v. Benedum-Trees Oil Co., 80 W. Va. 187, 94 S. E. 472; Stephens County v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566; United Fuel Gas Co. v. Swiss Oil Corp. (C. C. A.) 41 F.(2d) 4. The contrary view, that there can be no grant or conveyance of oil or gas in place separate or apart from the right to go on the premises and extract them, is followed in Oklahoma, Kansas, and Indiana. 1 Thornton's Law of Oil & Gas, p. 148; Rich v. Doneghey, 71 Okl. 204, 177 P. 86, 3 A. L. R. 352; Miller v. Sooy, 120 Kan. 81, 242 P. 140; Campbell v. Smith, 180 Ind. 159, 101 N. E. 89. In Ohio the courts seem to take a middle ground, holding that, while oil and gas in place are capable of separate reservation or conveyance, it is not necessary to adopt the rule of the West Virginia and similar jurisdictions that a reservation or sale of the royalties is a reservation or sale of the corpus of the mineral. Pure Oil Co. v. Kindall, 116 Ohio St. 188, 156 N. E. 119, 123. Numerous cases from these and other jurisdictions are cited in Dunlap v. Jackson, 92 Okl. 246, 219 P. 314.

[4] With these conflicting views of the character of the deposits in place there is, however, an unanimity of opinion that a reservation or sale by the landowner of an interest in the royalty or the rentals to be obtained from the land creates in the purchaser a right incident to the land itself which cannot be defeated by the act of the landowner without the consent of the purchaser. Whether we adopt the rule that the conveyances, which are the subject of this litigation, gave to the purchasers an interest in the oil and gas in place, an interest running with the land, or an interest in all royalties paid for a period of twenty years from the date of the outstanding lease, under the rule of Jones v. Pier, supra, it is manifest that the purchasers secured from the landowners such an interest in the royalties paid under the second lease as would entitle them to an accounting and an adjustment of their rights.

At the close of plaintiffs' case, dismissals were entered in favor of the fictitious defendants sued as John Doe Nos. I, II, and III; Jane Doe Nos. I, II, and III; John Doe Corporation Nos. I, II, and III; and also the Union Oil Company. The motions for a nonsuit of Edward L. Doheny, Lucy Smith Doheny, Carrie Estelle Doheny, and Lucy Smith Doheny, as administratrix, were granted. When the judgment was entered, the court inadvertently included the "Petroleum Securities Corporations (sic)" as one of the defendants as to which a nonsuit was granted. As no motion was made by that defendant and no nonsuit granted, the judgment was erroneous in that respect.

As to those defendants in whose behalf a nonsuit was granted, and as to those for whom dismissals were entered, the judgment is affirmed. As to all other defendants it is reversed.

I concur: STURTEVANT, J.

132 Cal.App. 640

**TAYLOR v. DE CAMP et al.**

**Civ. 8456.**

**District Court of Appeal, First District, Division 2, California.**

**June 17, 1933.**

**Hearing Denied by Supreme Court Aug. 14, 1933.**

**1. Partnership 🔑55.**

In action by assignee of insurance company against partnership insurance agency for premiums, evidence supported verdict that one defendant was not member of partnership.

**2. Principal and surety 🔑147(2).**

As respects creditor's rights to sue on undertaking, undertaking to pay surety all loss which it might sustain or for which it might become liable by having executed bond *held* not breached until surety had paid something on its bond.

**3. Principal and surety 🔑147(2).**

Undertaking to pay surety all loss which it might sustain or for which it might become liable by having executed bond was not one for benefit of creditor of principal in bond executed by surety which such creditor might sue (Civ. Code, § 2854).

**4. Appeal and error 🔑172(1).**

Where appellant did not urge in trial court that appellee was liable as stockholder in corporation, he could not do so on appeal.

**5. Insurance 🔑83(1).**

In action on bond to pay loss which employer might sustain by fraud or dishonesty of insurance agent, burden was on plaintiff to prove that loss was sustained through one of acts specified in bond.

**6. Trial 🔑109.**

In action against principals and surety, opening statement by attorney of party sued as principal, but who was not, was not binding on surety.

**7. Trial 🔑109.**

In action on bond insuring against insurance agent's dishonesty and fraud, statement that moneys had been expended by agent furthering business of principal and agent, and that business of agent was business of principal, *held* not admission that agent had been guilty of dishonesty or fraud.

**8. Fraud 🔑50.**

There is a presumption against fraud.

**9. Insurance 🔑83(1).**

In action on bond insuring against insurance agent's dishonesty or fraud, insurer's assignee could not recover where there was no proof that losses sustained were due to agent's dishonesty or fraud.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Churchill Taylor against V. E. De Camp and others. From order granting defendant the American Surety Company new trial, and from judgment for defendant Charles H. Dickinson, plaintiff appeals.

Affirmed.

S. Laz Lansburgh, of San Francisco (S. Joseph Theisen, of San Francisco, of counsel), for appellant.

Joseph G. De Forest, of San Francisco, for respondent American Surety Co. of New York.

Howard S. Lewis, of Los Angeles, for respondent Charles H. Dickinson.

NOURSE, Presiding Justice.

Plaintiff sued as the assignee of the State Assurance Company, Limited, to recover premiums from the General Agency, a partnership, its agent, and joined the American Surety Company on its bond assuring the fidelity of the agency. The cause was tried with a jury, which returned a verdict against the General Agency and V. E. De Camp and L. P. Swayne Companies as partners therein and against the American Surety Company, but in favor of the defendant Charles H. Dickinson. Thereafter the trial court granted a new trial as to the American Surety Company on the ground that the evidence was insufficient to support the verdict. Plaintiff appealed from the portion of the judgment on the verdict in favor of defendant Dickinson and also from the order granting a new trial to the American Surety Company. The appeal is taken on typewritten transcripts.

The plaintiff's assignor employed the General Agency to solicit and issue fire and automobile insurance policies, collect premiums thereon, and to generally exercise the powers usually given an insurance agency. The contract reserved to the employer the right to decline any business offered and to cancel policies which it considered undesirable. It required the agency to make periodic remittances of the net premiums to the insurance company within seventy-five days from the end of the month in which the business was written. Acting under the terms of the contract, the agency sold a considerable amount of insurance, deposited the premiums collected thereon in a bank account under the name of the General Agency, and from time to time made remittances to its employer through checks of the General Agency. Disputes arose as to the character of some of the business written by the agent, and a large number of policies were canceled by the employer either directly or by the agent acting upon orders of its employer. On February 25, 1926, the employer, exercising the power given in the contract, directed the agent to cease from writing any further business. At the same time the agent was directed to keep its offices open for the purpose of winding up the business; i. e., to collect premiums outstanding and to refund unearned premiums upon the canceled policies. When the suit was filed, the plaintiff claimed that the agent owed on the contract a sum in excess of $9,000. The defendant De Camp, who at all times was in active charge and control of the affairs of the agency, defended on the grounds, first, that, acting in good faith under the contract, the agency had expended a large sum of money in the establishment and maintenance of offices in San Francisco and Los Angeles for the use and benefit of its employer; and, second, that it was prevented from making collections of premiums because of the employer's wrongful and malicious cancellation of business written by the agent. The defendant Dickinson answered separately, denying that he was at any time a member of the partnership doing business under the name of the General Agency, and denying that he was at any time a member of a partnership doing business under the name of L. P. Swayne Company. The L. P. Swayne Companies, a corporation, filed a separate answer denying that Dickinson and L. P. Swayne individually were copartners with De Camp doing business under the name of the General Agency. The American Surety Company admitted the execution of the surety bond, and specially raised the issue that its liability was limited for loss sustained by the State Assurance Company, because of "any act or acts of fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or wilful misapplication of funds on the part of said The General Agency."

Upon the issues so framed, the plaintiff tendered proof upon the composition of the partnership doing business under the name of the General Agency through which it sought to hold Dickinson as a partner. Evidence was also offered of a document signed by Dickinson wherein he agreed to hold the surety company harmless against any loss which the company might suffer under its bond and evidence that Dickinson was the owner of one-half of the stock in the corporation sued as L. P. Swayne Companies. No evidence was offered tending to prove that the loss was the result of fraud, dishonesty, or willful misapplication on the part of the employee.

The jury having returned its verdict in favor of the defendant Dickinson, we must consider the appeal from that portion of the judgment in the light of a finding against the evidence produced by the plaintiff in reference to that defendant. On this appeal the appellant seeks to charge Dickinson upon three different theories: First, as a partner in The General Agency; second, as an indemnitor of the surety company; and third, upon his statutory stockholder's liability.

[1] The only evidence which the plaintiff offered tending to prove that Dickinson was personally a partner in the General Agency was the conclusion of the witness De Camp. This testimony was contradicted in so many different ways that it is unnecessary to say more at this time than that the evidence demonstrated that that partnership was composed of De Camp and the L. P. Swayne Companies, a corporation, and that Dickinson was a stockholder in the latter corporation, but that he at no time participated as an individual in the business of the partnership. The uncorroborated statement of De Camp that Dickinson was a partner does not create a substantial conflict with the undisputed evidence which shows the exact composition of the partnership. The finding of the jury on this issue was supported by all the competent evidence and cannot be disturbed.

[2, 3] The undertaking which Dickinson gave to the surety company was to pay the surety company all loss "which it may sustain or incur, or for which it may become liable by reason of having executed said bond. * * *" This was not an undertaking to pay the original debt or for the performance of the obligation; it was merely an undertaking to repay to the surety such sum as the surety might be compelled to pay by reason of its obligation. Hence there could be no breach of Dickinson's bond until the surety had paid something on its bond. The bond of Dickinson was not therefore one for the benefit of the creditor upon which the creditor might sue within the rule declared in section 2854, Civil Code. 13 Cal. Jur. p. 1003; Goff v. Ladd, 161 Cal. 257, 259, 118 P. 792.

[4] The appellant cannot urge the stockholder's liability of Dickinson because he did not tender that issue to the trial court. The complaint alleged that De Camp, Dickinson, Lawrence P. Swayne, and John Doe were copartners doing business under the name of the General Agency. It also alleged that L. P. Swayne *Companies* was a corporation. It then alleged that De Camp, Dickinson, Swayne, and others "were copartners doing business under the name of L. P. Swayne *Company*." It then alleged that all the defendants other than the surety company were partners doing business under the name of the General Agency. This allegation was concealed in the third cause of action, and was repudiated by appellant when the evidence was tendered to the ju-

ry. Throughout the trial appellant contended that the General Agency was a partnership composed of De Camp, L. P. Swayne, and Dickinson. Dickinson contended that the partnership was composed of De Camp and the L. P. Swayne Companies, a corporation. The appellant controverted this evidence, and now, for the first time, takes the position that it was a fact admitted in the pleadings. The jury returned its verdict against De Camp, "L. P. Swayne Companies," and the General Agency. By this the jury meant the L. P. Swayne Companies, a corporation; but there was no cause of action stated against that corporation except that based on the surety bond and pleaded in the third count, and hence no cause against Dickinson as a stockholder therein. The fourth count is but a skeleton of a pleading which does not begin to state facts upon which a stockholder's liability could be enforced under the Code sections then controlling.

[5-7] The appeal from the order granting a new trial to the surety company does not present any difficulty. The bond upon which appellant relies undertook to pay any pecuniary loss which the employer might sustain "by any act or acts of fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or wilful misapplication of funds on the part of said The General Agency." There was no evidence of any nature tending to prove that loss was sustained through any one of these acts, and of course the burden was upon the appellant to prove that he came within the terms of the bond. In his opening brief the appellant discussed the rules of law applicable, but did not print any evidence in support of the issue. This respondent challenged the appellant to show any evidence showing fraud, wrongful abstraction, or willful misapplication of any funds by the General Agency, and directed our attention to the evidence of the course of business of the employer and the employee which it claims negatives any inference of dishonesty in the handling of the funds by the General Agency, and placed the parties in the simple relation of debtor and creditor. The appellant ignores the challenge in his reply brief, and again fails to give us any reference to any evidence which tends to support this issue. At great length he argues that the agency mingled with its own funds premiums collected for its principal and used these funds in furthering its own business. But there is no evidence supporting either claim. In one portion of his brief appellant relies on the opening statement of counsel for Dickinson as evidence of these facts. At that time counsel said: "The evidence I think will show * * * that the entire efforts of The General Agency were devoted toward furthering the interests of The State Assurance Company, * * * and that every dollar that was taken in from any source whatsoever was spent, not in speculation, * * * but actually spent in furthering the business of The General Agency, and also the business of The General Agency * * * was the business of The State Assurance Company." Though this statement of counsel was not binding upon the surety company, it nevertheless falls far short of being evidence of fraud, misappropriation, or misapplication of funds on the part of the General Agency.

[8, 9] There is nothing which we have found in the record which discloses more than a common relation of debtor and creditor between the parties. The bond was not given to guarantee full performance by the agency under the contract. It was a bond of limited liability, limited to loss through fraud or similar acts. Fraud is not to be presumed, but, on the contrary, the presumption is against fraud. The authorities uniformly hold that there is no liability under a bond of this character, in absence of proof of the acts designated in the bond. 25 C. J. 1093, 1094. As there was no proof to support the verdict against the surety company, the trial court properly granted its motion for a new trial.

The judgment and order are both affirmed.

I concur: STURTEVANT, J.

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132 Cal.App. 471

## PEOPLE v. BRIERTON.

Cr. 2338.

District Court of Appeal, Second District,
Division 1, California.
June 8, 1933.

Hearing Denied by Supreme Court July 7, 1933.

1. **Criminal law** 🔑390.

Witness may be examined as to intent where intent is material.

2. **Criminal law** 🔑1170(4).

Error in exclusion of defendant's testimony on direct examination *held* harmless in so far as same evidence was fully covered by cross-examination.

3. **Criminal law** 🔑1169(1).

In prosecution of husband for forging indorsement on wife's check and for stealing check, exclusion of defendant's testimony that he gave portion of proceeds of checks to his wife *held* reversible error.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

**H. H. Brierton** was convicted of forgery and grand theft, and he appeals.

Reversed and remanded.

Hearing denied by Supreme Court; SEAWELL, J., dissenting.

J. E. Haley, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

HENDERSON, Justice pro tem.

By a grand jury indictment of three counts the defendant was charged with the offense of forgery of indorsement and with two separate acts of grand theft. Count I charged him with forgery of indorsement of the name of Alta B. Vail to a certain draft or check in the sum of $1,800.63 with the intent to defraud her and the Security First National Bank and the United States First National Bank of Los Angeles. Count II accused defendant of the theft of the $1,800.63 represented by the said check from said United States First National Bank; and count III alleged that he stole the check itself from the said Alta B. Vail. He was convicted by a jury of the offenses charged in the first and third counts, but was acquitted as to the second. From these judgments of conviction and the order denying his motion for a new trial the defendant prosecutes this appeal.

The prosecution in order to support the various allegations of the information was required to rely upon the testimony of the prosecuting witness, Alta B. Brierton, the wife of the defendant. Her testimony, which is somewhat unusual, pertinent to the inquiry here, discloses the following facts: At the times alleged in the indictment Mrs. Brierton, who was employed as a school teacher under her maiden name of Alta B. Vail, and the defendant, were residing together in the city of Los Angeles. Although living under the same roof their relations were not cordial, and they infrequently discussed business and money matters. In August, 1930, she determined to close her account with the Security First National Bank, and received from it the said cashier's check in which she was designated payee by the name of Alta B. Vail. The check, which represented her own personal property acquired by inheritance, was placed by her in a closet of their home for safe-keeping. Several weeks later upon the discovery of its disappearance and after a thorough search over a course of several days, she notified the bank of that fact and requested it to investigate the matter. She neither gave the check to defendant nor authorized him to indorse her name thereto. Nor was the defendant given permission to use the money represented by the check, and no part of its proceeds were, to her knowledge, ever turned over to her at any time by him. Also, she testified that during the fall and winter of 1930, "he never gave me any money."

It is undisputed that the defendant took the check, and during the month of October, 1930, upon indorsing his wife's name to the same, he deposited it to his own credit in an account with the United States Bank, from whence the money so derived was disbursed by him. The check or draft was received in due course and paid by the Security First National Bank, which was compelled to reimburse Mrs. Brierton for its value by reason of the alleged false indorsement.

The defense of the defendant was that his wife agreed to allow him to cash the draft and use the proceeds in the purchase of a sales contract for a shaving preparation. While the defendant was on the stand, and during his direct examination, his counsel asked him the following question: "For what purpose did you use that money?" The court sustained a general objection by the prosecution to this question. Thereafter defendant's counsel made the following offer of proof: "At this time I make an offer to show by this witness, by this question, that he thereafter disbursed the money he had on account for living expenses and for certain moneys which he turned over to Mrs. Brierton," to which the prosecution's general objection was likewise sustained. The appellant claims that these rulings constituted prejudicial error.

[1] The theory of defendant's question and offer was that the proof so offered would indicate an absence of the felonious intent required to constitute either the crime of forgery (People v. Turner, 113 Cal. 278, 45 P. 331), or of grand theft (People v. Eastman, 77 Cal. 171, 19 P. 266). The rulings excepted to were prejudicial. "A witness may be examined as to the intent with which he did a certain act, where that intent is a material thing in the action." People v. Morley, 89 Cal. App. 451, 457, 265 P. 276, 279, citing cases.

The defendant, on cross-examination, testified, however, that $1,000 of the check was required and used in his business, and to the question next asked: "And you kept on using the balance for household expenses?" He answered: "Yes."

[2] But even if the court erred in the exclusion of the testimony relative to the disbursement for living expenses on his direct examination, such error was rendered harmless where the same evidence was fully covered by the cross-examination of the defendant above quoted. People v. Singh, 78 Cal. App. 476, 248 P. 981.

[3] The evidence tendered by defendant, however, that he gave a portion of the proceeds of the check to his wife, was not covered by other testimony, and consequently its exclusion does not come within the saving grace of the rule first announced in People v. Singh, supra. The erroneous ruling of the trial court debarred the defendant from fully proving his defense by depriving him of the

right to completely overcome the inference of felonious intent established by his wife's testimony. It also prevented him from contradicting her statement that, during the period in question, he never gave his wife *any* money. The effect of such an explanation might have turned the scale and led the jury to acquit the defendant of the remaining offenses charged in the information, the gravamen of which affects the property of his spouse alone. For the foregoing reasons, we are of the opinion that the court's refusal to permit the defendant to introduce the evidence so offered constituted reversible error. People v. Blake, 65 Cal. 275, 4 P. 1; People v. Morley, supra.

We find no other error in the record; but for the error above stated, the judgment is reversed, and the cause remanded for a new trial.

We concur: CONREY, P. J.; HOUSER, J.

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**Dorothy TITCOMB, also Known as Dorothy T. Trippel, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA, and Wm. F. James, as Judge thereof, Respondents.***

**Civ. 9133.**

District Court of Appeal, First District, Division 1, California.

June 3, 1933.

Dissenting Opinion June 10, 1933.

Hearing Granted by Supreme Court July 31, 1933.

Application for writ of prohibition prayed to be directed to the Superior Court, of Santa Clara County, William F. James, Judge, to prevent further action in a contempt proceeding.

Thos. V. Cassidy, of Huntington Park, and Paul Nourse, of Los Angeles, for petitioner.

PER CURIAM.

Petition for writ of review and prohibition denied.

KNIGHT, Justice (dissenting).

The facts set forth in the petition herein, in my judgment, are legally sufficient to call for a hearing on the merits; consequently I dissent from the order denying the same. The main purpose of the proceeding was to prohibit the superior court of Santa Clara county from taking any further action against petitioner in a contempt proceeding growing out of her refusal to surrender the custody of her two minor children, aged 12 and 10 years, respectively, to the father, as directed by an ex parte order theretofore made by said court in a proceeding instituted by the father for the purpose of depriving the mother of the custody of said children.

It appears from the petition filed in the present proceeding and from the copies of the court documents attached thereto that the parties formerly resided in Arizona, and that in December, 1931, the courts of that state granted the mother of the children a decree of absolute divorce from her husband. The decree was filed and docketed in June, 1932, and about the same time, in a proceeding in habeas corpus instituted by the father, the courts of that state awarded her the sole and exclusive custody of the children, after having found that the father had willfully violated the terms of a previous order, made in the same proceeding, by taking the children out of that state, secreting them in California, and refusing to return them to their mother as directed in said previous order. It further appears that at the time the father instituted the proceeding in Santa Clara county the children were residing in Los Angeles county, pursuant to permission granted by the Arizona courts in the order made in said habeas corpus proceeding, and that at no time had the mother or the children ever resided or even been in the county of Santa Clara.

The proceeding instituted in Santa Clara county purports to be based on section 214 of the Civil Code. Following the filing of the application and on the same day the court granted an ex parte order directing that pending the hearing of the application the custody of the children be turned over to their father. A week later an amended ex parte order was made to the same effect, directing further that the sheriff of Los Angeles county "forthwith obtain the bodies and persons" of said children and place or deliver them "into the immediate personal possession and custody" of their father. The mother refused to surrender the children as directed by said ex parte order, and thereupon she was cited to appear and show cause why she should not be punished for contempt.

Said section 214 of the Civil Code reads as follows: "When a husband and wife live in a state of separation, without being divorced, any court of competent jurisdiction, upon application of either, if an inhabitant of this state, may inquire into the custody of any unmarried minor child of the marriage, and may award the custody of such child to either, for such time and under such regulations as the case may require. The decision of the court must be guided by the rules prescribed in section two hundred and forty-six." As will be noted, before the authority granted to the court thereunder may be exercised, the following jurisdictional facts must appear: First, that the husband and wife are living in a state of separation "without being divorced"; second, that the court is one of "competent jurisdiction," meaning, of course, one having jurisdiction over the parties; and, third, that the applicant is an inhabitant of this state. In the present case none of these jurisdictional facts affirmatively appear either in the application itself or in the ex parte order made pursuant thereto. It is alleged in said application, as a conclusion of law, that the applicant and the mother of the children "are married and not *legally* divorced" (emphasis added), but no facts whatever are set forth to support the conclusion that they are "not legally divorced"; and, even though facts to that effect were alleged, they would constitute nothing more than a pure collateral attack upon the validity of the divorce; and, of course, unless the decree of divorce were void on its face, an issue of that kind could not be heard or determined in a proceeding brought under the provisions of said code section. Secondly, there is no allegation whatever in the application nor any finding to the effect that the children or either of the parents at any time ever resided in or were inhabitants of the county of Santa Clara; and, in view of an entire absence of such allegations or findings as to these essential elements, it is not clear upon what legal ground the superior court of that county assumed jurisdiction over the custody of the children.

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*For subsequent opinion see 29 P.2d 206.

Moreover, and aside from these apparent jurisdictional defects in the court proceedings, said Code section contains no provision whatever, either express or implied, vesting the court with authority to make any order, ex parte or otherwise, for the change of the custody of the children pending the hearing of a proceeding instituted thereunder. It is extremely doubtful, therefore, whether the Legislature ever intended that any such authority should be exercised in a proceeding instituted thereunder; and the facts of this particular case as they are shown by the record before us would seem to furnish strong reasons for concluding that it never was so intended.

It may be that the mother would be afforded a right of appeal from any adverse ruling which might be made in the contempt proceedings; but it is well settled that, even though such remedy exists, prohibition will lie if the remedy by appeal be inadequate (21 Cal. Jur. 586); and, from the history of this case as it is shown by the petition herein, there would seem to be every reason to believe that such an appeal would be fruitless, because an adjudication of contempt would necessarily require the surrender of the children to the father, who, pending the appeal, would have ample opportunity to do as he did before, remove the children from the state, and thus deprive the mother of their custody.

It may be also that, if all the facts shown by the record before us were placed before the trial court at the hearing of the contempt proceedings, a different conclusion might be reached as to the custody of the children. But that is not a proper matter to be considered here, because, if the trial court exceeded its jurisdiction in making the ex parte order depriving the mother of the custody of the children, she is entitled to have the contempt proceedings based thereon permanently stayed [Pacific Coast Automobile Ass'n v. Superior Court, 121 Cal. App. 664, 9 P.(2d) 880] without being compelled to incur the expense and suffer the inconvenience of traveling from Los Angeles to Santa Clara county to present a defense in the contempt proceeding.

For the reasons stated, it seems to me that petitioner is clearly entitled to a hearing before this court in the present proceeding.

132 Cal.App. 554

## PEOPLE v. HILL.

Cr. 2301.

District Court of Appeal, Second District,
Division 1, California.
June 14, 1933.

**Embezzlement 🔑48(4).**

Where there was no evidence that county clerk's deputy, each time he allegedly abstracted money from safe deposit box properly accessible to him, acted under plan to appropriate other sums, refusal to instruct as to successive takings being single theft *held* not error.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Liberty A. Hill was convicted of grand theft, and he appeals.

Affirmed.

Cooper & Collings, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

The defendant was convicted upon six counts charging grand theft, committed by him at the times and in the amounts following, that is to say: Count 2, August 15, 1930, $1,000; count 4, August 19, 1930, $2,000;

count 24, March 2, 1931, $20,000; count 26, March 18, 1931, $15,000; count 30, April 2, 1931, $15,000; count 32, April 21, 1931, $15,000. Upon the separate verdicts returned the court rendered several judgments, which for the purposes of the appeal are treated as one judgment. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The sentence as pronounced by the court provides that the terms of imprisonment on counts 2, 24, and 26 shall run consecutively, and that the imprisonment on counts 4, 30, and 32 shall run concurrently with count 2. It is contended by appellant that the theft constituted only one offense; therefore that his conviction and sentence as for several different crimes is erroneous, and for that reason should be reversed.

At the time of the commission of the alleged offenses, and for a long time prior thereto, defendant was chief deputy of the county clerk of the county of Los Angeles, who by virtue of his office is clerk of the superior court. During the trial of an action in said court there were received in evidence two exhibits, consisting of two packages of $1,000 bills, amounting to a total sum of $75,000. These bills, while thus in custody of the court, came into the possession and control of the defendant. At that time the county clerk had certain rented safe deposit boxes in the First and Spring street branch of the Security-First National Bank in the city of Los Angeles, one of them being box No. 78. The county clerk and this defendant were the only persons who had keys for the box, and they were the only persons authorized to have access to the box. The carefully kept records of the bank show that the visits to this box, during the period in question here, were all made by the defendant, and that no such visits were made by the clerk. The evidence further shows that prior to the time of the alleged thefts the seventy-five bills were for safe keeping placed by the defendant in said box No. 78. Ultimately, and after the date of the latest of said alleged larcenies, it was discovered that the bills had disappeared from the box. So far as the record shows they never have been found.

The evidence tends to show that during said period of time the defendant was engaged in certain speculative transactions through a brokerage house; that in those transactions he lost large sums of money; that at various dates he paid to the broker sums of money in thousand-dollar bills. In the few instances when the broker was paid in checks on a bank where the defendant had an account, these checks were preceded by deposits of cash made in bank by the defendant. It will be noted that the total amount of the thefts of which the defendant was convicted is the sum of $68,000. In each instance the safe deposit record, and the testimony confirming such record, shows that the defendant made visits to said safe deposit box No. 78 on the same days when moneys were paid by him to the broker or were deposited by him in his bank account. All of these facts are shown in much detail by the evidence pertinent to the several counts upon which the defendant was found guilty. That he was guilty of taking the money at the several times specified, the record shows beyond any reasonable doubt.

The only real question in the case is as to whether or not there were six separate thefts or, as the defendant contends, only one theft. The defendant requested the court to give the following instruction to the jury: "You are instructed that where the property is stolen from the same owner and from the same place by a series of acts, if each taking is the result of a separate, independent impulse, each is a separate crime; but if the successive takings are all pursuant to a single, sustained, criminal impulse and in execution of a general fraudulent scheme, they together constitute a single theft, regardless of the time which may elapse between each act." In refusing to give this instruction the court said: "Refused—not involved in issues here. Money in this case came into possession of defendant lawfully. Therefore every taking from such funds, if there was such unlawful taking, constituted a separate offense."

We think that the court was right in its refusal to give said instruction. There is nothing in the evidence in any way tending to show that the defendant at any time when he abstracted from the safe deposit box some part of the money did so pursuant to any intention or plan to appropriate any sum other than the amount taken at that time. Apparently the temptation renewed itself from time to time as his speculative losses increased, and thus the successive offenses were committed. The contention now made in his behalf is a curious instance of an attempt to raise a presumption of guilt in aid of the defendant in order to reduce his punishment. The case is clearly one of successive embezzlements by a trusted custodian of funds. The defendant appears to have been given a fair trial, resulting in a conviction according to law.

The judgment is affirmed, and the order denying defendant's motion for a new trial is affirmed.

We concur: HOUSER, J.; YORK, J.

132 Cal.App. 448

## HARRIS v. DICKINSON et al.

Civ. 7862.

District Court of Appeal, Second District, Division 2, California.

June 6, 1933.

**1. Dismissal and nonsuit 🔑60(1).**

Whether action should be dismissed for unreasonable delay in prosecution was within court's sound discretion.

**2. Dismissal and nonsuit 🔑60(2).**

Dismissal of action for unreasonable delay in prosecution *held* not abuse of discretion, where two months elapsed after plaintiff substituted attorneys following over two years' delay by original attorney.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Arthur P. Harris against Belle Dickinson and another, as executrices of the estate of W. Q. Dickinson, deceased. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Henry Hayes, of Los Angeles, for appellant.

E. C. Pyle, of Los Angeles, for respondents.

STEPHENS, Justice.

This action for damages for breach of a contract for the exchange of real estate was filed and came to issue during July, 1928. The defendants were sued as executrices of the estate of W. Q. Dickinson, deceased. W. Q. Dickinson was one of the contracting parties. The claim upon the alleged breach was filed in probate court but one day before the last possible day.

[1, 2] No action on behalf of the plaintiff appears of record before October 24, 1930, when a substitution of attorneys was filed. Soon thereafter plaintiff notified defendant that a motion to set the case would be made on the 3d day of November, 1930. What became of this motion we do not know. On January 7, 1931, defendant made his motion to dismiss on the ground that plaintiff had unreasonably delayed the prosecution of the case. This motion was granted a week later. The plaintiff appeals and sets up an affidavit in which he states that his former attorney informed him on numerous occasions that the case was delayed in trial because of the congestion of the court calendar; that shortly before he substituted attorneys he became suspicious that his attorney was not properly attending to the matter.

Respondents argue that the pendency of the action prevented the closing of the estate, and that there was no excuse for the long delay.

The question was for the sound discretion of the trial court, and it cannot be said that the recitation of the facts indicates an abuse of such discretion. We do not favor a denial of a day in court on technicalities, but this case does not show that it was such. Assuming that plaintiff was entirely innocent of blame up to the substitution of attorneys, the case then went two months before motion to dismiss was made. After the long delay under the original attorney, there should have been prompt attention insisted upon under the second one.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

## DE RAAD v. NASH-DE CAMP CO. et al.*

Civ. 1203.

District Court of Appeal, Fourth District, California.

June 14, 1933.

Rehearing Denied July 13, 1933.

Hearing Granted by Supreme Court Aug. 7, 1933.

**1. Factors 🔑1.**

Under contract wherein grower agreed to pick and deliver apricots to distributing company's packing house, and distributing company agreed to market fruit for grower, distributing company became factor having right to sell fruit in own name.

**2. Factors 🔑64.**

Where commission merchants knew apricots shipped to them by factor were being handled for grower by factor on consignment basis, commission merchants could not keep proceeds of sale of apricots and credit amount thereof against moneys previously advanced to factor (Civ. Code, § 2351).

> The facts disclosed that commission merchants had previously advanced money to factor, not as particular advances for grower's fruit, but to factor in general, and commission merchants were therefore required to account for proceeds of such apricots, either to grower or some authorized agent of grower.

**3. Factors 🔑64.**

Where commission merchants knew that factor to whom they had previously made advances was handling grower's apricots on consignment, and that grower authorized handling of fruit by commission merchants, privity was established between commission

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Judgment reversed per stipulation, no opinion.

merchants and grower, and commission merchants could not consider factor as owner of fruit so as to be absolved from accounting to grower for proceeds of sales.

**4. Principal and agent** 🔑54.

Where employment of subagent is authorized, privity exists between principal and subagent, and latter is accountable directly to principal.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by C. G. De Raad against Nash-De Camp Company and others. From an adverse judgment, named defendant appeals.

Affirmed.

Corbet & Selby, of San Francisco, and Feemster, Perkins & McCormick, of Visalia, for appellant.

H. A. Savage, of Fresno, for respondent.

CAMPBELL, Justice pro tem.

This is an action brought by the respondent, a fruit grower, against appellant, Nash-De Camp Company, brokerage and commission merchants in San Francisco, engaged in shipping fruit to Eastern markets, and two individuals doing business in the firm name and style of Central Fruit Distributors, of Fresno, who were factors under contract with respondent. After the bringing of this action, the partners composing the Central Fruit Distributors were adjudged bankrupt. The trustee in bankruptcy appeared as a defendant, but made no defense. The partners, Bonzagni and Johns, constituting the old firm of Central Fruit Distributors, testified for the plaintiff, and the action resulted in a judgment in favor of the plaintiff for $2,084.23 and interest, against the Nash-De Camp Company. Motion for a new trial was denied in the lower court. Appellant contends that certain material findings in the lower court were unsupported by the evidence and are clearly contrary to the evidence. The facts may be summarized as follows:

Central Fruit Distributors was a copartnership composed of Henry A. Bonzagni and A. G. Johns. They were engaged in the season of 1931, and had previously been engaged, in buying fruit and shipping same to markets, and also securing fruit for packing and shipping to Eastern markets. They had an office in Fresno and packing houses at Armona and other places in California. The Central Fruit Distributors had done considerable business with the Nash-De Camp Company, the appellant herein. On the 23d day of March, 1931, the Central Fruit Distributors made a contract with the Nash-De Camp Company in writing, in which the Central Fruit Distributors was called "shipper" and the Nash-De Camp Company "distributor." After reciting that the shipper is indebted to the distributor in the sum of $10,565.89 on account of past business, and that it was desired to protect this amount and to assist the shipper in handling its 1931 business, by providing for advances not exceeding $2,500 in connection therewith, the contract provides that the shipper shall permit the distributor to handle and market all of its 1931 shipments; that certain charges shall be paid; that the distributor may retain 7 per cent. of the selling prices to apply on past indebtedness; that advances made may be deducted from the proceeds; and that the distributor shall have a lien on all funds in its hands belonging to the shipper, for any advances and indebtedness.

[1] On April 16, 1931, the Central Fruit Distributors, as shipper, entered into a contract with C. G. De Raad, respondent herein, as grower. By this contract respondent agreed to pick and deliver to packing house of Central Fruit Distributors at Armona all apricots grown on his ranch during the year 1931. The Central Fruit Distributors agreed to market the fruit for respondent. It is apparent that under this contract the Central Fruit Distributors became a factor having a right to sell fruit in its own name after it was packed in boxes. It recites a certain commission to be paid by the grower. The evidence further shows that the Central Fruit Distributors assigned to Nash-De Camp Company the apricots during the season of 1931, as was contemplated in the contract between them first above mentioned. This fruit amounted to a total of 38,224 crates, of which a part came from respondent De Raad, but the larger part came from a number of other growers. The evidence further shows the Nash-De Camp Company shipped the fruit East and sold it and sent accounts of sale to the Central Fruit Distributors, as was contemplated by the contract between them, for each car sold. The evidence further shows that the appellant Nash-De Camp Company rendered accounts of sales to Central Fruit Distributors, and they, in turn, rendered an account of sales to respondent. Respondent delivered his fruit to Central Fruit Distributors under his contract with them. It is apparent from the evidence that Central Fruit Distributors guaranteed respondent a certain price for the fruit which was sold up to the date of about June 1, 1931. From that time on, however, the Central Fruit Distributors agreed to reduce the charge for packing as set forth in the contract, from 45 cents to 35 cents per package, and ceased guaranteeing any price. The evidence shows that from this date, about June 1, 1931, the Central Fruit Distributors rendered accounts of sale to respondent for his

fruit in the last sixteen cars shipped to Nash-De Camp Company. During 1931, the Central Fruit Distributors shipped to the Nash-De Camp Company 18,134 crates of apricots belonging to respondent. The witness Johns testified that, of the total of 18,134 crates received from respondent, 5996 crates had been on guaranteed price basis, for which no claim was made in the present case by respondent against the Nash-De Camp Company, and that 12,838 crates were received by the Central Fruit Distributors on a straight consignment basis. The evidence also shows that Central Fruit Distributors had rendered accounts of sale to respondent for this fruit, and there was due respondent for this fruit $2,084 entirely unpaid.

It is undisputed that the Central Fruit Distributors never paid to the respondent any money whatever on account of the fruit involved in this action, and that they became bankrupt after this action was instituted, and no judgment, for this reason, could be obtained against the Central Fruit Distributors. When respondent did not receive his money from the Central Fruit Distributors, he made a demand upon the Nash-De Camp Company, appellant, for the net proceeds owing to him, which demand was refused, and, no payment whatever being made to respondent, this action was brought.

Appellant attacks the following findings made by the lower court, and claims that they are not only unsupported by any evidence, but are clearly contrary to the evidence:

"That * * * the proceeds of said fruit were, at the time of the commencement of this action, in an amount in excess of plaintiff's demand, actually in the hands of Nash DeCamp Company, and have never been transmitted to Central Fruit Distributors or plaintiff. * * *"

"That said Nash DeCamp Company has not accounted for or paid to Central Fruit Distributors, nor to plaintiff, the said sum of $2,084.23, nor any interest accrued or accruing thereon from and after July 15, 1931."

"That Nash DeCamp Company, at all times mentioned in said complaint, held, and still holds the net proceeds of the said fruit of plaintiff so placed with it on consignment, in excess of the demand of plaintiff as reduced at the trial, namely net proceeds in the sum of $2,084.23, together with accrued and accruing interest thereon at the rate of 7 per cent per annum from and after July 15, 1931."

It appears from the evidence that during the season of 1931 appellant paid to the shipper, Central Fruit Distributors, a little more than the proceeds of all fruit delivered to the shipper, and the evidence further shows that, while some of the checks were marked as "advances" and "advances on apricots," there is nothing to show whether these advances were applied on any particular grower's fruit, and it does show that these "advances" were made largely before, and most of them considerably before the De Raad fruit was delivered. It is certain from the evidence that, when the money was received from the sales of this particular fruit, no portion of the money was sent either to respondent or to the Central Fruit Distributors. The contract between the respondent and the Central Fruit Distributors provided that the fruit should be handled for the account of the grower. The evidence shows that in the presence of the agent of appellant the grower and shipper agreed that there would be no longer any guaranty and the remainder of the fruit should be handled on a straight consignment basis. The answer admits that the appellant knew that this particular fruit of the respondent was to be handled upon a consignment basis, and the lower court so found.

The evidence shows that the appellant kept the proceeds of respondent's apricots, and, instead of paying either to respondent or respondent's agent, relied upon the fact that it had previously advanced certain sums to respondent's agent. However, these sums cannot be directly connected with the proceeds of respondent's apricots, both because they had been advanced before the apricots were shipped and sold and because they were in no way advances on respondent's particular apricots. Section 2351 of the Civil Code provides: "A subagent, lawfully appointed, represents the principal in like manner with the original agent. * * *"

[2] The question to be solved, then, is this: Where the distributor knew that the matter was being handled for this particular grower on a consignment basis and for the account of the grower, when he receives the proceeds, can he, instead of paying the proceeds to the grower, or possibly to the grower's agent or shipper, keep these particular proceeds and rely upon the fact that he has previously advanced certain money to the shipper? It must be borne in mind that the appellant had not advanced previous money as particular advances for this respondent's fruit, but to the shipper in general. It seems to us that, irrespective of any such general advances, he must account for the proceeds where the matter is handled on consignment, either to the grower or some authorized agent of the grower, and this could only be done by paying over the proceeds after they were received. It is undisputed that this was never done.

Appellant contends that a portion of the general advances made by the Nash-De Camp Company to the Central Fruit Distributors was made for and on account of the respondent, notwithstanding that the trial court has found that such is not the fact.

[3, 4] In this case the pleadings, evidence,

and findings all show that the appellant had knowledge of the consignment character of the transaction with the respondent, and the respondent authorized the handling of his fruit by appellant. Thus an implied contractual relation or privity was established between the appellant and the respondent, and the appellant is not at liberty to consider the Central Fruit Distributors as the owner of the fruit. The facts of this case clearly show that there was privity between appellant and respondent. "Where, however, the employment of the subagent is authorized, a privity exists between the principal and subagent and the latter is accountable directly to the principal." 25 Corp. Jur. p. 349. While the respondent could maintain an action against the Central Fruit Distributors, and did so in this action, the Central Fruit Distributors went into bankruptcy, and nothing could be collected from them. Because of the privity of relations between respondent and appellant, respondent could likewise recover from the one who actually had the net proceeds in his possession; namely, the Nash-De Camp Company, appellant herein. The net proceeds constitute a trust fund to which the respondent was justly entitled. Bills v. Schliep (C. C. A.) 127 F. 103, and Union Stock-Yards Nat. Bank v. Gillespie, 137 U. S. 411, 11 S. Ct. 118, 34 L. Ed. 724.

There being ample evidence to sustain each of the findings attacked by the appellant, it necessarily follows that the judgment must be affirmed. It is so ordered.

We concur: BARNARD, P. J.; MARKS, J.

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132 Cal.App. 518

## DIGGS v. ARNOLD BROS., Inc.

Civ. 4792.

District Court of Appeal, Third District, California.

June 9, 1933.

Hearing Denied by Supreme Court Aug. 7, 1933.

**1. Appeal and error 🔑931(1).**

Appellate court must accept as true all evidence tending to support trial court's finding and consider all inferences reasonably leading to same conclusion.

**2. Appeal and error 🔑1010(1).**

Evidence in record, logically leading to trial court's conclusion requires that such finding be upheld on appeal.

**3. Malicious prosecution 🔑56.**

Burden is on plaintiff in action for malicious prosecution to show lack of probable cause for defendant to file charge against plaintiff.

**4. Malicious prosecution 🔑18(1).**

Whether defendant in action for malicious prosecution had probable cause to file charge against plaintiff depends on defendant's knowledge when proceeding was instituted.

**5. Malicious prosecution 🔑64(2).**

Evidence *held* sufficient to support trial court's finding in action for malicious prosecution that defendant maliciously and without probable cause caused plaintiff to be charged with grand theft.

**6. Malicious prosecution 🔑56.**

Advice of counsel is affirmative defense, burden of establishing which rests on defendant in action for malicious prosecution.

**7. Malicious prosecution 🔑56.**

Burden was on defendant, urging advice of counsel as defense to action for malicious prosecution, to show that defendant fully and fairly stated all facts to attorney and was then advised by latter that plaintiff had committed crime.

**8. Malicious prosecution 🔑64(2).**

Advice of counsel *held* not established as defense to action for malicious prosecution of automobile dealer on charge of stealing automobile, where defendant's credit manager did not inform attorneys of plaintiff's claim that car was sold on open account and none of them testified as to facts told them or advice given, except district attorney, who testified that he was not told all facts.

**9. Malicious prosecution 🔑64(1).**

Evidence in action for malicious prosecution *held* to show that defendant's agent acted within scope of authority in procuring plaintiff's arrest.

**10. Malicious prosecution 🔑42.**

Person having custody of another's property has no implied authority to take steps to punish one he supposes to have done something criminal with reference thereto.

**11. Malicious prosecution 🔑69.**

Verdict for plaintiff in action for malicious prosecution will not usually be disturbed as excessive, unless amount is so large as to be presumptively result of passion or prejudice.

**12. Malicious prosecution 🔑62.**

In determining amount of damages for malicious prosecution, court may consider parties' character and position and all circumstances attending transaction.

**13. Malicious prosecution 🔑62.**

Newspaper articles are admissible in action for malicious prosecution to prove damage caused.

**14. Malicious prosecution** ⇨69.

Award of $3,000 to business man of good reputation and credit for malicious prosecution on charge of grand theft, published in newspapers of wide circulation, *held* not excessive.

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Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Jackson Diggs against Arnold Bros., Incorporated. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ralph H. Lewis, of Sacramento, for appellant.

Charles A. Wetmore, Jr., and Ralph O. Marron, both of San Francisco, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment of the superior court sitting without a jury by which plaintiff was awarded damages for $3,000 against defendant for the malicious prosecution of plaintiff upon a charge of grand theft.

For several years prior to the time here involved plaintiff had been engaged in farming and fruit raising and was also a dealer in motorcars operating under a contract with the Hudson Motor Car Company in and adjacent to the city of Marysville. This district lay within the territory of Arnold Bros., Inc., which was the distributor in Northern California of the products of the Hudson Motor Car Company. Under the agreement between the parties, Diggs was obligated to purchase for his trade new Hudson-Essex cars through this distributing agency.

In the month of March, 1930, an automobile show was being held in Marysville, and, in order to stimulate the sales of their particular cars in that territory, Arnold Bros., Inc., participated therein, and placed in their exhibit a certain car known as a Sun sedan. At the conclusion of the show the car was left with the Diggs agency to sell, and in a few days thereafter the car was sold through the branch agency of respondent in Oroville. The car was sold on deferred payments and the contract assigned to a finance company, and the money received thereby deposited to the account of respondent, but no remittance was ever made to Arnold Bros., Inc.

The Marysville office of respondent was in charge of one Holtman, who negotiated the transaction and through whom the various steps necessary to close the deal were taken.

It is apparent from the record that respondent had nothing to do personally with the sale of the car, nor did he personally receive any of the proceeds from the sale thereof, nor execute nor receive any of the papers connected with the passing of the title or evidence of payment.

Respondent testified he did not know of the sale of the car until at least six weeks thereafter, and did not know that Arnold Bros., Inc., had not been paid therefor for at least two months after the delivery to the purchaser.

Early in July, 1930, the nonpayment was called to the attention of respondent and at that time he delivered to Arnold Bros., Inc., a postdated check for the amount due, payable July 20. On July 19, his business and bank account were attached by Holtman and proceedings in involuntary bankruptcy were later filed against him and the check was never paid.

In October, 1930, a verified claim was filed by Arnold Bros., Inc., in the bankruptcy proceedings sworn to by J. H. Arnold, president and treasurer of defendant corporation, in which claim it was set forth that respondent was indebted to Arnold Bros., Inc., in the sum of $1,539.27, for goods, wares, and merchandise sold and delivered to the bankrupt on an open book account. Aside from approximately $200 due for parts, no other unliquidated transaction than the Sun sedan deal was established between the parties within the time specified.

On July 3, 1931, a criminal complaint charging grand theft of the automobile in question was sworn to by A. M. Gardner, credit manager for Arnold Bros., Inc., and a warrant issued thereon under which respondent was arrested and held until released by the posting of bail. Thereafter, before any hearing on the complaint, the district attorney of Butte county, on his own motion, caused the complaint to be dismissed. Respondent then caused this action to be filed, which resulted in the recovery of damages as above stated. The matter now comes before us on appeal from that judgment.

Appellant attacks the judgment claiming that the evidence is insufficient to support the findings in that there is no evidence of lack of probable cause; that the credit manager who swore to the complaint acted in good faith upon advice of counsel; that the credit manager was not acting in the scope of his employment when he swore to the complaint; and that the damages are excessive.

[1, 2] In examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. We shall not attempt to recite testimony showing perhaps

appellant had probable cause to believe and act as it did, but all that is required is to point out testimony, which, if given credence by the trial court, would logically lead to the conclusion that appellant acted without probable cause in filing the charge against respondent. If such evidence is in the record, the finding of the court must be upheld. Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157.

Let us then in the light of that rule direct our examination to the testimony in the record bearing upon the question of probable cause. The finding of the court was that "said defendant Arnold Brothers, Inc., a corporation, then and there maliciously intending to injure the plaintiff in his good name and reputation, caused a complaint to be filed * * * and maliciously and without any probable cause whatsoever, caused plaintiff to be charged" etc.

[3, 4] The burden rests upon the plaintiff in an action such as this to show lack of probable cause in the defendant (16 Cal. Jur., 737), and is measured by the state of defendant's knowledge at the time the proceeding was instituted.

[5] The automobile which respondent was charged with having feloniously sold was, according to the affidavit filed by the president of the appellant corporation, in the bankruptcy proceedings some nine months prior to the institution of the criminal proceeding, sold to him on an open book account. The bookkeeper of respondent also testified that the account concerning the automobile in question was carried on the books of the Jackson Diggs Agency as an open account.

When we realize that the car in question was sold March 25, 1930, that the claim was filed in the bankruptcy court October 18, 1930, and that the complaint for grand theft of the car was not filed until July 3, 1931, the trial court was undoubtedly impressed with the long delay in determining that a criminal act had been committed.

The only witness who attempted at all to connect Jackson Diggs with the receipt of the money was the witness Holtman, who placed the attachment upon the business of Diggs, and according to the evidence, then attempted to purchase the claims against the company for 50 cents on the dollar in order to take over the business, which he subsequently did, and at the time of the trial was an agent of appellant corporation, selling Hudson-Essex cars in Marysville. The trial court may have considered this witness as not entirely impartial in his testimony. On the other hand, it was testified by various witnesses that Diggs had nothing to do with the sale of the car in question, received none of the proceeds personally, had no dealing with Arnold Bros., Inc., regarding the sale of the car until he delivered his check in July, and upon whom, the record discloses, no demand for payment of any kind was ever made until July, when he gave his postdated check.

At the time the complaint was requested by the credit manager for appellant, no statement, according to the testimony of the district attorney and of his secretary, was made regarding any bankruptcy claim having been filed by Arnold Bros., Inc., in the estate of Jackson Diggs. We also must bear in mind that numerous character witnesses were called for the plaintiff, all of whom testified to the reputation of the plaintiff for truth, honesty, and integrity in the vicinity in which he had lived and carried on his business for many years.

[6, 7] We next come to the second point urged by appellant as a defense to the action; that is, advice of counsel. The defense of advice of counsel is an affirmative one, and therefore the burden of establishing such defense rests upon the defendant, and the testimony adduced must be examined in that light to ascertain if the burden has been met. It here devolved upon appellant to show that it stated to the attorney fully and fairly all of the facts of the case and that after statement of all of such facts, it was advised by such attorney that a crime had been committed.

[8] In the recent case of Burke v. Watts, 188 Cal. 118, 204 P. 578, 581, the court was considering a case where it did not affirmatively appear that all of the facts were stated to the attorney, the court saying: "Touching the defense that appellant proceeded, not on his own judgment, but on the advice of the district attorney, we have referred to the evidence that appellant did not inform the district attorney that respondent was claiming title to the beds, and it was not shown that the district attorney had learned of such claim from any other source. The jury would therefore be justified in finding that the statement given to the district attorney, upon which he based his advice to appellant, in the first instance, did not constitute a full and fair recital of the facts. Under such circumstances the opinion of the district attorney could not be relied on to establish probable cause for the prosecution."

So in the instant case it appears that Gardner, credit manager for appellant, did not inform any of the attorneys whom he consulted that Diggs claimed the car had been sold on open account and that this fact was substantiated by a verified statement of the president and manager of the appellant.

In the case of Murphy v. Davids, 181 Cal. 706, 186 P. 143, the court there held that the defendant may not testify he honestly stated all the facts to his counsel, for it is a question for the court to determine, whether he did in fact honestly state all of the facts to counsel.

Not one of the various counsel to whom the officers of appellant allege they stated the facts of the case were placed upon the witness stand to testify as to what facts were told them or what advice, if any, was given, with the exception of the district attorney of Butte county, who testified that he was not told all of the facts in the case, and that, when he later learned of certain facts not told him by Gardner, he caused the complaint to be dismissed.

[9, 10] Appellant next questions the authority of Gardner, its credit manager, to cause the complaint against Diggs on a charge of grand theft to be issued. It is admitted that Gardner was the credit manager and employee of Arnold Bros., Inc., and had been for about six years. About a month before the criminal complaint was filed he was instructed by the secretary of the appellant corporation "to take it (Diggs file) over and investigate it and see if there was anything that could be done to collect any portion of the money."

Having in view the length of time elapsed between the filing of the claim in bankruptcy, that is October 18, 1930, and the filing of the criminal complaint, that is, July 3, 1931, the court may well have assumed that during that time appellant was waiting to see what amount, if any, would be recovered through bankruptcy, and then, despairing of getting the full amount of the claim by that means, adopted the all too common practice of credit men of resorting to the criminal courts to coerce debtors into making further payments.

None of the officers of the corporation, so far as it appears in the record, either before or during the trial, disavowed the acts of their credit manager. On the other hand, we find certain letters to the district attorney of Butte county from the corporation referring directly to such a criminal proceeding. It therefore not only appears that the agent Gardner in procuring Diggs' arrest was acting within the scope of his authority, but it further appears from the evidence, and the inference is to be drawn therefrom, his action in procuring the arrest was instigated and ratified by appellant. The rule seems to be clearly expressed in the case of Allen v. London, etc., Railway Co., L. R. 6 Q. B. 65: "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property, it is done merely for the purpose of vindicating justice."

[11-14] Finally appellant assigns as a point for reversal that the damages awarded by the court are excessive. In a case of this kind there is no inflexible rule by which the amount of damages to be awarded can be determined. A verdict will not usually be disturbed as excessive unless the amount is so large as to be presumptively the result of passion or prejudice. In determining the amount of damages the court may consider the character and position of the parties and all of the circumstances attending the transaction. Newspaper articles are admissible in evidence for the purpose of proving the damage caused; such publication being a consequence in the ordinary and natural course of events for which defendant is answerable. We quote from the opinion of the trial judge, which indicates clearly the facts which led him to reach the conclusion he did as to the amount involved, all being elements properly to be weighed and considered in determining the amount, if any, to be awarded as damages:

"The plaintiff, Jackson Diggs, had been in business in and around the city of Marysville for a number of years, and according to the manager of one of the leading banks of Marysville held a splendid reputation as a business man and a fine credit therefor. That he has sustained damages there is no question. It is not altogether simply the trouble of coming from the city of Piedmont, California, to Oroville to surrender to the sheriff under the warrant of arrest, but the great damage to this plaintiff lies in having it notoriously published in the newspapers of wide and general circulation that he was charged with grand theft, which must necessarily have injured him to considerable damage and from the fact that no amount of money paid him at this time can take away from him the stain of being charged as a thief, but the only way the law can in any manner recompense him would be by money judgment, which in our opinion, and we now find to be, the sum of $3,000.00."

We fail to find any reason for a reversal of the judgment, and the same is therefore affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

132 Cal.App. 490

## WESTCOTT v. NIXON.

**Civ. 372.**

**District Court of Appeal, Fourth District, California.**

**June 8, 1933.**

**Hearing Denied by Supreme Court Aug. 7, 1933.**

**1. Bankruptcy 🔑304.**

When creditor accepts payment from debtor, whether there is reasonable cause to believe that preference would be effected is question of fact.

**2. Bankruptcy 🔑303(4).**

In action by trustee in bankruptcy against creditor to recover preference payments, evidence *held* to sustain finding that creditor had reasonable cause to believe such payments to be preferences.

**3. Bankruptcy 🔑303(5).**

In action by trustee in bankruptcy to quiet title to 100 tons of baled hay alleged to have been sold by bankrupt to creditor, evidence *held* to support finding that no title passed to creditor (Civ. Code, § 3440).

> Evidence disclosed that attempted sale of 100 tons of hay was made May 17, 1929, which hay was yet to be cut and baled, and was to be paid for July 17, 1929. By October, 1929, all 100 tons were in debtor's barn, and creditor did nothing to take possession of hay until February, 1930, and debtor exercised control over hay and sold some of it.

**4. Fraudulent conveyances 🔑137(4).**

Sale of hay yet to be grown, where delivery was not made immediately upon hay being cut and baled, was void as against nonassenting creditors (Civ. Code, § 3440).

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Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Earl W. Westcott, as trustee in bankruptcy of the bankrupt estate of Robert Curtis Kitchel, a bankrupt, against P. G. Nixon. Judgment for plaintiff, and defendant appeals.

Affirmed.

Ward G. Rush, of Tulare, and G. L. Aynesworth, of Fresno, for appellant.

Sherrill Halbert, of Porterville, Bush & Cleary, of Modesto, and Feemster & Cleary, of Visalia, for respondent.

CAMPBELL, Justice pro tem.

The plaintiff, as trustee in bankruptcy of the bankrupt estate of Robert Curtis Kitchel, a bankrupt, began this action to quiet title to one hundred tons of baled alfalfa hay, and also to recover certain alleged preference payments and also to quiet title to an order for approximately $100. In the first cause of action it is alleged that on the 2d day of January, 1930, Kitchel indorsed and delivered to Nixon, in payment of past indebtedness, an order in the sum of $308 drawn on the Globe Grain & Milling Company by Kitchel; that Kitchel was bankrupt at the time and Nixon knew or had reasonable cause to know the fact. The second count alleges that on the 10th day of December, 1929, Kitchel, under similar circumstances, gave Nixon a personal check on the Bank of Italy for $300. The third count alleges that on the 4th day of February, 1930, under similar circumstances, Kitchel assigned an account of $107.94 on the Globe Grain & Milling Company to Nixon; that Nixon had not received the money; and prays that the plaintiff's title to the same be quieted. The fourth count alleges that on the 25th day of July, 1929, Kitchel sold and attempted to transfer to Nixon one hundred tons of alfalfa hay, but retained possession and control thereof. The trial court entered judgment for plaintiff on each count, found payment as alleged in the first cause of action, and that about the time that P. G. Nixon was familiar with the above-mentioned circumstances of said Robert C. Kitchel, and knew, or had reasonable cause to believe, that said Robert C. Kitchel was insolvent and unable to pay his debts as they became due, and adjudged the payment a preference. A similar finding was made as to the $300 personal check and the order on the Globe Grain & Milling Company, for the rest of the money that was owing him; the total being $107.94. On February 12, 1930, Kitchel filed his petition in bankruptcy and was thereafter adjudicated a bankrupt.

[1] The question of the existence of reasonable cause to believe that a preference would be effected, is a question of fact, and each case must be determined from an independent investigation of the facts. Remington on Bankruptcy, vol. 4, § 1820; 7 C. J. p. 152. In Re McDonald & Sons (D. C.) 178 F. 487, 492, the court says: "Positive proof of collusion between debtor and creditor, by which one may be preferred, is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances as the means of ascertaining the truth, and the rule of evidence is well settled that circumstances inconclusive if separately considered may by their joint operation, especially when corroborated by moral coincidences, be sufficient."

[2] In the case of Sundheim v. Ridge Avenue Bank (D. C.) 138 F. 951, 953, the court says: "Reasonable cause to believe that it was intended to give a preference does not require proof that the defendant had either actual knowledge or actual belief, but only such surrounding circumstances as would lead an ordinarily prudent business man to

conclude that a preference was intended." By the weight of authority, the test is: What inference would an ordinary business man draw from the facts? The facts that were before the trial court may be briefly summarized as follows: In December, 1928, Nixon agreed to furnish Kitchel money, the arrangement first being that he would loan the money on the hay, and finally, according to the testimony of Kitchel, culminated with Nixon taking an option on the hay. At that time Nixon knew that Kitchel was running a ranch and had to have money to pay his rent, labor, and power bills. Nixon kept in touch with Kitchel during the months following their first business transaction, and finally, in September, Nixon advanced Kitchel four hundred dollars in two separate checks. In the latter part of November, Kitchel and Nixon discussed an arrangement whereby Kitchel purchased a one-half interest in Nixon's dairy herd; about the 1st of December, 1929, Nixon made an agreement with Kitchel to sell him a one-half interest in his dairy for $3,250, first payment to be made within a month or six weeks. The initial payment was supposed to be $1,500, but Kitchel could not pay this amount and about December 16th, Kitchel paid $300. Kitchel told Nixon he could apply the rest of the money coming from the cotton gin as he had considerable money coming, but Nixon, upon investigation of the cotton gin, found Kitchel was not telling him the truth, and, in fact, there was very little money coming to Kitchel, and it was impossible for Kitchel to meet the balance of the payments on account of the purchase price of one-half interest in the dairy herd. The evidence further shows that Kitchel could not carry out his agreement to buy the cattle, and Nixon terminated Kitchel's contract and put Kitchel to work on his ranch at $100 per month. This occurred on or about January 1, 1930. Thus it appears conclusively that Nixon, by his investigation prior to January 1, 1930, knew of Kitchel's financial condition. Nixon received payment of $308 in January in the course of business, by a check or by cash left by the order on the cotton gin, and February 4th, eight days before Kitchel went into bankruptcy, Nixon took from him an order for all the money that Kitchel had coming from the cotton gin. The evidence shows that the payment of $300 made by Kitchel about December 15th, on account of sale of cattle, was a payment on a previous indebtedness and not a cash transaction as contended by appellant. Further, as the court says in the case of In re John Morrow & Co. (D. C.) 134 F. 686, 688: "A sale of goods to be paid for in 10 or 30 days is not, in fact, a cash transaction, and cannot, by agreement of the parties, or a usage of merchants, be regarded as such within the meaning of the bankrupt law [11 USCA]." It appears from the record that appellant Nixon, in testifying at the trial in the lower court, endeavored to evade answering some of the material questions propounded by counsel, and in such cases the trial courts particularly have an opportunity to draw conclusions from the attitude and actions of a witness while on the stand, which conclusions, in many instances, are of decided assistance to the court in determining questions at issue. It is apparent from the record that there is ample evidence to sustain the trial court's findings on the first three causes of action.

[3] In reference to the fourth cause of action of the plaintiff's complaint, the court found: "* * * On the 25th day of July, 1929, the said Robert Curtis Kitchel transferred, or attempted to transfer, the title of said personal property, to-wit, said approximately one hundred tons of baled alfalfa hay * * * to the defendant, P. G. Nixon; that said transfer, or attempted transfer or sale of said personal property to said P. G. Nixon * * * was not accompanied by immediate delivery or transfer or possession of said personal property, and that there followed said transfer or attempted transfer or sale no actual or continued change of possession of said personal property but on the contrary the said Robert Curtis Kitchel continued at all times in control and in possession of said personal property up to the date of his adjudication as a bankrupt and that no public notice whatever by recording or otherwise was given of the transfer or attempted transfer or sale thereof to the said defendant P. G. Nixon."

Appellant challenges the sufficiency of the evidence to support the finding. In the case of Hassell v. Bunge, 167 Cal. 365, 139 P. 800, 801, the court says: "* * * Change of possession is a question of fact to be determined by the trial court or jury upon a consideration of all of the evidence. The finding upon this, as upon other issues of fact, is conclusive on appeal, unless, reading the evidence in the light and with the inferences most favorable to the conclusion reached below, the appellate court can say that that conclusion is without substantial support in the record."

Briefly summarized, the evidence shows that there was an attempted sale of one hundred tons of hay about May 17, 1929, and that the purchase price was payable by July 17, 1929. The hay was yet to be cut and baled at that time, but there was at least sixty-one tons of hay in the barn by July 26, 1929, and by October there was one hundred and six tons in the barn. That the appellant did nothing to take possession of said hay, nor did he exercise any control over the hay between the 26th day of July, 1929, and the following February. On the other hand, there is evidence that the vendor, Kitchel, had repeatedly exercised control over the hay, and had even sold hay out of the very pile appellant now contends was hay set aside for him. Thus the evidence clearly shows that the hay was not delivered immediately, but, on the contrary, remained in the barn of the vendor for a period of some six months or more after the sale, and the appellant made no visible effort to take delivery, or exercise any control over it.

Unless, as a matter of law, there was some reason for the contrary, the delivery of the hay should have been actual, apparent, and not constructive, and the transfer, possession, or control of the hay by the transferee should be continuous, and so open and unequivocal as to carry with it the usual marks and indication of ownership. Section 3440, Civ. Code.

[4] The mere fact that the crop was yet to be grown is no justification for the failure to deliver it immediately upon the hay being cut and baled, for while property not in existence at the time of the sale cannot be the subject of the rule of immediate delivery, nevertheless, when the property comes into existence, the delivery must be made at once. Sequeira v. Collins, 153 Cal. 426, 95 P. 876; 12 Cal. Jur. 1009.

It cannot be said, as a matter of law, that the appellant used due diligence in taking possession and control of the hay, when he allowed it to remain at the place of sale and under the possession and control of the vendor the long period of time that he did in the instant case.

"Growing crops are not susceptible of manual delivery until harvested and are not in the possession or control of a vendor so as to require an immediate change of delivery upon sale. When, however, the crop is harvested the vendee must take immediate possession and retain the same under penalty of having the transfer voided at the instance of creditors." 12 Cal. Jur. 1005. This rule is supported by Crocker v. Cunningham, 122 Cal. 547, 55 P. 404; Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340; O'Brien v. Ballou, 116 Cal. 318, 48 P. 130.

Reading the evidence in the light of the inferences most favorable to the conclusion reached by the trial court, we cannot say that the finding is without substantial support in the record. It follows that the attempted transfer of the personal property to appellant in this action was conclusively presumed to be fraudulent, and therefore void against nonassenting creditors. Civ. Code, § 3440.

Let the judgment of the lower court be affirmed. It is so ordered.

We concur: BARNARD, P. J.; MARKS, J.

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132 Cal.App. 557

## PEOPLE v. HENRY.

Cr. 2317.

District Court of Appeal, Second District, Division 1, California.

June 14, 1933.

Hearing Denied by Supreme Court July 13, 1933.

1. **Criminal law** ⚷1159(2).

In prosecution for grand theft where there was substantial evidence that person from whom defendant obtained property was incompetent to transact business affairs and that defendant knew of her mental condition, jury's verdict finding defendant guilty was conclusive on such questions (Pen. Code, § 484).

2. **Larceny** ⚷65.

Evidence *held* to sustain conviction for grand theft (Pen. Code, § 484).

3. **Larceny** ⚷3(4).

Test whether testimony shows defendant's guilt of grand theft depends upon presence or absence of good faith on part of defendant in appropriating money (Pen. Code, § 484).

4. **Criminal law** ⚷1166½(6).

Where trial judge examined jurors collectively, refusal to permit separate questions to each juror regarding residence, and whether he would be willing to be tried by person of his frame of mind, *held* not prejudicial error.

5. **Criminal law** ⚷1129(1).

Where no assignment of misconduct to trial court's remarks was made, alleged impropriety would not be considered on appeal.

6. **Criminal law** ⚷1119(5).

Where affidavits did not disclose names of jurors or nature of their conversations with witnesses for prosecution except that affiants could hear name of defendant mentioned, error could not be predicated on conversations.

7. **Larceny** ⚷70(3).

In prosecution for grand theft, wherein evidence tended to show misapplication of funds on different occasions, instruction directing jury to render verdict on each of 15 counts *held* proper.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Melville G. Henry was convicted of grand theft, and he appeals.

Affirmed.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

HENDERSON, Justice pro tem.

The defendant was charged by an indictment of fifteen counts, each of which charged him with the offense of grand theft of various moneys, stocks, and securities of Frances Graham Rice. The different times at which the property was taken were from January 2, 1931, to the 17th day of October, 1931, and the total amounts alleged in the several counts aggregated $11,500. He was found guilty by a jury upon eight of the counts and acquitted as to the others by direction of the trial court.

In brief, the testimony discloses that Frances Graham Rice was a woman of the age of 94 years, penurious, impaired in vision to the extent that she could with difficulty read large print and write her name, suffering with senile dementia, and incompetent to transact the ordinary affairs of life. Owing to her physical and mental condition, it was necessary for her to live under the supervision and care of a nurse. She appeared to be growing progressively worse, and appellant first learned of Mrs. Rice from her nephew, who expressed the fear that guardianship proceedings would have to be instituted which might result in her being committed to some sanitarium or other institution. Professing a Christian interest in her affairs and at the same time expressing disapproval of the appointment of a guardian for Mrs. Rice on the ground that it would unnecessarily wound her feelings, defendant offered, in the event that she and her relatives were willing, to assume the control and management of her affairs. By a fantastic tale regarding his recollection of both Mrs. Rice and her deceased husband when he was a boy in New York, together with the false representation that he was a man of sufficient wealth and leisure to enable him to devote his time and attention to her affairs, he was able to obtain both her consent and that of her relatives to such an arrangement.

[1] Appellant obtained Mrs. Rice's power of attorney on December 22, 1930, and assumed complete charge of her affairs. On the 2d of January, 1931, he dictated a letter, without the knowledge of her relatives, by the terms of which Mrs. Rice promised to assign all of her property to him in consideration of his association and companionship and his agreement to care for her during the remainder of her life. Defendant accepted the proposal by a letter simultaneously written, and removed Mrs. Rice from the home of her nurse to that of a Mrs. Wells, whom he subsequently married. The assignment of the stocks was thereafter executed by Mrs. Rice. The defendant withdrew and placed in his own name the moneys from her bank accounts, which he used, together with her stocks, at the times mentioned in the indictments in business ventures of his own, which for the most part were highly speculative and unfortunate. On October 26, 1931, defendant dictated another letter whereby Mrs. Rice ratified and reaffirmed her past agreements and assigned and delivered to him her annuity check "with no terms or conditions attached thereto." The record discloses that appellant neither failed nor refused to maintain and supervise a home for Mrs. Rice until she was removed from his control by process of the court. It was the theory of the prosecution that the defendant had fraudulently appropriated the property of an incompetent person, while the defendant claimed title to the same by reason of the alleged contractual relationship. The evidence is conflicting, yet there is substantial testimony of both lay and medical witnesses that Mrs. Rice was incompetent to transact her business affairs, together with ample proof that defendant had knowledge of her mental condition. Upon these questions of fact the verdict of the jury is conclusive. 8 Cal. Jur. 587.

[2, 3] Appellant's challenge to the sufficiency of the testimony to constitute grand theft, as defined by section 484 of the Penal Code, is without merit. The test of whether the testimony satisfies the section depends upon the presence or absence of good faith on the part of the defendant in appropriating the property. It is fundamental that if property is taken by one in good faith under his claim of title in himself, he is exempt from prosecution "'* * * however puerile or mistaken the claim may in fact be.'" It is equally true "'* * * if the claim is dishonest,—a mere pretense,—it will not protect the taker.'" Dean v. State, 41 Fla. 291, 26 So. 638, 639, 79 Am. St. Rep. 186. To the same effect is Burke v. Watts, 188 Cal. 118, 125, 204 P. 578.

The good faith of accused persons in relationship with incompetents has received, however, some attention from other courts. In the case of Hobbs v. People, 183 Ill. 336, 55 N. E. 692, 693, an imbecile widow, not having sufficient mental capacity to attend to the most ordinary business affairs, was allowed a pension by the government. The defendant, not a licensed attorney, representing that he would attend to her legal business which he maintained required the appointment of a guardian, induced her to sign an order directing the pension agent to turn over her check to him, which she had previously indorsed. He gave a receipt therefor reciting that it was to be cashed by him, after which he would deduct his fees and pay her the balance. Defendant performed no legal services and converted the money to his own use, after which he was convicted of embezzlement. The court, in affirming the judgment, said in part as follows: "The seventh instruction told the jury, in substance, that, if Mrs. Throater was a demented or distracted person, of unsound mind and memory, and not capable of transacting the ordinary business of life, and defendant knew it, it was not material whether she parted with the possession of the check willingly or unwillingly." To the same effect is Rex v. Wallace, 24 Dom. Law. Rep. 825.

There was ample evidence of the defendant's knowledge that Mrs. Rice was of unsound mind and incapable of performing the ordinary business affairs of life, and of his lack of good faith throughout the entire transaction, to support the judgments.

[4] Appellant next claims that he was prejudiced by a denial of the right of reasonable examination of prospective jurors. During the selection of the jury, the trial judge examined them collectively, propounding the usual inquiries, including whether they were qualified jurors residing in Los Angeles county or had heard anything about the facts of the case from any source. The court then refused defendant's counsel the privilege of separately interrogating each prospective juror upon his particular place of residence, or whether he would be willing to be tried for a similar offense by a person of his frame of mind, on the ground of their immateriality. While answers to these questions might well have been permitted, their refusal did not constitute prejudicial error. Such special questions, which the trial court deemed proper and material and not covered by his collective examination, were permitted. The conduct of the trial judge falls squarely within the construction of the cases of People v. Edenburg, 88 Cal. App. 558, 263 P. 857, and People v. Riordon, 79 Cal. App. 488, 496, 250 P. 190; by the Supreme Court of California in the case of People v. Estorga, 206 Cal. 81, 85, 273 P. 575, 576, as follows: "In those cases the jurors who were examined collectively by the court appear to have been those who had been drawn and seated in the jury box in the customary manner, were thus reduced to 12 in number, and had thereby become more definitely prospective jurors for the case on trial. This court, however, is not prepared to criticize a collective examination by the trial court of jurors drawn and seated in the jury box, provided the examination be of such nature, and conducted in such manner, as to sufficiently disclose the state of mind and attitude of the jurors toward the cause and the parties involved, and that opportunity for a 'reasonable examination' of the prospective jurors be accorded the people and the defense, on it being made to appear to the satisfaction of the court that such further examination is both 'reasonable' and proper. We commend to the trial courts, however, a consideration of some of the observations made by the District Courts of Appeal on this subject."

[5] Appellant further assails the court's "sarcastic and disparaging remarks imputing bad faith" directed toward his counsel while interrogating the prospective jurors Jeffrey and Wheeling, neither of whom was retained to try the cause. This statement was the outgrowth of a question to the court with reference to the limitation of the examination of prospective jurors on matters which were deemed by him to be immaterial. No assignment of misconduct to the court's remarks was made. Under such circumstances ordinarily the alleged impropriety will not be considered on appeal. People v. MacDonald, 167 Cal. 545, 551, 140 P. 256; People v. Nakis, 184 Cal. 105, 116, 193 P. 92.

[6] The appellant next assigns misconduct on the part of the jury and complains that the court failed to heed the affidavits of Mrs. Henry, wife of the defendant, and one Jennie Adams Conrad, charging that certain members of the jury designated merely as jurors "6" and "7," without identifying them by name, were seen in conversation with witnesses for the prosecution during the course of the trial. As the affidavits did not disclose the names of the jurors or the nature of the conversations except that they were able to hear only the name of defendant mentioned, error cannot be predicated thereon. As was stated in People v. Golsh, 63 Cal. App. 609, 618, 219 P. 456, 460: "It does not appear that the conversation related to the case on trial. It therefore is not of itself a circumstance sufficient to raise a presumption that the juror was improperly influenced. It was, of course, a grave impropriety, exposing the juror to suspicion and reflecting upon the administration of justice, but, in the absence of any showing as to the nature of the subject-matter of the conversation we cannot say that it was legal misconduct, calling for a reversal of the judgment. People v. Dunne, 80 Cal. 34, 21 P. 1130; People v. Phelan, 123 Cal. 551, 567, 568, 56 P. 424."

[7] Appellant strenuously insists that there was insufficient evidence to warrant the instruction which directed the jury to render a verdict on each of the fifteen counts. It is contended that the crime, if any, was complete when the property was assigned to him and was improperly split into the separate causes of action. There was sufficient evidence, including his own admissions, which tended to show the misapplication of funds on different occasions, and the instruction was not erroneous. People v. McCann, 96 Cal. App. 664, 667, 274 P. 621; People v. Hatch, 13 Cal. App. 521, 533, 534, 109 P. 1097. Objections were made to other instructions, which appear to be without merit. The instructions of the trial court fairly and comprehensively stated the rules of law applicable to the case.

A majority of the points raised in the appellant's brief were unsupported by authority, and, while other objections were made in like manner for our consideration, a careful review of the entire record discloses no error prejudicial to his rights.

The judgments and order denying a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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132 Cal.App. 585

## DOUGLASS v. GUARDIAN HOLDING CORPORATION.

Civ. 7654.

District Court of Appeal, Second District, Division 1, California.

June 15, 1933.

Hearing Denied by Supreme Court Aug. 14, 1933.

**1. Appeal and error 🔑1075.**

Finding as to when leased premises should have passed to lessee should not be set aside for failure to prove when term began, where time was indefinite by appellant lessor's own reasoning in its brief.

**2. Contracts 🔑319(2).**

Party wrongfully terminating contract and preventing other party from performing it is estopped to deny that latter was damaged to extent of his actual loss and fair outlay.

**3. Landlord and tenant 🔑129(4).**

Lessor's failure to deliver premises, constructed in agreed manner, to lessee at time fixed, and devotion thereof to another use, entitled lessee to recover damages in amount fairly or reasonably compensating him for time lost in preparing to enter business thereon.

**4. Appeal and error 🔑931(4).**

Finding that tenant was ready and able to accept building four months before lessor devoted it to another use *held* to warrant appellate court in believing that trial court found from evidence that tenant's demand for possession was made sufficiently long time before lessor's act for 3⅓ months, on which award of damages for lost time was based, to elapse.

**5. Landlord and tenant 🔑129(1).**

Finding that lessee refused to accept possession of building because of lessor's failure to provide adequate illumination, gas and electric connections, etc., as agreed, *held* not inconsistent with finding that lessor refused to deliver possession as finding that tenant rescinded lease.

**6. Landlord and tenant 🔑128(2).**

Lessee refusing to accept premises until put in condition promised did not impliedly release lessor from liability under lease or parties' agreement.

**7. Landlord and tenant 🔑129(1).**

Finding that lessee placed personalty on leased premises with lessor's consent *held* not inconsistent with findings that lessee refused to accept and lessor refused to deliver possession of premises as finding that tenant took possession with lessor's consent.

**8. Trover and conversion 🔑18.**

Lessee's demand for possession of personalty, placed on leased premises by him because of lessor's fraud, is not condition precedent to action against lessor for conversion thereof.

**9. Appeal and error 🔑907(2).**

Appellate court, having no record of evidence, will presume that trial court found in accordance with evidence before it.

**10. Appeal and error 🔑694(1).**

Appellate court will not set aside award to lessee for wages of watchman, employed with lessor's consent to guard personalty on leased premises, for want of finding that such services were necessary or amount paid therefor reasonable, in absence of record of evidence.

**11. Appeal and error 🔑694(1).**

Award of damages to lessee for loss in purchase and subsequent sale of equipment for garage, possession of which never passed to him, will not be set aside on appeal, in absence of contrary evidence in record.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by C. A. Douglass, Jr., against the Guardian Holding Corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Victor Ford Collins, of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

This is an appeal by defendant from a judgment awarding plaintiff the sum of $2,352.06, made up as follows: $1,000 for time lost by plaintiff in preparing to enter into a garage business on premises of defendant; $1,000 for conversion of certain personal property belonging to plaintiff; $126.43 for wages of a watchman guarding said personalty; $225.83 for loss sustained by plaintiff in relation to articles of equipment which he purchased in anticipation of engaging in said garage business. In totaling the specific items above mentioned, an error of 20 cents in favor of the defendant appears in the judgment.

The matters complained of were originally covered by a single complaint, the first count of which sought damages for conversion; the other counts, damages arising out of a transaction in relation to a lease. The first count was later dismissed and a separate action filed in lieu thereof, and this new action was consolidated for trial with the original action. The appeal is upon the judgment roll alone, and attacks particularly the findings made by the lower court as the basis of its judgment.

In the fall of 1927 defendant was erecting two buildings; a large apartment house, known as the Guardian Apartments, and, on the same premises, a one-story garage building. According to the findings, plaintiff and defendant on October 31, 1927, entered into an agreement in writing bearing that date, whereby defendant leased to the plaintiff said garage building for a ten-year period from and after "said Guardian Apartments were officially accepted by the lessor from the builder thereof, and said apartments were open to receive tenants and from and after written notice of said acceptance had been given by the defendant to plaintiff." The court also found "that said Guardian Apartments and said garage should have been completed and should have been officially accepted by the defendant from the builder thereof and said building opened to receive tenants and written notice of such acceptance should have been given plaintiff on or about the 15th day of January, 1928, and that ample time elapsed between the 31st day of October, 1927, the date of said lease, and said 15th day of January, 1928, within which it should have as aforesaid completed said building; that said Guardian Apartments and said garage were not completed and ready for tenants until on or about the 1st day of May, 1928, which the court finds to be an unreasonable length of time."

In paragraph 21 of the findings the following appears: "21. The court finds that plaintiff lost time equal to at least one full month between the 31st day of October, 1927, and February 1, 1928, and two and one-third months between the 1st day of February, 1928, and the 10th day of April, 1928, on which day defendant made other use of said premises, or a total loss of time of three and one-third months, in preparing to enter upon said premises and conduct therein and thereon a first-class garage business, and that the reasonable value of the time spent and lost by plaintiff in connection therewith is the sum of $1,000.00, and by reason thereof plaintiff sustained damages in a like amount, to-wit, the sum of $1,000.00; that plaintiff paid out, laid out and expended various sums of money in preparing to enter upon said premises and conduct and operate thereon a first class garage business; and in the same connection, with the consent of the defendant, placed upon said premises various articles of personal property, and in particular those mentioned in plaintiff's complaint in action No. 280376, and all of which articles mentioned in said complaint the defendant converted to its own use and benefit, the reasonable value of which at the time of said conversion was the sum of $1,000.00, and, by reason whereof plaintiff sustained further damages in a like amount, to-wit the sum of $1,000.00."

[1-3] Because plaintiff in his complaint alleged, "That in the making, execution and delivery of said agreement it was understood and agreed between the parties thereto and hereto that said Guardian Apartments would be officially completed and officially accepted from the builder thereof and open to receive tenants not later than the 1st day of December, 1927, and that it was further understood and agreed by said parties that thereupon but not later than said 10th day of December, 1927, plaintiff herein should receive possession of said garage building and be permitted to conduct a general garage business therein," and also that the lease was "for the period of ten years beginning on or about the 10th day of December, 1927," appellant contends that there is no legal basis for the award of $1,000 for the loss of time of the plaintiff, and also that the findings indicate that there was a complete failure of proof of the allegations in regard to the beginning of the lease term. Commenting first on this latter contention, it seems to us that where, by defendant's own reasoning as developed in its brief, the time of beginning was somewhat indefinite, a finding that the premises should have passed to plaintiff under the lease on or about January 15, 1928, approximately one month after the time named by plaintiff as the correct date, should not be set aside on the ground mentioned, failure of proof. As to the contention that there is no legal basis for an award of damages for time lost in ineffectual preparations to enter upon a lease, we have in mind the rule referred to in United States v. Behan, 110 U. S. 338, 4 S. Ct. 81, 28 L. Ed. 168, holding that the party who voluntarily and wrongfully puts an end to a contract and prevents another from performing it is estopped from denying that the injured party has been damaged to the extent of his actual loss and his outlay fairly incurred. In the case of Schnierow v. Boutagy, 33 Cal. App. 336, 164 P. 1132, we find a situation where defendant agreed to lease to plaintiff a storeroom then in process of construction. For breach of this contract plaintiff recovered a money judgment for loss of his time in securing another storeroom. Since in the instant case the court found that there was a breach by the defendant of this contract in his failing

to deliver the premises "at the time and constructed in the manner agreed upon," and further that defendant, by devoting the garage building to another use on or about April 10, 1928, made it impossible for the plaintiff to obtain possession, we feel that the court was fully warranted in law in fixing as damages the amount of money which under the evidence he found would fairly or reasonably compensate the plaintiff for his lost time.

[4] Defendant complains that, although there is a finding that demand for the premises was made by the plaintiff, the finding is defective in not stating when the demand was made. Quoting from his brief: "From aught that appears from the findings, where no time is given, the demand may have been made on the 10th day of April, 1928. Without a finding as to the time of the demand by plaintiff for possession of the premises, there can be no possible cause of action."

In view of a finding made by the court that plaintiff was ready, able, and willing to accept the garage building on December 10, 1927, we are content to believe that from the evidence adduced at the trial the court drew its conclusion that demand for possession was made a sufficiently long time before April 10th for the 3⅓ months upon which the award for lost time is made to elapse.

[5, 6] Appellant contends that various findings of the court are inconsistent or contradictory. "In paragraph 8 of the findings (Clk. Tr., p. 54) we have a definite finding of a rescission of the lease by the plaintiff, although no time is given as to this rescission. In the same findings of fact we have a directly opposite theory, to-wit: that on April 10th, 1928, the defendant refused to give the possession of the garage to the plaintiff, and devoted it to other uses. Now which theory of the findings is correct? In other words, we have an issue raised by the findings." To analyze this complaint, we must quote paragraphs 8 and 9 of the findings:

"8. The court finds that the defendant also failed and refused and neglected to provide suitable and adequate illumination along said driveway for the purposes aforesaid, and also failed, refused and neglected to install and/or maintain gas and/or electric connections and meters for said garage separate and apart from said apartment house building by which gas and electric current would be furnished to said garage and a measurement thereof made apart from said apartment house; and that the court further finds on account of all the foregoing and the failures on the part of the defendant, as hereinbefore found, it became and was necessary for plaintiff to and he did refuse to accept possession of said premises for the reason he could not make use thereof by reason of the narrowness of said right of way from said Hollywood Boulevard to said garage building, and lack of proper illumination and lack of proper gas and electric connections and meters.

"9. The court finds that plaintiff demanded that defendant comply with its said agreement mentioned above and complete said improvements in accordance with the provisions of said agreement and deliver the possession of said garage to plaintiff, but that defendant not only failed and neglected to complete said improvements as agreed but it also failed and refused to deliver possession of said garage to plaintiff, and on the contrary on or about the 10th day of April, 1928, devoted it to other uses and purposes and not in the performance of said ten year lease, and therefore made it impossible for plaintiff to obtain possession thereof."

Somewhere in this paragraph 8 appellant sees "a definite finding of a rescission of the lease by the plaintiff," but we see none. The finding is rather that here was a refusal to accept possession for perfectly good reasons. If the driveway had been widened and lighting apparatus adjusted as demanded by plaintiff and as agreed upon, prior to April 10th, this plaintiff might have entered into possession immediately thereafter. Certainly no release of the defendant from liability under the lease or the agreement between the parties is implied by plaintiff's refusal to accept the premises unless or until they were put in the condition they were promised to him.

[7] This appellant also argues that in paragraph 21 of the findings of fact there is a finding "that the plaintiff actually took possession of the premises with the consent of the defendant." If there is such a finding, of course it contradicts or is inconsistent with the other findings just above quoted, that plaintiff necessarily refused to accept possession and that defendant refused possession of the premises. Is there in paragraph 21 a finding that "plaintiff actually took possession with the consent of the defendant"? Not at all. The finding is merely that plaintiff placed upon the premises, with the consent of the defendant, certain articles of personal property which defendant converted to its own use to the damage of plaintiff in the sum of $1,000.

The appellant in answering the conversion suit made the following allegations: " * * * That the plaintiff did trespass upon the property of the defendant herein and place certain property therein against the defendant's wishes, and without his knowledge or request. That thereafter the defendant demanded of the plaintiff that he leave the premises, and that the defendant (plaintiff?) did so without removing the property left thereon. That the defendant did not seek or desire said property, and that the plaintiff has failed, neglected and refused to make demand for said property."

[8] It is now contended that "if the plaintiff with the consent of the defendant, placed the personal property (of which the plaintiff has received an award of $1,000.00 damages) on the property, and in the possession of the defendant, with the consent of both parties, then the plaintiff could not maintain an action for damages for conversion of this property except and until the plaintiff has alleged, proven and there was found a demand from plaintiff to defendant for the possession of the property alleged to have been converted." It may be that the evidence showed that the plaintiff's consent or action in placing the property in the garage was induced by fraud, and, if so, a demand would not be required. Field, J., in the case of Paige v. O'Neal, 12 Cal. 483, 495, said: "* * * It is a general rule, that when the possession of property is originally acquired by a tort, no demand previous to the institution of suit for its recovery is necessary"—a rule which was also followed in Sargent v. Sturm, 23 Cal. 359, 83 Am. Dec. 118, a case in which the action was to recover the possession or value of the property. The complaint, in the case at bar, alleged that defendant "surreptitiously and tortiously and unlawfully sought and gained and took possession of all thereof (the personal property) from the plaintiff, against his will and without his consent and converted the same to its own use," and all of these allegations the court by finding No. 23 found to be true.

[9] We have no record of the evidence before us, and in such a case it will be presumed "that the trial court found in accordance with the evidence that was before it." Turgeon v. Barney, 70 Cal. App. 432, 435, 233 P. 394, 395.

[10, 11] Objection is made to the allowance of the last two items mentioned in the judgment, $126.43 for watchman's wages, and $225.83 loss sustained in the purchase and subsequent sale of equipment for the garage. There is a finding that the watchman was employed with the consent of the defendant "to properly guard and care for" the personal property and we are not prepared to say, under the circumstances of this case and in the absence of a record of the evidence, that this award should be set aside on the theory of defendant that there is no finding that the services were necessary or that the amount paid therefor was reasonable. As to the last item, $225.83, we advert once more to the rule adhered to in United States v. Behan, supra, and are convinced that the trial court considered, with the evidence before it, that this constituted fairly the measure of damages for expense incurred in regard to the garage equipment. We quote here from the decision in the case of Burnham v. Abrahamson, 21 Cal. App. 248, at page 255, 131 P. 338, 342: "On an appeal from the judgment on the judgment roll alone, every fact essential to the support of the court's findings and the judgment must be presumed to have been proved. Or, as the rule is stated in all the cases: 'All intendments will be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken; and only matters which might have been presented to the court below, which would have authorized the judgment, will be presumed to have been thus presented, if the record shows nothing to the contrary.'" Citing many cases.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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132 Cal.App. 510

## BANK OF OROVILLE et al. v. MINNESOTA FIRE INS. CO.

Civ. 4836.

District Court of Appeal, Third District, California.

June 9, 1933.

**1. Insurance 🔑561.**

That insurer's adjusting agent promised to prepare proof of loss for insured and led insured to believe that claim would be adjusted without necessity of filing such proof constituted waiver of fire policy provision requiring proof of loss.

**2. Insurance 🔑311(3).**

Mortgagee's rights under mortgagee's clause of fire policy may be lost in event of insured's breach of policy even without mortgagee's knowledge thereof (Civ. Code, § 2541).

**3. Insurance 🔑537.**

That mortgagee's clause provided that loss, if any, subject to conditions of fire policy, was payable to mortgagee, *held* not to require mortgagee to file separate proof of loss.

**4. Insurance 🔑555.**

Provision of fire policy requiring filing of proof of loss may be waived by insurer or its duly authorized agent (Civ. Code, § 2636).

**5. Contracts 🔑318.**

Law abhors forfeitures of contracts.

**6. Insurance 🔑555.**

Question whether provision of policy requiring filing of proof of loss has been waived depends on circumstances of each particular case.

**7. Insurance 🔑665(7).**

Question of mere delay in filing required proof of fire loss or waiver thereof will be determined in insured's favor when reasonably possible.

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Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Bank of Oroville and another against the Minnesota Fire Insurance Company. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Thornton & Watt, of San Francisco (Evans M. Taylor, of San Francisco, of counsel), for appellant.

J. Oscar Goldstein, of Chico, for respondents.

Mr. Justice R. L. THOMPSON, delivered the opinion of the court.

The plaintiffs recovered judgment in a suit upon an insurance policy for the total destruction of a warehouse by fire. The appellant contends the claim for insurance was forfeited by failure to present sworn proof of the loss until several days after the time allowed therefor by the terms of the contract. The trial court held this clause of the policy was waived by the conduct of the insurer.

The plaintiff Hayes owned a warehouse at Oroville of the approximate value of $8,000. The Bank of Oroville held a mortgage on this and other property belonging to Hayes to secure an indebtedness of $9,000. Through a local agent, the Minnesota Fire Insurance Company, a corporation, with its western place of business at Seattle, insured this warehouse February, 1930, for a three-year term, for the sum of $3,000. A mortgage clause was attached to the policy providing that "loss, if any, on building only, subject however to all the terms and conditions of this policy, payable to Bank of Oroville, Oroville, California." On June 23, 1931, the warehouse was totally destroyed by fire. At the time of the fire Mr. Hayes was engaged as foreman of a state highway construction company near Emigrant Pass. Upon receipt of information of the fire, he immediately went to Oroville, consulted the president of the bank, and notified the local agent of the insurance company of his loss. The agent promptly wired the company at Seattle. R. V. Smith, the San Francisco agent of the company, was immediately sent to Oroville to adjust the claim. The agent arrived at the scene of the fire within a week thereafter. He investigated the affair, consulted with the president of the bank, acknowledged the bank's mortgage interest to the full extent of the insurance, and said "they (the bank) have got to be taken care of." He inquired for the owner, Hayes. He raised no objection to the claim. He departed for San Francisco, leaving an impression with the president of the bank that its claim would be promptly settled in full. He said he would make out an appraisement and prepare the proof of loss for Mr. Hayes to sign. Mr. Putnam, the president of the bank, testified in that regard: "He handed me that card and said he was the adjuster for the Minnesota Fire Insurance Company, and that he had come up to adjust on Hayes' loss, and he says, 'I understand you represent Mr. Hayes.' I told him 'yes', in that particular case that Mr. Hayes was away and I would look after it for him. He says to me, 'Have you made out your appraisement?' I says 'No, I never heard of such a thing as us making out an appraisement.' And he said 'Well, I will make it out, and when I get back to the city I will send you a copy of it, and I will also fill out and send up a proof of loss to be executed for Mr. Hayes.' And I says 'All right; if we are not satisfied we will get a carpenter and make our own appraisement,' and he said 'Very well,' and I said 'You understand that the Bank of Oroville has a claim there of three thousand dollars,' and he said 'Yes, that is understood, they have got to be taken care of,' and I asked him if it was necessary for the bank to file a proof of loss, and he said 'No,' and that was about the conversation although I never got these documents from Mr. Smith, neither the appraisement nor the proof of loss filled out."

Having heard nothing further from Smith, after his departure from Oroville, Mr. Putnam wrote him on July 16th, as follows:

> "When you were here something over ten days ago to adjust the loss on property of V. B. Hayes, you promised to send me the amount of your adjustment within a week. but up to the present time I have not received same.
>
> "Please advise me what you have decided to do with reference to this loss and oblige,
>
> "Yours very truly."

To this inquiry the adjuster replied on July 18th with an offer of compromise, in which he said he hoped to go to Oroville and take the matter up with Putnam personally. He, however, stated in this letter that, while it would no doubt cost more than the amount of the insurance to restore the building and that it was old and deteriorated, still he would recommend the payment of $2,000 "if Mr. Hayes cares to settle for that amount."

On July 21st, Mr. Putnam wrote to Smith rejecting the proffer of $2,000, and saying positively they would accept no sum short of the entire amount of the insurance.

Under date of July 23d, Smith wrote to Mr. Putnam as follows:

> "In view of the attitude you and Mr. Hayes take in this matter, I think it would be advisable for you to prepare and file proof of loss with the company in accordance with the conditions of the policy."

This matter was not sent to the Bank of

Oroville, which held the mortgage interest in the destroyed property. It was addressed to Mr. Putnam, "President First National Bank of Oroville." It appears Mr. Putnam was the president of both the Bank of Oroville and the First National Bank. He testified this letter reached the First National Bank in his absence, and that he never heard of it until three or four days before the trial commenced in March, 1932, at which time the defendant called upon plaintiffs to produce the letter. He said that in searching their files it was then discovered in the First National Bank records. No such notice was sent to Mr. Hayes.

Mr. Hayes returned to Oroville about July 21st, and was fully informed by Mr. Putnam concerning the conference with Smith, his promise to prepare the proof of loss, and the expectation of a settlement of the claim without further trouble. Hayes returned to his work on the highway without knowledge of the subsequent letter of Smith to Putnam advising them to prepare the proof of loss. Hayes never heard of this letter of July 23d and had no reason to doubt that Smith would prepare the proof of loss if it became necessary to file such a document. It is true that Putnam would still have had time within which to procure the preparation and filing of the proof of loss after Smith advised him to do so in the letter of July 23d. But he absolutely denies having seen this letter until shortly before the time of the trial. It does not appear that he knew where to reach Hayes during that period of about a month prior to the expiration of time. Mr. Smith had told him that the owner of the insured property must himself swear to a proof of loss, and that a mortgagee of the property could not do it for the owner. At least the owner was never served with notice that Smith had changed his mind and withdrawn his promise to prepare the proof of loss. It is true that after the sixty-day period had elapsed, Putnam wrote to Hayes at Santa Maria, August 25th, saying: "I have not heard from the insurance, and I suppose that you filed your proof of loss. You had better keep track of the time and if no settlement is made by them, during the sixty days, I think you had better place it with an attorney to collect at the end of that time."

This letter indicates that Putnam had not heard of the agent's letter advising them to file the proof of loss. It also suggests that he still hoped for a settlement of the claim, although he cautiously recommended Hayes not to let the time elapse for filing the proof of loss. At least the information contained in this letter from Smith never reached Hayes until the sixty days had passed. When he received Putnam's letter, he promptly prepared and forwarded the sworn proof of loss, which reached the company about six days after the limitation of time specified in the policy. The insurance company immediately notified Hayes that it repudiated the obligation created by the policy on the ground that he had failed to file his proof as required by the contract. The good faith of the adjusting agent, as indicated by his conduct in the transaction, may reasonably be questioned.

[1] We are of the opinion the conduct of the adjusting agent of the insurance company amounted to a waiver of the provision of the policy requiring the insured to file a sworn proof of loss within sixty days after the fire. The property was valued at several times the amount of the insurance. A local agent insured the property with full knowledge of its value. It was totally destroyed by fire. The adjusting agent personally investigated the claim and was acquainted with the surrounding circumstances. He must have known that the loss was far greater than the amount of the insurance. No criticism of the transaction was offered by him. No fraud was charged in the procuring of the policy or otherwise. No defense to the suit was made by the insurance company except the technical one that the insured had forfeited his claim by failing to file his proof of loss until six days after the time had expired. The defendant is estopped from relying on this technical defense because its duly authorized agent himself promised to prepare the proof of loss for the insured if it became necessary to do so, and for the reason that the agent also led the assured to believe his claim would be adjusted without the necessity of filing this proof by saying to Putnam with regard to the bank's interest in the policy, "they have got to be taken care of." Moreover, the agent made no effort to notify Hayes, who was the owner of the insured property, that he had changed his mind and withdrawn his promise to prepare the proof of loss. Quite a similar situation existed in the case of Francis v. Iowa Nat. Fire Ins. Co., 112 Cal. App. 565, 297 P. 122. In that case the court held that similar conduct estopped the insurance company from contending that the policy was forfeited by failure to file the proof of loss within the time prescribed in the contract.

[2] It is true that the Bank of Oroville, as mortgagee of the insured property, might lose its right to recover on the policy under the mortgagee's clause which was attached thereto, in the event of a breach of the contract by the insured even without the mortgagee's knowledge thereof. Section 2541, Civ. Code; Welch v. British American Assur. Co., 148 Cal. 224, 82 P. 964, 113 Am. St. Rep. 223, 7 Ann. Cas. 396. Section 2541, supra, provides: "Unless the policy otherwise provides, where a mortgagor of property effects insurance in his own name providing that the loss shall be payable to the mortgagee, or assigns a policy of insurance to a mortgagee,

the insurance is deemed to be upon the interest of the mortgagor, who does not cease to be a party to the original contract, and any act of his, prior to the loss, which would otherwise avoid the insurance will have the same effect, although the property is in the hands of the mortgagee, but any act which, under the contract of insurance, is to be performed by the mortgagor, may be performed by the mortgagee therein named, with the same effect as if it had been performed by the mortgagor."

[3] Even though the policy did contain the mortgage clause to the effect that "loss, if any, subject to all the terms and conditions of this policy, is payable to Bank of Oroville," this did not require the mortgagee to also file a separate proof of loss in addition to the one which the contract required the insured to file. The filing of such proof by the insured, under the circumstances of this case, is a sufficient compliance with the contract. In 7 Cooley's Briefs on Insurance (2d Ed.), page 5746, it is said in that regard: "The general rule seems to be that, unless the mortgagee clause attached to the policy makes it obligatory on the mortgagee to furnish proofs of loss and an appraisement, it is not a condition precedent to his right of action that he furnish the same."

[4] Under the policy in this case, which provides that "Within sixty days after the commencement of the fire the insured shall render to the company * * * preliminary proof of loss consisting of a written statement signed and sworn to by him, * * *" it became necessary for the insured Hayes to file with the company his sworn proof of loss within sixty days after June 23d, upon which date the fire occurred, unless that requirement was waived by the acts or conduct of the defendant or its authorized agent. McCormack v. North British Ins. Co., 78 Cal. 468, 21 P. 14; White v. Home Mutual Ins. Co., 128 Cal. 131, 60 P. 666; Gillon v. Northern Assur. Co., 127 Cal. 480, 59 P. 901; Estrada v. Queen Ins. Co., 107 Cal. App. 504, 290 P. 525. The authorities are, however, uniform to the effect that the provision of an insurance policy, which requires the filing of proof of loss, may be waived by the insurer or its duly authorized agent. Section 2636, Civ. Code; 26 C. J. 393, § 507; 33 C. J. 23, § 680; 7 Cooley's Briefs on Ins. (2d Ed.) p. 5955, § 12; Francis v. Iowa Nat. Fire Ins. Co., 112 Cal. App. 565, 297 P. 122; Savage v. Norwich Union Fire Ins. Soc., 125 Cal. App. 330, 13 P.(2d) 955.

In the present case we are satisfied the delay in filing the proof of loss until six days after the expiration of the sixty-day period within which the policy requires that document to be filed was waived by the conduct of the agent of the insurance company.

[5-7] The law abhors forfeitures of contracts. The question of a waiver of this provision of an insurance policy depends upon the circumstances of each particular case. Where a cause of action upon an insurance policy for recovery of loss sustained on account of fire is otherwise valid, the question of a mere delay in filing the required proof of loss, or the waiver thereof, will be determined in favor of the insured when this may be reasonably done without violence to the facts of the case. In 5 Joyce on Insurance (2d Ed.), page 5564, it is said, concerning the question of waiver: "The question concerning whether or not there has been a waiver of this provision must in all cases depend upon the circumstances of each particular case. The courts will construe this provision, as a rule, against the insurer, and will not scan very closely evidence introduced by the insured tending to rebut a technical forfeiture."

On page 5607 of the last cited authority the author says: "If the insurer by its acts and conduct leads the claimant to believe that the company is preparing to adjust the loss, the insurer will be estopped from claiming the proofs were not furnished as provided in the policy."

In view of the foregoing we are of the opinion the findings and judgment are adequately supported by the evidence.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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132 Cal.App. 563

## PEOPLE v. STANDARD OIL CO. OF CALIFORNIA.

Civ. 830.

District Court of Appeal, Fourth District, California.

June 14, 1933.

Hearing Denied by Supreme Court Aug. 10, 1933.

**Master and servant** ⚿347.

Statute requiring employer, on employee's compensable death without dependents, to pay $300 into compensation fund, *held* unconstitutional and unwarranted under police power (St. 1917, p. 836, § 9 (b), subd. 2 (10), as amended by St. 1929, p. 420, § 1; Const. art. 20, § 21).

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by the People against the Standard Oil Company of California. Judgment for defendant, and the People appeal.

Affirmed.

A. I. Townsend, of San Francisco, for the People.

Pillsbury, Madison & Sutro, of San Francisco (Felix T. Smith, Harley C. Stevens, and Francis Gill, all of San Francisco, of counsel), for respondent.

Bronson, Bronson & Slaven and Harold R. McKinnon, all of San Francisco, amici curiæ.

BARNARD, Presiding Justice.

On January 13, 1930, one Jack P. Dunn sustained injuries arising out of and in the course of his employment by the defendant, which caused his death on the same day. The defendant is a self-insurer under and by virtue of the provisions of the Workmen's Compensation, Insurance and Safety Act, and the said Dunn left no dependents. On August 4, 1932, this action, based upon the provisions of section 9 (b), subd. 2 (10), of chapter 222, of the Statutes of 1929 (page 423 et seq.), was brought by the Industrial Accident Commission in the name of the people of the state of California, to collect from the defendant the sum of $300 alleged to be due and owing from the respondent to the state of California on account of said death. A demurrer to the complaint was sustained on the ground that the same failed to state a cause of action, and, from the ensuing judgment, this appeal has been taken.

The main question presented is whether those portions of this amendment to the Workmen's Compensation Act which provide for the creation and enforcement of an employer's liability, in compensable death cases where the employee leaves no dependents, to pay the sum of $300 into what is known as the subsequent injuries fund, to be used for the purposes named in the act, are unconstitutional as in contravention of section 21 of article 20 of the Constitution of this state. While this precise question has not heretofore been passed upon, that portion of this amendment which purported to confer upon the Industrial Accident Commission the power to enforce such a liability as is here relied upon was held unconstitutional in the case of Commercial Cas. Ins. Co. v. Indus. Acc. Commission, 211 Cal. 210, 295 P. 11, 13. A somewhat similar act, having a similar purpose, was adopted in 1919 (Stats. 1919, p. 273), a portion of which was held unconstitutional in the case of Yosemite L. Co. v. Industrial Acc. Commission, 187 Cal. 774, 204 P. 226, 228, 20 A. L. R. 994. The effect of that decision was held in People v. Yosemite Lumber Co., 191 Cal. 267, 216 P. 39, 40, to be to render the entire amendment of 1919 void, since no jurisdiction over the enforcement of its provisions was therein conferred upon the courts.

It is appellant's contention that neither the cases referred to nor the principles therein set forth are controlling here, for the reason that the 1929 act materially differs from the 1919 act, in that it specifically confers jurisdiction upon the courts to enforce the liability attempted to be created. The argument is made that the opinion in the earliest of the cases referred to conceded that the Legislature might, under its general powers, provide a fund of the general nature of that involved here, that certain questions were reserved as not necessary to the decision of the two later cases, and that anything said in any of these cases to the effect that the form of liability attempted to be created by these acts was beyond the power of the legislature was unnecessary to the respective decision.

In the case of Yosemite L. Co. v. Industrial Acc. Commission, supra, it was pointed out that the second paragraph of section 21 of article 20 of the Constitution confers no authority to create a tribunal with any other judicial power than to settle disputes arising under legislation authorized by the first paragraph of the section. The court then examines the first paragraph of the section and comes to the conclusion that it provides only for the creation of a liability upon the part of an employer to compensate his own employees for injuries arising out of the employment, or the dependents of such an employee if the injury results in death. In this connection the court said:

"The first grant to the Legislature by the new section is the grant of power 'to create and enforce a complete system of workmen's compensation.' This does not authorize the creation of a liability on any person to pay such 'compensation,' or require any person to contribute funds to support the proposed system. It does not purport to touch upon the subject of liabilities.

"The next phrase of the new section empowers the Legislature 'in that behalf to create and enforce a liability on the part of any and all persons to compensate any and all of their workmen for injury or disability and their dependents for death incurred or sustained by the said workmen in the course of their employment.' This does not authorize the creation of a liability on the part of any person to compensate the workmen of other persons, nor the dependents of workmen of other persons. The phrase 'their workmen' necessarily confines the persons to be compensated to workmen who are in the employ of the person who is made liable. This is also shown by the provision that if the workman is killed by an injury in the course of his employment, the compensation is to be made to his 'dependents' thus excluding any idea of liability in such a case to provide for the welfare of workmen in general, or of a particular class of disabled workmen, in no way connected with the employer who is made liable for the particular injury. Nothing is added to the force of the provision by the use of the word 'plenary.' If the Legislature has power to do a certain thing, its power to do it is always plenary. It is merely surplus verbiage.

"The use in this clause of the words 'any and all persons,' in describing those made liable, and the words 'any and all of their workmen,' in describing those to be compensated, do not show an intent to empower the Legislature to enlarge the liability against a particular employer for a particular injury so as to include compensation to workmen in general as a class, or a contribution to a fund to be applied to the benefit of a class of persons, instead of to the dependents of the workman who may be killed by the injury.

"Nor is such enlarged meaning given to the section by the use of the phrase 'complete system of workmen's compensation,' in the opening clause, or by the elaborate definition of that phrase which follows the first sentence. The section mentions and describes but one kind of liability: The liability of 'any or all persons' to compensate 'any or all of their workmen.' This is in effect a provision for any person to compensate his workmen, which is but another form of saying that any employer shall compensate his employee, for an injury arising out of the employment, or the dependents of such employee, if the injury causes death to him. The language of neither one of these parts of the section shows or expresses an intent to add another liability to that expressly stated. In these circumstances the maxim, 'expressio unius, est exclusio alterius,' is applicable, and the meaning to be inferred is that only which is explicitly stated. And particularly it should not be inferred or implied from such language that so novel and different a thing was intended as the liability to the state which is imposed by the act of 1919."

After reviewing the arguments which had been submitted to the voters in support of the constitutional amendment which is now section 21 of article 20, and further stating that the statute under consideration was in fact a tax measure and that the constitutional amendment was not intended to provide for taxation of any kind, the court said:

"Our conclusion is that section 21 of article 20, as amended in 1918, did not authorize the Legislature to impose a liability on an employer to pay money to the state for the purposes specified in the Act of 1919. It follows by necessity that said section gives no authority to the Legislature to confer on the Industrial Accident Commission jurisdiction to determine any dispute that may arise concerning the liability of employers sought to be imposed by said act of 1919."

The conclusion thus reached, that the jurisdiction attempted to be conferred upon the commission by that act was not authorized by the constitutional amendment, was based upon the holding that the amendment did not authorize the Legislature to impose a liability upon an employer to pay money to the state for the purposes specified in the act, and that the rule of express mention and implied exclusion applied. If the reasoning of that case be correct, the constitutional amendment referred to not only limits the power of the Legislature in conferring jurisdiction upon the commission in such a case, but also prevents its authorizing a court to enforce a liability which it has not the power to create.

The reasoning and conclusions of that case were expressly reaffirmed in People v. Yosemite Lumber Co., supra, in which case it is said:

"In deciding that question this court held that, under the amendment of section 21 of article 20 of the state Constitution, adopted in 1918, investing the Legislature with power to create a system for the enforcement of workmen's compensation through and by means of an Industrial Accident Commission, the powers of the Legislature in that regard were limited thereby to the investment of the said Commission, with jurisdiction to create and enforce a liability on the part of employers to compensate their workmen and surviving dependents for injuries sustained or death incurred by such workmen in the course of their employment, and that such constitutional grant of power to the Legislature did not authorize it to invest said Commission with jurisdiction to create or enforce a liability on the part of employers to compensate the workmen of other employers, or dependents of such workmen, or to require the employers of workmen killed during the course of their employment, but leaving no surviving dependents, to pay into the state treasury the sum provided in said act of 1919 for the rehabilitation and re-education of persons injured in the service of other employers than those upon whom the liability to make said payment was by said act imposed; and that said act, in so far as it attempted, in sections 5 and 6 thereof, to invest such Commission with such jurisdiction was unconstitutional and void."

However, in that case, after recognizing the plausibility of an argument to the effect that section 21 of article 20 of the Constitution so limited the power of the Legislature that it could not impose a liability upon employers for compensation to other than their own employees and their dependents, the court held it unnecessary to decide such a question.

In Commercial Cas. Ins. Co. v. Industrial Acc. Commission, supra, that part of the 1929 statute which purports to confer jurisdiction upon the Industrial Accident Commission in a dispute of this nature was before the court. After reviewing and approving the reasoning and conclusion in the case of Yosemite L. Co. v. Industrial Acc. Commission, supra, and in passing upon a claimed difference between the objects and purpose of the statute under consideration and the statute of 1919, the court points out that the 1929 act imposes a liability upon an employer to make a payment which may be used in whole or in part to compensate employees who are not and never have been in his service. In considering a contention there made that a reasonable construction of section 21, article 20, of the Constitution, permits legislation of this character, the court says:

"The above provision of this section of the Constitution, both that quoted and relied upon by the respondent and the latter part thereof which we have quoted, must be read together, as the two parts form but one complete sentence. As so read, we think that the intent of the framers thereof is clear and unambiguous, and that they intended by this amendment of the Constitution to limit the power of the Legislature in enacting a Workmen's Compensation Act to provide for the compensation by the employers of their own employees, and that any legislation which exceeds these limits is beyond the power of the Legislature, and, therefore, void."

While holding void the particular subsection then under consideration, the court declined to consider the question of the validity of other portions of the act as not involved in that case.

The appellant argues that all that was decided in Yosemite L. Co. v. Industrial Acc. Commission was that under the constitutional provision the Legislature was without power to confer upon the commission jurisdiction over such a dispute as was then under review, and that anything else appearing in the decision in that case was dicta. It is then contended that section 21 of article 20 of the Constitution has not limited the power of the Legislature to making provision for the creation and enforcement of a liability on the part of employers to compensate their own employees and their dependents for injuries or death incurred in the course of the employment, but that this section expressly authorizes the Legislature to provide for "any and all workmen incurring injury in the course of their employment," thus conferring an express authority to impose a liability upon an employer to compensate all workmen no matter by whom they are employed, and further that, aside from the constitutional provision, authority for the legislation here in question may be found in the general police power of the state. However, in the case just mentioned, the court held and based its decision upon the proposition that the liability attempted to be imposed was unconstitutional and void, and that it necessarily followed that the power to adjudicate such a matter could not be conferred upon the commission. The court analyzed the respective portions of the constitutional amendment and concluded:

"The section mentions and describes but one kind of liability: The liability of 'any or all persons' to compensate 'any or all of their workmen.' This is in effect a provision for any person to compensate his workmen, which is but another form of saying that any employer shall compensate his employee, for an injury arising out of the employment, or the dependents of such employee, if the injury causes death to him. The language of neither one of these parts of the section shows or expresses an intent to add another liability to that expressly stated. In these circumstances the maxim, 'expressio unius, est exclusio alterius,' is applicable, and the meaning to be inferred is that only which is explicitly stated."

That this constitutional amendment limits the liability that may be imposed by legislative action to that of an employer in connection with his own employees is reaffirmed in the case of People v. Yosemite Lumber Co., and, while this particular portion of the opinion may not have been necessary to the decision of that case, it has considerable persuasive force under the circumstances. The same may be said of the decision in the case of Commercial Cas. Ins. Co. v. Industrial Acc. Commission, and, while the court there confined its decision to that portion of the statute now under review which attempted to confer jurisdiction in such matters upon the Industrial Accident Commission, it is again stated that the intention of the constitutional amendment is plainly to limit the power of the Legislature, in enacting a Workmen's Compensation Act, to making provision for the compensation by an employer of his own employees, and that any legislation which exceeds such limits is void.

However beneficial and desirable may be the ends sought to be accomplished by the provision here in question, we feel that the decisions we have cited and the principles therein laid down are controlling here. While the decisions in Yosemite L. Co. v. Industrial Acc. Commission and Commercial Cas. Ins. Co. v. Indus. Acc. Commission were limited to the question as to whether jurisdiction had been conferred by the respective acts upon the Industrial Accident Commission, both decisions were based upon the ground that the Legislature had exceeded the limits of the constitutional enabling clause and, in the latter case, that the constitutional provision limited the power of the Legislature to providing for compensation by an employer in connection with his own employees only.

If this conclusion is correct, section 21, article 20, of the Constitution not only does not grant the power in question, but expressly limits the same to the liability of an employer to and for his own employees. It follows that the Legislature may not under the general police power of the state make such a provision as is here attempted. In the absence of any constitutional restriction, it has been held that it was within the general police power of the state to enact a similar statute. State Ind. Commission v. Newman, 222 N. Y. 363, 118 N. E. 794. It has also been held that a statute of this nature is not in conflict with the Fourteenth Amendment to the Federal Constitution. Sheehan v. Shuler, 265 U. S. 371, 44 S. Ct. 548, 68 L. Ed. 1061, 35 A. L. R. 1056; Mountain Timber Co. v. Washington, 243 U. S. 219, 37 S. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642. A different situation is presented where the power of the Legislature has been definitely limited by a constitutional provision adopted by the people, who have thus placed their own limitation upon the power, police or otherwise, which may be used in the particular matter involved. In this particular contention the appellant relies upon certain language used in Yosemite L. Co. v. Industrial Acc. Commission, where it is stated that it may be conceded that under its general powers the Legislature might provide a fund for the benefit of all persons disabled in industry in this state. In view of all the language used in that decision, we do not understand the portion here particularly referred to as conceding that such a fund might be provided for by the Legislature, under its general powers, to be created in the manner attempted in the act of 1919 and again in the act of 1929, in the face of the constitutional provision. The language referred to contains no concession that such a fund might be created by increasing the liability of an employer from one in relation to his own employees in case of injury, to one involving the providing of compensation in whole or in part for the employees of others. This conclusion is confirmed by the above quotation from the later case of Commercial Cas. Ins. Co. v. Indus. Acc. Commission.

A number of other points are raised, notably that the portion of the statute which is here attacked, being a tax measure, imposes a tax without regard to its uniformity of application; that it discriminates without jurisdiction among those within the class it purports to tax, and that it lays the entire burden of a tax for the purpose of compensating all workmen engaged in industry in this state who may be injured in a certain manner, upon a very small proportion of the employers of the state. In view of the conclusion we have reached upon the main issue presented, it becomes unnecessary to consider these other questions.

It is our conclusion that those portions of subsection 10 of section 9 of chapter 222 of the Statutes of 1929, which purport to create and enforce a liability upon the part of an employer to provide compensation for workmen not employed by him, are unconstitutional and void.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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132 Cal.App. 398

## ANDERSON et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

## BENJAMIN FRANKLIN BOND & INDEMNITY CORPORATION v. MITCHELL, Commissioner of Insurance.

Civ. 8805, 8821.

District Court of Appeal, Second District, Division 2, California.

June 2, 1933.

**1. Insurance** 🔑**20.**

Statute providing that surety company's right to do business "shall remain unimpaired" pending court review of insurance commissioner's action in suspending its license for violation of rules specified therein, does not grant right to do business pending court review of commissioner's action in suspending license for insolvency (Pol. Code, §§ 596b, 625a, 631, 633d; Code Civ. Proc. § 1056).

**2. Constitutional law** 🔑**296(1).**
**Insurance** 🔑**4.**

Statute prohibiting surety company from doing business until deficiency in assets is paid up, though not providing for notice before commissioner suspends company's license for insolvency, *held* not unconstitutional as denying due process to suspended insolvent company, which had its day in court in mandamus proceeding against commissioner (Code Civ. Proc. § 1056).

Original applications by Walter N. Anderson and another, and by the Benjamin Franklin Bond & Indemnity Corporation, for writs of mandate prayed to be directed to the Superior Court in and for Los Angeles County, Harry H. Archbald, Judge, and to E. Forrest Mitchell, Commissioner of Insurance, to compel acceptance of surety bond.

Writ denied.

Prior opinion, 18 P.(2d) 756.

F. E. Davis, of Hollywood, Edward V. Jones, of Los Angeles, and Milton H. Silverberg, of San Francisco, for petitioners.

Everett W. Mattoon, County Counsel, and Fred M. Cross, Deputy County Counsel, both of Los Angeles, and Frank L. Guerena, of San Francisco, for respondents.

WORKS, Presiding Justice.

In each of these proceedings the writ of mandate is demanded. In each, upon presentation of petition therefor, and ex parte, an alternative writ was issued. The two proceedings may be determined by a single opinion. Throughout the opinion petitioner Benjamin Franklin Bond & Indemnity Corporation will be referred to as the bond company.

In the first proceeding, Civil No. 8805, it is alleged in the petition that the bond company exists for the purpose, "among others, of making, guaranteeing or becoming a surety" on bonds and undertakings, and that it had, prior to July 1, 1932, "fully complied with all the requirements of the law" of California regulating its formation and its right to transact business within the state, and that, since the date mentioned, it has regularly done business therein; that petitioner Anderson has been appointed a notary public and that it is necessary for him to qualify himself for the office by giving bond to be approved by a judge of respondent court; that on July 1, 1932, respondent insurance commissioner issued to the bond company the certificate of authority to do business provided for by law; that on November 9, 1932, the insurance commissioner "undertook to and did issue an order of suspension and revocation of said certificate of authority" and that he gave due publicity thereto; that on the last-mentioned date the bond company commenced in respondent court an action against the insurance commissioner, and five days later filed an amended and supplemental complaint in the action, all "under section 631 of the Political Code * * * for the purpose of cancelling the said action of the Commissioner in issuing, filing and circulating the said order of suspension and revocation." Section 631 of the Political Code reads, so far as it is material here, as follows: "If at any time the insurance commissioner revokes the certificate of authority theretofore granted to any insurance company, * * * any interested person or company may commence an action against the insurance commissioner for the purpose of reviewing the facts and the law pertinent to the controversy and for the purpose of obtaining the relief refused or for canceling the action of the commissioner. In any such action the court shall have full power to investigate all the facts de novo without regard to the determinations previously made by the commissioner."

A copy of the amended and supplemental complaint is made part of the petition in this proceeding, and it is alleged in the petition that due service of the pleading was made upon the insurance commissioner, service of summons and of the complaint theretofore having been made, and that the action is still pending and undetermined. It is also alleged that on November 16, 1932, the bond company issued to petitioner Anderson a bond in the amount required by law, to qualify him as a notary public, that the same was presented to a judge of respondent court for his approval but that the judge refused and still refuses to approve it, and that he "will, unless compelled so to do, now and continuously hereafter 'pending final determination by the courts of such controversy' refuse to approve any and all bonds or undertakings issued by the" bond company. Speaking with reference to the action above mentioned it is alleged in the petition that "all of the allegations in the original and supplemental complaints or petitions on file therein are true; and no notice or publication as required by section 1056 of the Code of Civil Procedure was ever given or made, and the liabilities of the said plaintiff, Benjamin Franklin Bond and Indemnity Corporation have never exceeded and do not now exceed its assets; it has never conducted and does not now conduct its business fraudulently, but is carrying out and always has carried out its contracts in good faith and has been guilty of no act, thing or deed, either as specified in section 596b of the Political Code, or otherwise or at all, that would justify the suspension or revocation of its said certificate of authority; and said plaintiff Benjamin Franklin Bond and Indemnity Corporation has never been cited to show cause why its certificate of authority should not be suspended or revoked either as provided by said section 596b of the Political Code or otherwise or at all." It is further alleged that "the said action of the said Insurance Commissioner in suspending and revoking said Certificate of Authority was taken wholly without notice, citation, publication, justification or excuse whatsoever, but was done and taken extra-judicially and without probable cause and with malicious intent."

It was and is now the theory of the bond company that, because of the action begun by it against the insurance commissioner in respondent court, its right to do business in California has been restored and that, therefore, it is entitled to the mandate of this court, in effect undoing what the commissioner did in issuing the alleged order of suspension and revocation, and to that end requiring respondent court hereafter to approve bonds or undertakings issued by the bond company. This theory is based upon language of section 633d of the Political Code, which, after referring to actions "against the Insurance Commissioner for the purpose of reviewing the facts pertinent to the controversy and for the purpose of obtaining relief or cancelling the act of the Insurance Commissioner," reads: "Pending final determination by the courts of such controversy, the right of the company or other insurer whose license to do business in the State of California has been revoked or suspended, shall remain unimpaired."

To the petition in Civil No. 8805, respondents presented return that the only "order" made by the insurance commissioner, affecting the bond company and derogating from the certificate of authority issued to it by him on July 1, 1932, was in the form of a letter, copy of which was addressed to the county clerk of every county in the state. The body of this widely circulated letter reads: "In pursuance of the provisions of section 625a of the Political Code of the state of California, this is to certify that the certificate of authority to transact in this state the business of fidelity and surety insurance, heretofore granted to Benjamin Franklin Bond and Indemnity Corporation, has been suspended as provided in section 1056 of the Code of Civil Procedure of California." This letter was dated November 10, 1932. Section 625a of the Political Code reads in part as follows: "Whenever the certificate of authority of any such corporation to do business in this state shall for any reason be surrendered, revoked, canceled, or annulled, or whenever the said certificate of any such corporation has been suspended as provided in section one thousand fifty-six of the Code of Civil Procedure of this state * * * the insurance commissioner of this state shall forthwith certify to the county clerk of each county of this state, the name of such corporation, and the date of such surrender, revocation, cancellation, annulment or suspension. * * *"

It is unnecessary here to set down any of the allegations of the petition in Civil No. 8821. The two proceedings are much alike as to questions presented, were set down for hearing together, were so heard, and were briefed together. It is proper to note, however, that in response to allegations in the petition in 8821, somewhat similar to those contained in the petition in 8805, respondent Mitchell, who is not a party respondent in the last-named proceeding, in his answer and return "denies that a purported examination was made by respondent of petitioner's financial condition and affairs, and denies that a purported deficiency was found by respondent; and in this connection respondent alleges that subsequent to July 1, 1932, respondent actually examined the financial condition and affairs of petitioner and found an actual excess of liabilities over assets in the sum of $190,795.09," and he also admits the allegations of a certain paragraph of the petition "except that the deficiency was a purported deficiency, and alleges that the notice by respondent to petitioner to pay up the deficiency in sixty (60) days was given by respondent in accordance with the direction of section 1056 of the Code of Civil Procedure of the state of California."

Upon the return day petitioners offered no evidence whatever. Respondents offered and the court received in evidence a lengthy report, of date October 8, 1932, to the insurance commissioner, signed by one designated as "Principal Examiner" and approved by one styled "Supervising Examiner." This report relates to the financial standing of the bond company, includes a mass of figures, is accompanied by a number of pertinent exhibits, and ends with this conclusion: "On the basis of this examination and of the financial statement herein presented, the company's capital stock was impaired on July 31, 1932, to the extent of at least $190,795.09, and may in fact be impaired to a still greater extent determinable only upon findings with respect to which the foregoing report contains specific reservations."

No mention of any revocation or suspension of authority to do business, strictly and properly so called, is made in section 1056 of the Code of Civil Procedure. However, in both sections 631 and 633d of the Political Code a revocation or suspension of authority is referred to, and it is in connection with the mention in the latter that a suit against the insurance commissioner to test the "controversy" is provided for, although such a suit is also mentioned in section 631. No such suit is suggested in section 1056 of the Code of Civil Procedure. It will be observed, also, that section 625a of the Political Code, the material portion of which is quoted above, draws a distinction between procedure under section 1056 of the Code of Civil Procedure and other procedure authorized by law, this by means of the few lines of the section beginning with the words "or whenever" and ending with the mention of that Code. It will be seen that section 1056 provides for the very course indicated by the report made to the insurance commissioner by his examiners in the present instance. Section 1056 reads in part "that the insurance commissioner shall have the same jurisdiction and powers to examine the affairs of such corporations as he has in other cases; shall require them to file similar statements and issue to them a similar certificate. And whenever the liabilities of any such corporation shall exceed its assets, the insurance commissioner shall require the deficiency to be paid up in sixty days, and if it is not so paid up, then he shall issue a certificate showing the extent of such deficiency, and he shall publish the same once a week for three weeks, in a daily San Francisco paper."

These proceedings are apparently made complex because of the fact that the Legislature has tied together section 1056 of the Code of Civil Procedure, providing for a publication, after the lapsation of sixty days, in a San Francisco newspaper, and section 625a of the Political Code, providing for letters to the county clerks of the state, but this apparent complexity is far from real. This is because the newspaper notice and the letters to the county clerks were intended by the Legislature for the protection of the public. Whether the notice was given is a point which is of no interest to petitioners. The bond company was duly notified to make good the deficiency in its assets, and whether or not the newspaper notice was published is a wholly immaterial matter here. The material situation at the present moment is that the action taken by the insurance commissioner was pursuant to section 1056 of the Code of Civil Procedure, and because of a deficiency in the assets of the bond company, and not under the terms of section 633d of the Political Code, as will hereafter more fully be shown.

Section 633d of the Political Code, a lengthy and complex enactment, prescribes various rules for the guidance of those organizations, among them such as the bond company, which are subject under the law to the jurisdiction of the insurance commissioner. After laying down these rules, and after making provision for investigations by the commissioner for the purpose of ascertaining whether they have been infringed, the section contains this language: "Any insurance company or other insurer wilfully violating or failing to observe and comply with any of the provisions of this section, applicable thereto, shall be guilty of a misdemeanor and punishable by a fine of not exceeding five hundred dollars for each violation thereof, or the insurance commissioner may revoke the license of such company or other insurer for the remainder of the term covered by such license." Following this excerpt comes the provision, already mentioned, for the institution of suits by aggrieved insurance companies for the purpose of procuring a judicial determination as to the correctness of revocations or suspensions of license imposed by the commissioner—as the section puts it, "for the purpose of obtaining relief or canceling the act of the insurance commissioner." It is during the pendency of a suit thus, and by this authority, commenced, that the right of a company to do business "shall remain unimpaired," to state with brevity a portion of the section which has been set forth more specifically in an earlier part of this opinion.

[1] We think the bond company leans upon a broken reed in ascribing the force it does to the language of section 633d of the Political Code to the effect that, pending a determination of a certain suit, the right of such a company to do business in the state "shall remain unimpaired." We think such a suit is authorized by the section merely to test the rightness of action of the insurance commissioner based upon the matters proscribed by section 633d itself. These are matters of infraction of specific inhibitions of the section—specific "don'ts," if it pleases—which companies may not infringe continously and with impunity. When it comes to the inhibitions of section 1056 of the Code of Civil Procedure the situation is totally different. The settlement of the matters there touched upon cannot, and the Legislature intended they should not, await the comparatively tardy determination of a court of justice. When a company suffers its liabilities to exceed its assets, summary action must be somewhere possible in order to halt the immense damage likely to result from its continuance in the business of giving surety bonds. It would be most unwise to allow this danger to be revived by the mere bringing of an action at law. The necessity for the giving and maintenance of binding and enforceable—or realizable—surety bonds goes hand in hand with the due administration of justice itself. No one can say that the power to take summary steps in such matters, reposed in the insurance commissioner by section 1056, is ill-placed or that the Legislature in so placing it acted inadvisedly or unconstitutionally. We should here assert, for we have omitted the remark thus far, that section 1056, provides, in terms, that until an ascertained deficiency in assets is paid up, "such company shall not do business in this state." This one provision stands effectually in opposition to the argument of petitioners. Certainly, to our minds, the bond company, under the facts here, is not protected by the clause in section 633d of the Political Code upon which it so confidently relies.

[2] Much of what we have said above is a repetition of matter contained in an opinion rendered by us in the two proceedings some time ago. At the conclusion of our former opinion we rendered judgment in each proceeding that the alternative writ of mandate be vacated and that a peremptory writ be denied. A petition for a rehearing of both proceedings was presented by petitioners, and it was granted. The rehearing was allowed to the end that we might give due consideration to the claim that section 1056 of the Code of Civil Procedure is unconstitutional because parties situated as is the bond company now are denied due process of law under it. In presenting the claim petitioners rely upon Porter v. Investors' Syndicate, 286 U. S. 461, 52 S. Ct. 617, 76 L. Ed. 1226. We think, however, that the situation exhibited by that case is very different from the one presented here. There a state commissioner, acting administratively and not judicially, had attempted to prescribe certain rules affecting the conduct of businesses which were in progress under permits which had been previously issued by him. The rules were designed to modify the nature of such businesses, and therefore to affect profits, without opportunity to be heard, and a statute of the state forbade a resort to the courts as a corrective after the rules were

announced and before they took effect, but allowed the corrective only after final judgment to be rendered after the harm had been done. It is true that section 1056 of our Code of Civil Procedure does not provide for notice before the taking of such action as was taken by the insurance commissioner in the instance now before us, but the order of suspension issued by him, if his course be considered as an order of suspension, could not take effect under the statute short of sixty days after it was promulgated, for the section provides, and the order required, that the deficiency in the bond company's assets be made good within that period. The fact that the bond company was accorded due process of law under the laws of the state is evident from the institution and progress of the very proceedings which now engross our attention. Petitioners in the two present proceedings invoked the writ of mandate as a means whereby to halt what they considered as the headlong course of the commissioner, and alternative writs of mandate were issued upon ex parte presentations. Upon return to the writs, an issue was presented as to whether the commissioner's action was supported by the evidence adduced before him. As we have already shown, evidence was presented to us upon but one side of this question. This evidence furnished an ample support for the ruling of the commissioner. The bond company has had its day in court, and it has not been denied, but has been fully accorded, due process of law under the statutes of the state.

In each Civil No. 8805 and Civil No. 8821 the alternative writ of mandate is vacated and a peremptory writ is denied.

I concur: STEPHENS, J.

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132 Cal.App. 496

## PEOPLE v. O'BRYAN.

Cr. 2357.

District Court of Appeal, Second District, Division 1, California.

June 9, 1933.

Rehearing Denied June 24, 1933.

Hearing Denied by Supreme Court July 7, 1933.

**1. Incest** ⇨13.

Generally, evidence of complaints of outraged woman is admissible only to corroborate or sustain her testimony.

**2. Incest** ⇨13.

Where evidence of complaint by outraged woman is admissible, only fact of making complaint may be shown.

**3. Incest** ⇨13.

In prosecution of father for attempt to commit incest on daughter, admission of testimony of third person that daughter, who died before trial, had made complaint at police station *held* prejudicial error.

**4. Incest** ⇨13.

In prosecution of father for attempt to commit incest with daughter, admission of evidence of conversation in which father stated he had money for daughter if she would have come back when he called *held* prejudicial error.

Testimony in question was given by a third person who testified that the actual attempt was committed on the evening of August 17th, but that on morning of August 8th he overheard conversation between the father and the daughter at daughter's house, in which father stated that he had $90 for her if she would have come back when he called that night.

**5. Criminal law** ⇨44.

To constitute "attempt," there must be act done with intention of committing crime, tending to but falling short of act intended.

[Ed. Note.—For other definitions of "Attempt," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Albert C. O'Bryan was convicted of an attempt to commit incest, and he appeals.

Reversed.

W. C. Dalzell, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

DESMOND, Justice pro tem.

Defendant was found guilty by a jury of the crime of attempt to commit incest and sentenced to San Quentin state prison. He appeals from the judgment and from an order denying his motion for a new trial.

One John Wilemon testified that, armed with a revolver, he had secreted himself in a bedroom closet at the home of defendant's daughter Anna, a married woman, referred to occasionally hereinafter as Mrs. N———; that he entered the closet upon his observing the defendant come up the walk toward the front porch of Mrs. N———'s home about 7 o'clock of the evening of August 17, 1932, while he and Mrs. N——— were alone in the house, Mrs. N———'s husband having gone to work a few hours previously; that shortly after defendant's arrival at Mrs. N———'s house, this witness surprised him in the act of attempting to have sexual intercourse with Mrs. N———, his own daughter, against her objection, the witness describing in detail the position in which he found the defendant and Mrs. N——— on the bed as he opened the closet door, the revolver grasped in his right hand. The defendant claimed in his testimony that he was the victim of a "frame-up", that his intention in going to the bedroom with his daughter was at her request to examine the wound left in her side by a recent operation, which the daughter complained had not been a complete success, the defendant having had some experience with wounds and operations during a period of twelve to fourteen years while serving as a nurse or orderly in the hospital at Soldiers' Home, Sawtelle. Defendant testified that his daughter, after he had visited her that same afternoon, had followed him to his automobile as he was leaving for home and asked him for $200 to lift the burden of debt weighing upon herself and her husband, suggesting that defendant could easily borrow $1,500; that he said he could not give her the amount desired, but would consider the request for assistance and would return that night, if possible, with some money to meet current pressing needs; that Wilemon was in Mrs. N———'s house at the time he had this conversation by the street curb, but the daughter's husband had gone to work shortly after defendant arrived that afternoon. Defendant further testified that when he returned that same evening he had $9 which he intended to give to his daughter; that the latter persuaded him to stay a little while and when he entered the bedroom for the purpose of examining Mrs. N———'s wound, Wilemon and the daughter together disrobed him, the former taking off his trousers, the latter his shoes, while Wilemon kept him covered with the gun; Wilemon, on the other hand, testifying that when he opened the closet door and pointed the gun at defendant, he was already undressed, except as to underwear and socks. It is undisputed that defendant was kept thus disrobed and under the threat of the revolver for some two or three hours in the bedroom, and that in the meantime two men who were summoned by the daughter by telephone came in and saw him while he was in that condition; that about 10 p. m. defendant was permitted to return to his home, where his wife (not the mother of Mrs. N———) was ill, Mrs. N——— driving him there, defendant sitting in the auto seat between her and Wilemon; that the two men who had been called to her house by Mrs. N——— followed in another auto; that defendant refused to leave his own home when requested to return to the daughter's house by Wilemon, and later at about 11 p. m. was arrested, having gone to bed after the escorting party had left his house. Defendant testified that while he was held en deshabille in the bedroom of his daughter's house, Wilemon demanded that he pay the sum of $1,500 to the daughter and himself, saying he was to receive $500 of that amount; he also testified that his daughter had urged him, after she had talked with Wilemon in the adjoining hallway, to meet the latter's demands, and indicated by his testimony that the daughter was forced to play her part in the drama through some dominance acquired over her previously by Wilemon, the defendant stating that he did not blame his daughter for what was done. It may be noted here that defendant and the mother of Mrs. N——— had been divorced many years previously when Mrs. N——— was a very young child, and that thereafter Mrs. N——— made her home, until her marriage, with her mother, not with defendant. Meantime the mother of Mrs. N——— and the defendant married other spouses. Wilemon swore that when he caught the defendant in flagrante delicto, the latter offered him $1,000 for his freedom and later increased the amount by $500, but all offers were refused, the witness preferring to hold defendant until the daughter's husband should "settle" with him.

Wilemon testified over strenuous and repeated objections that after leaving O'Bryan's home, he drove the daughter to the police station and that the daughter there complained to Officer Whitehead concerning her treatment at the hands of defendant. The record reads as follows:

"Q. By Mr. Ferguson (Deputy Dist. Atty.): You testified that you came out to the car from O'Bryan's home and found Mrs. N——— at the car? A. Yes, sir.

"Q. Did you go anywhere with Mrs. N——— at that time?

"Mr. Dalzell: Just a minute; to that we object as incompetent, irrelevant and immaterial. This is after the offense alleged and anything that is done by Mr. Wilemon or Mr. N——— (undoubtedly this should be Mrs. N———) outside of the presence of the defendant is absolutely immaterial, has nothing to do with any of the issues in this case.

"The Court: Let me have the question and answer again. (Question and answer read by the reporter.)

"The Court: Objection overruled.

"Q. By Mr. Ferguson: Did you, Mr. Wilemon? A. I went to the police station in Sawtelle.

"Q. Directly from O'Bryan's home? A. Yes, sir.

"Q. About what time did you arrive at the police station?

"Mr. Dalzell: May it be understood, your Honor, we are making the same objection to all these questions?

"The Court: Yes. A. Around 11 o'clock; it was something like that.

"Mr. Ferguson: May the answer be repeated by the reporter? (Answer read by the reporter.)

"Q. That station, you say, was the West Los Angeles Police Station? A. Yes, sir.

"Q. Upon arrival there, who did you see? A. I asked for an officer, and I think—

"Q. Just who did you see, Mr. Wilemon? A. I seen Mr. Whitehead and Mr. Davis.

"Q. This is Mr. Whitehead, the man to whom you refer? A. That is one of the gentlemen, yes.

"Q. Now, did you and Anna N——— talk to those two officers at that time?

"Mr. Dalzell: The same objection, your Honor. A. She did.

"The Court: The same ruling.

"Q. By Mr. Ferguson: At that time and place did Anna N——— make a complaint to Mr. Whitehead and Mr. Davis, the two officers you have mentioned?

"Mr. Dalzell: Just a minute. We object to that—

"The Court: You may answer that 'yes' or 'no'.

"Mr. Dalzell: Just a minute.

"A. Yes.

"Mr. Dalzell: I wish to assign counsel's asking of the question as misconduct.

"The Court: Objection overruled.

"Q. By Mr. Ferguson: Was that complaint concerning lewd and lascivious conduct upon her committed by the defendant O'Bryan?

"Mr. Dalzell: To that we object as incompetent, irrelevant and immaterial, and an attempt to get hearsay into the record by an indirect method.

"The Court: You may answer the question 'yes' or 'no'. Objection overruled. A. Yes.

"Mr. Dalzell: We assign the asking of the question as misconduct.

"The Court: You may proceed.

"Q. By Mr. Ferguson: How long did you and Anna N——— remain at the police station? A. Until about 1 o'clock, I should judge. Something like that.

"Q. That would be 1 o'clock on the morning of the 18th? A. In the morning, yes.

"Q. Do you recall now the day of the week the 17th was on? A. The best I can remember it was on a Thursday."

Officer Whitehead's testimony on direct examination was as follows:

"By Mr. Ferguson: Q. Mr. Whitehead, you are a Detective Lieutenant of the Los Angeles City Police Force, are you not? A. I am.

"Q. On the 17th day of August of this year, where were you working? A. At West Los Angeles Division.

"Q. Where is the station of that division located? A. Located at 1653 Perdue Avenue, West Los Angeles.

"Q. On the night of August 17th of this year did you see a person who has been described at this case as Anna N———? A. I did.

"Q. Where were you when you first saw her? A. In the police station.

"Q. Was that the first time, to your knowledge, that you had ever seen the woman? A. Yes, sir.

"Q. What time did you say that was about? A. Approximately 10:30 p. m.

"Q. Was there anyone present with you at the time you first saw Mrs. N———? A. Mr. Wilemon.

"Q. Anyone else? A. Not at the first time. Shortly thereafter I called Mr. Davis, my partner at that time.

"Q. Did Mr. Wilemon and Mrs. N——— come into the police station? A. They did.

"Q. You saw them in one of the rooms of the police station? A. I did.

"Q. At that time and place did Anna N——— make a complaint to you concerning a lascivious attack committed upon her by her father, O'Bryan, the defendant in this case?

"Mr. Dalzell: Just a minute. We object to that as incompetent, irrelevant and immaterial, hearsay, a statement not in the presence of this defendant.

"The Court: Objection overruled. You may answer 'yes' or 'no'. A. Yes, sir.

"Mr. Ferguson: Cross-examine.

"Mr. Dalzell: No questions."

Wilemon was permitted to testify, over defendant's objection, to a conversation between defendant and his daughter in the early morning of August 8th, after the defendant had spent the night at the home of his daughter, occupying the bedroom in which he was apprehended ten days later. Wilemon testified that during the preceding night he and the daughter had occupied the living room of the house, he sleeping on a duofold and Mrs. N——— on a day bed. As to this testimony the record reads as follows:

"Q. By Mr. Ferguson: Did you have any discussion with O'Bryan concerning him staying there that night? A. Yes, I offered to take him home.

"Q. And what did he say? A. He first said that he would let me take him home, and then he backed out; he wouldn't go.

"Q. Did he say anything else? A. He said he would go to bed back there, and he did, went to bed in Mrs. N———'s bedroom.

"Q. What bed did he occupy? A. The bed in the back bedroom.

"Q. That is the same bedroom, of course, that you have previously testified about? A. Yes, sir, it is.

"Q. Did you hear any conversation between O'Bryan and Mrs. N——— the night of the 7th?

"Mr. Dalzell: I object to that as incompetent, irrelevant and immaterial, and that it cannot have any bearing on any issue in this case.

"Mr. Ferguson: I think that it will have, your Honor. I would be glad to state my purpose if we may approach the bench.

"The Court: I think you had better. I do not see the point at the present time. (The following proceedings were had at the Judge's bench, out of the hearing of the jury):

"Mr. Ferguson: I expect the witness to testify in response to the pending question that on the night of the 7th, the defendant in this case offered Anna N——— $90.00 to go back in the bedroom with him, and perhaps additions to that, which additions are matters which would suggest a proffered act of sexual intercourse.

"Mr. Dalzell: I object to that, Mr. Ferguson. The witness could hear what you were saying.

"The Court: Perhaps we should be more careful and not make any further offers of proof up at the bench.

"Mr. Ferguson: Well, I suggest that your Honor ask the witness if he heard what I said, and if he did, I will withdraw the question.

"The Court: Did you hear any part of what we were discussing, Mr. Wilemon?

"The Witness: I was not paying any attention to you, Judge, at all.

"Mr. Dalzell: I insist upon my objection.

"The Court: The objection is overruled. (The following proceedings were had in the presence and hearing of the jury):

"Mr. Ferguson: Will you read the question, Mr. Reporter? (Question read by the reporter as follows: 'Q—Did you hear any conversation between O'Bryan and Mrs. N——— the night of the 7th?') A. Well, I heard a conversation about 6 o'clock in the morning. I didn't hear any during the night.

"Q. Would that be the morning of the 8th? A. Yes, it would be the morning of the 8th.

"Q. Where were you when you heard that conversation? A. I was laying on the duofold.

"Q. Where was Anna N———? A. She was over by the kitchen door, the best I remember. I wouldn't say positively she was by the kitchen door, but she was there in the room.

"Q. And could you tell where the defendant O'Bryan was? A. He was in the front room. I was laying with my face to the wall, and my back towards where they were at.

"Q. How close were they together, that is, O'Bryan and Anna N———, at that time? A. I didn't see them; I just heard them talk.

"Q. And what did you hear on that occasion? A. I heard him tell her that he had $90.00 for her if she would have come back when he called that night. He said, 'You know when I called you back I had $90.00 for you if you come back there, but I guess you were afraid of your cowboy friend.'"

Wilemon had previously testified that he was a rodeo entertainer, and presumably could be classed as a cowboy, although that had not been his sole occupation. After Wilemon had given the testimony last quoted, he was asked under cross-examination if he had ever mentioned this conversation of August 8th between defendant and his daughter in any of the proceedings in this cause, there having been two former trials in which the jury had failed to bring in a verdict. This question the witness was not permitted to answer, the district attorney objecting on the ground of immateriality. Later, the defendant gave his own version of the incident, denying any such conversation, but saying that in the early morning of August 8th he had gone into the living room to get his keys and found Wilemon and Mrs. N——— occupying the same bed. On cross-examination defendant was asked if this occasion was not the first on which he told what he had seen on this morning of August 8th. Objection was made on the ground that the inquiry was incompetent, irrelevant, and immaterial, but the objection was overruled, the defendant required to answer and did so, in the affirmative.

[1-3] Appellant claims on this appeal that all the quoted testimony relative, first, to the complaint, second, to the conversation of August 8th, was improperly admitted. We proceed therefore immediately to a discussion of this contention. We think it may be fairly stated as the general rule that evidence as to the complaints of an outraged woman may be admitted only as corroborating or sustaining her testimony, and that when she does not appear as a witness, even the fact that she made complaint, however recently after the injury, is not admissible. There is an exception to this rule in the case of a child too young to testify, the courts holding that testimony as to the complaint in such case and under certain circumstances may be given by the person to whom complaint is made. People v. Figueroa, 134 Cal. 159, 162, 66 P. 202; People v. Bianchino, 5 Cal. App. 633, 636, 91 P. 112. We know of no other exception. Whether the alleged victim of the assault in this case would have testified that she made complaint to the police officers we shall never know, because she

died before the case first came to trial. Having in mind the fact that testimony of a complaint made as soon as possible after an attack is admissible in the case of an adult victim of rape to demonstrate the fact that the act was committed against her will, and knowing that instead of making an immediate complaint the woman alleged to have been injured in this case did not telephone the police or go to the police station, if at all, until approximately four hours after the time of the offense charged, and then only after defendant had refused to go back to her house at the point of Wilemon's gun there to settle with her husband we seriously doubt whether the admission of her own testimony on these points would have been justified. If it be urged that she is dead and cannot testify, and therefore that the testimony of Wilemon and the police officers was properly admitted as in the case of a child unable to testify, then we must rule against that contention, a compelling reason being furnished by the nature of the inquiries made by the district attorney and the answers thereto. We need only quote here the well-known rules set out in 22 California Jurisprudence page 385: "Particulars of Complaint.—While the fact of complaint is admissible in evidence, the particulars or details thereof may not be shown. Any statement as to the name of the perpetrator by the prosecutrix is, therefore, inadmissible, unless made merely to identify the complaint and not for the purpose of disclosing the guilty party." In addition to cases there cited, see, also, People v. Avila, 50 Cal. App. 228, 230, 194 P. 768, 769, where it is said "the true rule is to admit evidence of the fact of complaint in all cases, and in no case to admit anything more. The evidence, when restricted to this extent, is not hearsay, but in the strictest sense original, evidence. When, however, these limits are exceeded, it becomes hearsay in a very objectionable form. There is every reason, therefore, why it should be admitted to the extent indicated, and none why it should be admitted further." Citing People v. Mayes, 66 Cal. 597, 6 P. 691, 56 Am. Rep. 126; 3 Greenleaf on Evidence, § 213.

[4, 5] As in the Avila Case, where evidence over defendant's objection was adduced from the officer who arrested defendant, we must say here that the court in ruling that such evidence was admissible committed prejudicial error. As to the testimony given by Wilemon over objections of the defendant, regarding a conversation which he says he overheard between defendant and Mrs. N——— on the morning of August 8th, we feel that it was improperly admitted. Conversation is not a crime, nor is it an attempt to commit a crime. To constitute an attempt there must be an act done with the intention of committing a crime tending to but falling short of the act intended. 7 Cal. Jur. p. 875. See discussion of this subject by Field, C. J., in People v. Murray, 14 Cal. 159, where defendant was indicted for an attempt to contract an incestuous marriage. As is said in Ex parte Floyd, 7 Cal. App. 588, 590, 95 P. 175, 176, "Mere soliciting one to commit an act which would constitute a crime, if committed, is not made criminal by our Penal Code."

We are familiar with the rule invoked by respondent to support the admission of the testimony complained of, namely, that evidence of similar offenses between the same parties may be introduced for specific and limited purposes, in prosecutions involving sexual crimes. But neither the events nor conversation of August 7th and the early morning of August 8th constituted an offense of any sort, similar or otherwise. Whether evidence relating to them was introduced at the first or second trial, we do not know, but such evidence, if believed by the jury in this case, of course, worked serious prejudice to the defendant, perhaps just enough to enable this third jury to find defendant guilty. We have read the entire transcript in this case and have considered other points urged by appellant; however, find it unnecessary to discuss them, since on the matters already referred to, his position on this appeal must be sustained.

Judgment and order reversed.

We concur: HOUSER, Acting P. J.; YORK, J.

132 Cal.App. 475

## KECK v. WINGERT et al.

**Civ. 7754.**

District Court of Appeal, Second District, Division 2, California.

June 8, 1933.

**1. Brokers 🔑38(4).**

Evidence in principal's action against broker for secret commission from other party to transaction *held* not to warrant finding that plaintiff employed defendant as agent to sell or lease oil land for stated commission.

**2. Brokers 🔑38(4).**

Evidence in action for secret commission *held* not to warrant finding that plaintiff gave broker options to lease oil lands, and executed leases for smaller cash payment than lessee offered broker in reliance on latter's false representations.

**3. Evidence 🔑596(1).**

Party seeking to establish fact contrary to written evidence must make case with more than usual clearness.

**4. Contracts 🔑99(3).**

Written instrument, unquestionably executed by purported maker, cannot be held false and fraudulent, except on clear and satisfactory evidence.

**5. Appeal and error 🔑110.**

No appeal lies from order denying motion for new trial in civil case (Code Civ. Proc. § 963)

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by Katie Keck against Jeff G. Wingert and another. From a judgment for plaintiff and an order denying defendants' motion for a new trial, defendants appeal.

Appeal from order denying motion for new trial dismissed, and judgment reversed.

Walter F. Haas and Frank F. Oster, both of Los Angeles, for appellants.

W. H. Gregory, Fred H. Luth, and Ames Peterson, all of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Action by plaintiff to recover from defendants an alleged secret commission claimed to have been obtained by them in acting as agents for plaintiff in the leasing of certain prospective oil lands. From a judgment rendered against them defendants have appealed.

The contentions of appellants are many, but we think the material ones may well be summed up and considered as a claim that the findings are not supported by the evidence.

The findings state, in substance, that plaintiff was the owner of certain lands adjacent to the Santa Fé Springs oil field; that defendant Wingert was an attorney and defendant Koon a licensed real estate broker; that Wingert and Koon entered into an agreement, which was in effect at all times mentioned, wherein and whereby Koon agreed to open up and operate a real estate and insurance office, to keep an itemized account of all operations and furnish Wingert with a monthly statement of such operations, and after deducting operating expenses the net profits were to be divided equally between the two; that Wingert on his part was to pay to Koon $150 on the 1st day of each and every month; that plaintiff had no knowledge of such agreement; that Wingert was at all times mentioned in the complaint employed by plaintiff as her attorney; that on or about July 10, 1928, "for the purpose of secretly and without the knowledge of the plaintiff securing the right to sell or lease her property," and for the further purpose of "secretly and without plaintiff's knowledge, deriving a financial benefit through such handling of her property and sharing such financial benefit" with Koon, Wingert introduced the latter to plaintiff and "represented to her that he was a reliable real estate broker and one to whom she should [sic] entrust the handling of said property," and that he (Wingert) would act as her legal adviser in all matters handled by Koon; that relying upon said representations plaintiff employed Koon to represent her "in the matter of any sale or lease" of said property; that she "promised to pay" Koon, "as compensation * * * for any sale or lease thereof" a commission of 5 per cent., and that the latter agreed to accept the same as compensation for his services; that during the months of August, September, and October of 1928 defendants, acting through Koon, represented to plaintiff that it was necessary for her to execute and deliver to Koon various instruments for the purpose of showing to prospective lessees that he was authorized to execute a lease for said property; that, believing such representations to be true and relying thereon, "the plaintiff executed and delivered to said defendant Koon, but only for the purpose aforesaid, various instruments, which said instruments, however, in fact, purported to give to said defendant Koon an option to lease said property for his own use"; that on or about October 3, 1928, "with intent to deceive and defraud" plaintiff, and to enable defendants "secretly to derive a financial benefit at the expense and to the detriment of plaintiff," the defendants, acting through Koon, represented that the latter had secured a lessee for said property, and "falsely and fraudulently represented to plaintiff that the highest and only consideration or amount which said lessee was willing to pay for the use of said property under such lease" was $10,000 cash and other consideration out of the proceeds of the oil produced; that relying upon said false and fraudulent "representations," and "believing the same to be true," she executed two leases of the property, one covering the east half and the other the west half, to one Alfred L. Marsten; that in truth and in fact said Marsten had offered $15,000 cash to said Koon and a certain royalty to be paid out of production; that defendants retained $5,000 thereof for their own use and benefit and paid plaintiff $10,000 only; "that plaintiff has acknowledged her willingness to pay defendants the sum of $750.00 as compensation in full" for the services rendered by them; that plaintiff executed the oil lease option agreement attached to the answer of defendants "upon the representation of the defendants, acting through Koon, that it was necessary for her to execute the same for the purpose of enabling said defendant to show prospective lessees that he was authorized to negotiate a lease of said property on her behalf," and that it was executed "relying upon said representation, and solely for the purpose aforesaid."

The findings were evidently prepared by the court, a copy was sent to counsel for each party, and an order made permitting the filing of an amended complaint to "conform to proof" in accordance with such findings, the allegations thereof to be "deemed denied." Judgment was entered for $4,250 of the alleged secret commission, being the $5,000 paid Koon by Marsten less $750 allowed for compensation.

[1] It is not clear from plaintiff's testimony when the introduction of herself to Koon was made by Wingert, but the testimony of Koon fixes it as of July 10, 1928, and so do the findings. Nor is the service that Koon was to render made any more definite by the evidence of plaintiff. The latter quotes defendant Wingert as saying of Koon at the time of the introduction, "He is a man of considerable experience; I know he will be a man that will treat you fair and handle your property in the right way"; to which she said Koon responded after acknowledging the introduction, that "he thought he could put over a deal for us, or work up a deal that would be satisfactory to us," and that Wingert said "the customary commission was 10%," but that "Mr. Koon had agreed to do this and work it up for 5%." Mr. Wingert admitted that he said to Mrs. Keck, substantially, "that Mr. Koon's compensation would ordinarily be 10%, but on this deal I think he is willing to take 5%," and that thereafter Koon entered into negotiations with respondent. Koon's testimony is to the effect that after the introduction Wingert said that Mrs. Keck "had some property out at Santa Fé Springs" that "she was trying to dispose of," and asked if he would look at it "and try to dispose of it for her"; that respondent asked as to his fee "in case I made a sale of the property, and I told her that real estate code of ethics put a 5% commission on a sale." It will be seen that the only definite statement as to what he was to do for the 5 per cent. commission was to sell the property. This definite testimony as to what was to be done by Koon for the 5 per cent. commission is not controverted. In view of the evidence we fail to see how the finding that "plaintiff employed Koon as her agent * * * and particularly to represent her in the matter of any sale or lease" of said property, and at "a commission of five per cent. of all moneys that might be obtained upon any such sale or lease," can be upheld. Koon interested certain people in paying $1,000 for a three days' option to buy a part of the property and to lease a part of it. The option was not taken up and the $1,000 was forfeited to Mrs. Keck.

[2-4] A new well came in on the Santa Fé Springs field and Koon came to the conclusion that a lease might be made to the advantage of respondent. A written thirty-day option to lease her property was made by Mrs. Keck in favor of Koon, dated August 20, 1928, calling for a cash consideration of $15,000, $25,000 to be paid out of 15 per cent. of the first oil production and a royalty of one-sixth of production, a well to be spudded in within sixty days from date of the lease. With regard to this option respondent testified on direct examination to the following conversation with Koon, evidently after her first reading of it: "Mr. Koon, this looks like a straight option from me to you," to which she stated he replied, "It doesn't mean anything at all except this: these big companies won't allow me to come into their offices unless I have some kind of a paper," the witness adding, "and we had asked him to try to lease the place to a big company." She was then asked, "And you signed the agreement?" to which she answered, "I signed it." The witness then identified another "Oil Lease Option Agreement," dated August 24, 1928, and testified that it was signed by herself and defendant Koon. This instrument was the same as the first, except that it was a ninety-day option instead of thirty days, the cash bonus was $10,000 instead of $15,000 and the well was required to be spudded in within one hundred and twenty days instead of sixty. Both options were introduced as plaintiff's exhibits. With regard to the second option, the attention of plaintiff was called by her attorney to the bonus of $10,000 cash provided for therein, "it appearing there have been some erasures," and she was asked whether or not at the time she signed it "the words ten thousand dollars cash appeared in it," to which she replied: "This is the paper Mr. Koon showed me the evening in Mr. Wingert's office that had been erased, and it was in

figures, and then later it had been erased, or looked as though it had been erased or something. It is in letters now." The witness was then asked: "The question is was that $10,000 or $15,000?" to which she replied, "It was $15,000.00. Q. At the time you first saw it? A. Yes." The court then asked plaintiff "whether the words 'ten thousand dollars' and the figures '$10,000.00' appeared in the document at the time" she signed it. To this the witness answered: "I haven't the duplicate of this—I don't know where—I kept all my papers together, but at the end I came to find out my papers were not dated like this paper was. I didn't have any 24th; but we were holding out for $15,000.00, and the evening we were in Mr. Wingert's office I discovered this had been $15,000.00—according to my memory it was $15,000.00, and I discovered it had been $15,000 and had been erased and put $10,000.00." This evasive answer did not satisfy and Mrs. Keck was again asked if the $10,000 was there at the time she signed the paper; her reply being: "I have nothing to go by except my memory. I know we were holding out for $15,000 and I haven't a duplicate of those papers. The fact that we were claiming and wanting $15,000 and trying to get $15,000, and then when I asked Mr. Koon to let me see this option paper he bet me $100.00 I couldn't produce one like it, and I said to him, 'you know the reason why' "—at which point the witness was interrupted by the question: "You haven't answered the court's question, madam. You can answer it yes or no. In this document to which you have just referred, at the time you signed it, had the figures been changed from $15,000 to $10,000?" After this instruction to the witness to answer the question "Yes" or "No," she replied, "No, sir." Apparently the court was still not satisfied, as the following question was next asked: "What was the amount, so far as those figures were concerned, at the time you signed the document?" to which the plaintiff responded, rather evasively, "As well as I remember they were $15,000.00."

The testimony of Koon is to the effect that, when he first talked to Mrs. Keck, the commission he named and the one to which the conversation related was on the basis of a sale of the property. He then goes on: "But after I went into the deal and this other well out there came in the property got more valuable for leasing. Then I went to her and explained to her that in trying to lease the property I wanted an option to work on, and that I would get my profit out of the other people, and she would know in advance what she was getting out of the property. And she gave me the option of the 20th and I gave it back to her on the 23rd." The witness had previously testified that the commission in leasing prospective oil property was a matter of agreement and was not fixed by the realty board rules. There was no conflict in the evidence as to such statements. Defendant Koon further testified that on his next visit after receiving the option of August 20th, and which was evidently on August 23rd, when he "took it [the option] back to her," he told Mrs. Keck—and there is no conflicting evidence on this point—"that the oil men were kicking on the 60-day drilling clause," and asked her "to give me another option with a 120-day drilling clause in place of the one for 60 days, and she agreed to do so. I went up and had one prepared on the 24th day of August," which "read $15,000 cash and drilling in 120 days." And: "When I went down to Mrs. Keck's on the 24th Mrs. Keck said that the family had decided they would rather take a less cash bonus and get it in the hands of someone who would drill quicker, than to hang out for five or ten thousand dollars more cash bonus and take a chance on someone else proving out the field and drilling close to them; and for that reason they agreed that evening of the 24th before the papers were signed to change it from $15,000 to $10,000." Koon stated that he took both copies of the agreement back to his office and had the stenographer make the change from $15,000 to $10,000, which she did by erasing the former and inserting the latter amount with her typewriter in both copies. The stenographer's testimony corroborates that of defendant Koon in regard to such change. After the change was made, according to his testimony, Koon took both copies, then unsigned, to plaintiff, who read them over and called his attention to the fact that the option period was extended from thirty to ninety days, whereupon he asked her if that was satisfactory and she said it was, that each of them signed both copies, and that he left one with Mrs. Keck.

The evidence shows without dispute that on August 25th plaintiff executed another option to purchase the west six acres of the property mentioned for $20,000 cash and to lease the east four acres thereof for a bonus of $10,000, to be paid out of the first 15 per cent. of the oil produced, good for three days and made as an alternate to the option of August 24th. This was followed by an option covering the whole property, dated October 3, 1928, good for ten days, also made "as an alternate" to the option of August 24th, providing for no cash bonus but for $35,000 to be paid out of the first 15 per cent. of oil produced. Each option in effect grants to L. A. Koon, erroneously designated "optioner," his heirs or assigns, the exclusive right and privilege of leasing the property for the purpose of prospecting or drilling for oil, gas, or other hydrocarbon substances on the terms and within the time stated therein. The option of August 24th, under which it appears the lease was finally made, reads: "It is specifically understood that owner [Katie Keck] is to execute oil lease to optioner

[Koon] or his assigns, at his or their request." It appears that each option, with the exception of that of August 24, was specially designed to fit a deal with particular parties with whom Koon was working, and that he had no success until he met Alfred L. Marsten of San Francisco, about October 3d, and finally concluded negotiations with him. During such negotiations the option of August 24th was shown Marsten, who thereupon, according to Koon's testimony, asked what he (Koon) wanted, to which the latter replied, "$5000.00, 2% overriding and $5000.00 out of oil." Two leases were executed on October 9, 1928, between plaintiff and Marsten, in accordance with the option agreement of August 24th, except that, complying with plaintiff's request, two leases were made instead of one, one covering the east half and the other the west half of her property. No oil was found on the premises so leased, and before the trial date herein the owner of the leases had quitclaimed his rights to plaintiff.

The deposition of Marsten is to the effect that the cash price named in the option shown him was $15,000, and that Koon was to get $5,000 out of oil and a gross overriding royalty of 2 per cent. That he was confused in the amount named in the option agreement is clearly shown from figures prepared by himself at the time and handed to his lawyer with instructions to draw up the lease. Such figures show how the amounts agreed upon between himself and Koon were to be divided. The memo thereof was introduced in evidence by the attorney for Mr. Marsten, and reads as follows:

| | Owner | Koon |
|---|---|---|
| Percentage ................. | 16–2/3% | 2% |
| Cash ...................... | 10,000 | 5,000 |
| Oil ....................... | 25,000 | 5,000 |

The testimony of the attorney corroborated that of Koon as to the instrument reading $10,000 to plaintiff at the time he saw it, and is to the effect that he drew the lease in accordance with such instruction.

The conversation hereinbefore referred to which took place in the office of appellant Wingert, and during which the offer to bet $100 was made by respondent, occurred in the latter part of January or the first part of February of 1929. At the time there were present the defendant Wingert, an associate of his, Mr. Nicholas, Koon, Mrs. Keck, and her attorney, Mr. Luth. With regard to the wager of $100, plaintiff and her attorney testified that it referred to the production of a copy of the option of August 24th, the other witnesses that it went only to the production of an option of that date with the sum $15,000 appearing therein. Mrs. Keck apparently had duplicates of all the other option agreements, but strangely enough the particular one in question was missing. Evidently there is no denial that Koon gave her a copy of the option of August 24th, and there is no denial of the fact that under the lease she signed with Marsten she was only to get $10,000. Respondent rests her contention on the claim that she did not know Koon was to get anything out of the deal except a 5 per cent. commission, which the record shows without dispute she never offered or agreed to pay him at any time, although her sworn complaint alleges that she promised and agreed to pay a commission of 5 per cent. Koon's testimony is to the effect that at the time he took the $10,000 check to respondent in payment of the cash bonus under the Marsten lease, he at the same time exhibited to her his check for $5,000 and told her what he was to get out of the oil produced, and that she said she was "awfully glad" he did that well for himself. This is denied by Mrs. Keck, who testified, however, that she asked Koon two or three days later what he got out of the deal and that he told her, and also that he had given Wingert one-half of it, to which she remarked, "Poor Mr. Wingert, I guess he needed it." No complaint was made by her that she had been deceived or that the $5,000 belonged to her, and there is no showing of the indignant wrath one might expect upon discovering a loss of $5,000 through trickery, as respondent contends.

The evidence shows without dispute that appellant Wingert was seriously ill in a hospital from August 18, 1928, to some time in January of 1929, and knew nothing about the options or the making of the lease until after it was done. Wingert's wife, however, testified that Mrs. Keck called on her on October 11, two days after the negotiations were completed, and gave her some flowers, saying "she was glad Mr. Koon had closed the deal at this time since Mr. Wingert was in the hospital and our expenses must necessarily be very high; she was so glad it was through this deal this money had come to us at this time."

The trial commenced December 3, 1929, and the cause was submitted December 8th. The case was apparently reopened on April 8, 1930, for the purpose of introducing the testimony of two witnesses for defendants, B. J. Bradner, attorney for Mr. Marsten, and Herbert R. MacMillan. We have already alluded to the testimony of Bradner. MacMillan was an oil man with whom Koon was negotiating. He testified that Koon had shown him the option of August 20th on August 23d; that a few days later Koon returned and exhibited the option agreement of August 24th, and at that time the witness noticed that the cash bonus to be paid respondent was $10,000 instead of $15,000, as in the former option; that in the latter part of September or the first of October he went with Koon to call on Mrs. Keck; that the agreement of August 24th was on the table when they were talking; that he told respondent he understood she was to get $10,000 in cash and $25,000 out of oil, and that he was "to pay Mr. Koon $5,000 in cash and $5,000 in oil and a 2% royalty out of oil"; that she said "she was very glad to see Mr. Koon get the money as he had worked hard on the deal." It appears that one of the "sticking points" in the negotiations with MacMillan was a cloud on the title which he (MacMillan) wanted "lifted." In the agreement finally concluded with Marsten that burden was assumed by him. During the conversation above referred to Mrs. Keck's daughter was present. Mrs. Keck denied that MacMillan said he was to pay her $10,000 and Koon $5,000. The daughter, however, was not so positive, stating that "as far as she could recollect" there was nothing said as to that.

We have gone into the details of evidence that might on its face seem conflicting more than we should, but it is deemed important in view of the conclusion that we are forced to make, i. e., that there is no real conflict on material matters. It is clear that Mrs. Keck knew what she was signing at the time she executed the first option agreement; that the agreement was signed voluntarily and without fraud on the part of any one; that thereafter she executed in a similar manner three other options along lines that seemed to fit negotiations being conducted by Koon; that the one of August 25th called for no cash bonus, but for a bonus of $10,000 to be paid out of oil; and that respondent attempted to avoid the effect of such documents, and particularly the one of August 24th, by the statement that Koon told her they did not mean anything except that he needed them to get into the offices of the big companies. There is no ambiguity in the option last referred to, or in any of them, and no room for interpretation of terms and meaning; and we know of no principle that permits one who has executed a document which is clear on its face, with a knowledge of what it means to set it at naught on such evidence as appears in the record of this case. It has been frequently held that oral testimony which rests upon the memory of witnesses is not as trustworthy as written or documentary evidence, and that a party seeking to establish a fact contrary to the written evidence must make out his case with more than usual clearness. Von Dorn v. Crary, 198 App. Div. 931, 189 N. Y. S. 252, 258. "A written instrument unquestionably executed by a person by whom it purports to have been made * * * cannot be properly condemned as false and fraudulent except upon clear and satisfactory evidence." Russell v. Scofield, 134 Wis. 21, 113 N. W. 1094, 1095. The evidence in this case shows no real conflict on material points (White v. Greenwood, 52 Cal. App. 737, 199 P. 1095), and to set aside clear and unambiguous written instruments and stamp the character of a transaction as fraudulent on the evidence presented here would be a miscarriage of justice.

[5] Defendants have also appealed from the order denying their motion for a new trial. There is no such appeal in civil cases. Section 963, Code Civ. Proc.

The appeal from the order denying motion for new trial is dismissed. The judgment is reversed.

We concur: WORKS, P. J.; STEPHENS, J.

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132 Cal.App. 506

## ATKINS et ux. v. BARNUM.

Civ. 7826.

District Court of Appeal, Second District, Division 2, California.

June 9, 1933.

As Amended on Denial of Rehearing July 3, 1933.

**1. Automobiles 🔑245(40).**

Evidence of speed of motor vehicle in excess of permissive limits under statute constitutes prima facie evidence for jury's consideration in determining whether driver exercised care (St. 1923, p. 553, § 113).

**2. Appeal and error 🔑110.**

No appeal lies in civil cases from order denying motion for new trial (Code Civ. Proc. § 963).

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Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Walter Minear Atkins and wife against W. L. Barnum. Judgment for plaintiffs, and defendant appeals from the judgment and from an order denying motion for new trial.

Judgment affirmed, and appeal from order dismissed.

Paul Nourse, of Los Angeles (Forrest A. Betts, of Los Angeles, of counsel), for appellant.

Russell H. Pray, of Long Beach, for respondents.

ARCHBALD, Justice pro tem.

Action by husband and wife to recover damages to the latter resulting from the alleged negligence of defendant. From a judgment in favor of plaintiffs, defendant has appealed.

An automobile driven by defendant north on Linden street in Long Beach collided at the intersection of that thoroughfare and Eighth street with a Ford truck driven by one Eva Bond, who was proceeding easterly on Eighth street, with the result that the truck, struck on the right rear wheel, swung around to the northeast, striking plaintiff Annie Marie Atkins, a pedestrian crossing Eighth street, seriously injuring her.

[1] Appellant does not question the sufficiency of the evidence to support the verdict and judgment, but urges that the court erred in giving an instruction to the effect that exceeding a given speed made a prima facie case of negligence. The instruction complained of reads: "The law of this state does not make the driving of an automobile at any particular rate of speed necessarily unlawful. The law merely provides that any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such speed as to endanger the life, limb or property of any other person. But the law does provide that if a person shall drive at a rate of speed in excess of fifteen miles an hour in traversing an intersection of highways when the driver's view is obstructed, within the meaning of the law as stated in these instructions, such fact shall in itself constitute evidence of a violation of the law. Such fact shall not constitute conclusive evidence but will constitute evidence which must be taken into consideration by the jury along with the other evidence in a case in determining whether or not a person driving a vehicle over an intersection drove such vehicle at a careful and prudent speed and at such a speed as not to endanger the life, limb, or property of other persons. Such fact will constitute prima facie evidence and will be sufficient to show negligence on the part of the driver unless the effect of such evidence be overcome by other satisfactory evidence in the case."

It is appellant's contention that, when the Legislature amended section 22 of the then existing California Vehicle Act in 1923 by changing the expressly prohibitory speed limits of the act as they existed theretofore (Stats. 1919, p. 220, § 22 [a]), to permissive limits, and by adding subdivision (c) in the amended section (Stats. 1923, p. 553, § 113), it changed the rule as to speed in excess of such limits being a violation of law and hence evidence of negligence. This court has recently decided this question adversely to such contention. Thompson v. Dentman, 21 P.(2d) 1009. The act as amended in 1923 (Stats. 1923, p. 553) divided the subject-matter of the former section 22 into three subdivisions, (a), (b), and (c), and numbered it 113. The section as so amended, in effect at the time of the happening of the accident here involved, so far as material reads as follows:

"Sec. 113. *Restrictions as to Speed.* (a) Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person.

"(b) Subject to the provisions of subdivision (a) of this section and except in those instances where a lower speed is specified in this act, it shall be lawful for the driver of a vehicle to drive the same at a speed not exceeding the following: * * *

"2. Fifteen miles an hour in traversing an intersection of highways when the driver's view is obstructed. * * *

"(c) In all charges for a violation of this section, speeds in excess of those set forth in subdivision (b) of this section shall be taken as prima facie but not as conclusive evidence of a violation of this section. * * *"

It is contended that subdivision (c) relates only to criminal charges, and with that contention we agree. In our opinion, however, appellant is confused in his claim. The usual legislative method of regulation is by prohibiting the doing of an act. The express prohibition in this section is in subdivision (a); i. e., "No person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person." That is the prohibited act made an offense under the California Vehicle Act. Any violation of that positive prohibition would not establish a "prima facie" case of negligence. It would be conclusive evidence of negligence. Scragg v. Sallee, 24 Cal. App. 133, 144, 140 P. 706.

By enacting subdivision (b), however, in our opinion the Legislature prohibits traveling at a speed in excess of the limits fixed therein. Under the plain language of such subdivision, traveling at a speed under the limits set is only lawful when done in accordance with the provisions of subdivision (a). By setting a permissive speed, the Legislature has said that traveling at a speed in excess of such limits is not lawful per se. All that is necessary to make a prima facie case of a violation of subdivision (a) (the positive prohibition), is to show that the limits prescribed by (b) have been exceeded. The burden then shifts under (c) to show that as a matter of fact there has been no violation. In other words, such limits were placed there to establish the boundary between the zone in which travel is prima facie lawful and that in which it is prima facie unlawful. Any other construction of the section would make subdivisions (b) and (c) meaningless.

In the instruction given the court has clearly told the jury that exceeding the limits named in itself constitutes "evidence of a violation of the law"; "not conclusive evidence," but evidence to be taken into consideration by the jury in determining "whether or not a person driving a vehicle over an intersection" drove such vehicle "at a careful and prudent speed and at such a speed as not to endanger the life, limb or property of other persons." We are of the opinion that such instruction correctly and clearly states the law. Similar instructions have been upheld many times by the Supreme Court and District Courts of Appeal.

[2] Appellant has also appealed from the order denying his motion for a new trial. No such ground of appeal exists in civil cases. Section 963, Code Civ. Proc.

The appeal from the order denying motion for new trial is dismissed. Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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## ANSELMO et al. v. SEBASTIANI et al.*

Civ. 4880.

District Court of Appeal, Third District, California.

May 31, 1933.

Rehearing Denied June 30, 1933.

Hearing Granted by Supreme Court July 28, 1933.

**1. Mechanics' liens 🔑93.**

In action to foreclose mechanic's lien, whether building was adequate to serve purposes for which built *held* immaterial, where it was erected according to plans and specifications furnished by lessee having contract to purchase.

**2. Pleading 🔑126.**

In action to foreclose mechanic's lien for erecting building, denial that all land described in lien was necessary for use of such building raised no issue (Code Civ. Proc. § 1185).

> The complaint alleged in substance that all of 8-acre tract was required for reasonable and convenient use of preserving building constructed for use in connection with winery and fruit juice factory. The answer recited: "Deny that all of the real property described in said lien * * * is necessary to, or is required for the use of the preserving building alleged to have been constructed by said plaintiffs, * * * and that the building constructed by plaintiff is a small building and covers only a small fractional portion of one acre, and that the remainder of said real property is in noways connected with, or an adjunct to said building."

**3. Appeal and error 🔑983(3).**
**Mechanics' liens 🔑291(6).**

Area to be included in order of sale on foreclosure of lien for erection of building is fact question determinable largely within trial court's discretion, which will not be disturbed unless abused (Code Civ. Proc. § 1185).

**4. Mechanics' liens 🔑182.**

Determination of area to be covered by mechanic's lien for erection of building must take into consideration intended use for which building is erected (Code Civ. Proc. § 1185).

> If building is erected for use as a separate and distinct unit, area of land required for its convenient use may properly be limited to an area necessary for ingress and egress, but, if its use is dependent on, and connected with, uses made of other buildings or uses made of other portions of tract on which it is situated, then, if all the larger tract is required for "the necessary and convenient use" of building involved, such larger tract may properly be included in order of sale.

**5. Mechanics' liens 🔑281(1).**

Evidence sustained finding that entire 8-acre tract on which preserving building erected for use in connection with other buildings used in winery was necessary "for convenient use and occupation" of preserving building, within statute (Code Civ. Proc. § 1185).

> There is a difference between the "necessary and convenient use" within Code Civ. Proc. § 1185, which includes the purpose for which the building is erected, and a distinct and separate use which may prove profitable in the operation or use of the building on which the lien is sought to be foreclosed. The fact that the use might prove profitable cannot be considered unless it is a "necessary and convenient use" and one contemplated in the erection of the building.
>
> [Ed. Note.—For other definitions of "Convenient Use" and "Necessary," see Words & Phrases.]

**6. Mechanics' liens 🔑161(4).**

In action to foreclose mechanic's lien for erecting building under cost plus contract, interest *held* properly allowed from date of filing of complaint, though time of payment was not mentioned in contract (Civ. Code, § 3287).

> Record showed that, shortly after filing of complaint, plaintiffs, mechanic lienors, furnished to defendants a bill of particulars showing every item of cost incurred in erection of building, and, since amount of indebtedness or amount owing could be calculated and determined from statement rendered, and statement was found to be true and correct, it was a matter of mere calculation within statute, accuracy of bill of particulars rendered by plaintiffs not being questioned at trial.

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*For subsequent opinion see 26 P.2d 1.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Angelo Anselmo and another against Samuel Sebastiani and others. From an adverse judgment, named defendant and a certain other defendant appeal.

Affirmed.

Charles M. Jones, of Stockton, and Albert Picard, of San Francisco, for appellants.

Glenn West, of Lodi, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiffs had judgment against appellants for the foreclosure of a lien for and on account of the erection by the plaintiffs of a certain building upon a tract of land belonging to the defendants situate in the town of Woodbridge, county of San Joaquin. From this judgment the defendants Sebastiani and Woodbridge Vineyard Association prosecute this appeal.

It appears from the record that on or about the 6th day of December, 1929, the defendant Salvatore Castorina entered into an agreement with the plaintiffs to erect a certain structure known as a "preserving building," to be situate on the premises belonging to the appellants. The building was erected on a portion of the premises which had been leased by the owners to Salvatore Castorina. It appears that at the time mentioned the appellant Sebastiani had a contract for the purchase of the premises, from the appellant Woodbridge Vineyard Association, and on January 28, 1930, the premises involved herein were conveyed by the Woodbridge Vineyard Association to the appellant Samuel Sebastiani. The premises involved are described as two parcels of land, one containing 5.49 acres and the other as containing 2.5 acres. The parcels, however, are contiguous, and really constitute one tract, and at all the times herein mentioned was known as the "Woodbridge Winery." The premises upon which the preserving building was erected contained five other buildings, all used in connection with the winery. The building erected by the plaintiffs was to be used as a part of the plant. It was not, and is not, in addition to any building theretofore erected and being used by the Woodbridge Winery, but was a building designed to be used in connection therewith in the storing and preservation of pumice, until such time as the pumice might be used in the manufacture of alcohol and such other by-products as might be obtained therefrom. The pumice to be stored in the preserving building was the refuse of grapes, such as seeds and skins, after the juices had been extracted therefrom in the process of making grape juice and wine, carried on in the other buildings, the pumice then being conveyed from the building just referred to and stored in the building, and to be stored in the building erected by the plaintiffs known as the preserving building.

The contract for the building was oral, and was upon a cost plus basis, to wit: That the plaintiffs were to furnish all the material, labor, etc., erect the building according to plans and specifications furnished by an architect, and were to receive as compensation 10 per cent. in addition to the cost.

After the completion of the building, payment not having been made therefor, the plaintiffs filed a lien in which it is set forth that the building cost the sum of $4,527.80, plus 10 per cent. agreed to be paid to the plaintiffs for erecting the building, making a total sum of $4,980.58. Not having received payment, this action was begun for the foreclosure of the lien filed by the plaintiffs. Judgment went for the plaintiffs for the full amount of the lien plus 10 per cent., as just stated, together with interest from the date of the beginning of the action, less the sum of $500 paid on account.

Upon this action the appellants contend that the building was not completed substantially according to the plans and specifications, and that the building was useless for the purposes for which it was constructed, etc.; that the area of land decreed to be sold was far in excess of the land containing a convenient space about the building required for its convenient use and occupation.

It is further contended that the court was in error in allowing interest from the 18th day of March, 1930, the date of beginning of the action, and that the interest should have been allowed only from the date of the entry of judgment.

[1] The court found, upon conflicting evidence, that the building was erected according to the plans and specifications. Whether the building erected according to the plans and specifications was or was not, or is or is not, adequate to serve the purposes for which it was built, is immaterial. The defendant Castorina furnished the plans and specifications, and directed the modifications thereof. The plaintiffs, as found by the court, constructed a building, as we have just stated, according to the plans and specifications. It would serve no useful purpose to review the conflicting testimony relative to certain alleged defects, and it suffices to state that a review of the testimony shows that the findings of the court are amply supported. The testimony is not set out in the briefs, but reference is made to the transcript which we have examined.

[2] The real controversy presented by the appellants relates to the area of land ordered sold, and the allowance of interest. The complaint, after describing the land upon which the buildings to which we have referred are

situate, and the erection of the preserving building, contains the following allegation: "That all of said land is required for the reasonable and convenient use of said improvements and addition to said building and structure, to-wit: The addition to said winery and fruit juice factory."

The answer referring to the parcels of land necessary and convenient for the use of the structure erected by the plaintiffs reads as follows: "Deny that all of the real property described in said lien is covered by, or is necessary to, or is required for the use of the preserving building alleged to have been constructed by said plaintiffs, and in that behalf allege that the tract of land described in said lien contains approximately 8 acres, and that the building constructed by plaintiff is a small building and covers only a small fractional portion of one acre, and that the remainder of said real property is in noways connected with, or an adjunct to said building." This denial, of course, is insufficient to raise an issue, and would preclude our holding that the finding of the court that all of the property was necessary to the convenient use and occupation of the building erected by the plaintiffs, were there no testimony in the record to support the finding.

In the case of California Corrugated Culvert Co., a Corporation, v. Stewart, 215 Cal. 120, on page 123, 8 P.(2d) 1013, we find the following: "In the present case the issue was tendered by the allegation in the complaint that 'the whole of said real property is necessary for the convenient use and occupation of said barn and grain elevator.' The only plea in the answer with reference to the foregoing allegation is as follows: 'Denies that the whole of said real property is necessary for the convenient use and/or occupation of the barn and/or grain elevator.' The denial in this form concedes the truth of the allegation. [Citing a number of cases.] The allegation of the complaint must be deemed admitted, and it was not necessary to find on the fact so admitted. [Citing additional authority.] If the court had found the fact contrary to the admission in the pleading, the finding would be disregarded. [Citing Bradbury v. Cronise, 46 Cal. 287.]"

Without deciding this question upon the failure of the appellants to deny the allegation of the complaint, we will set forth the testimony showing the connection and the use of the building and intended use of the building erected by the plaintiffs, as it relates to the other buildings situate and used on the same tract of land, being testimony of John T. Hunt, witness for plaintiff:

"Q. You have looked over this property, have you? A. Yes, sir.

"Q. Approximately 8 acres that is called for in the description set out in the claim of lien? A. Yes, sir.

"Q. And the buildings are on that property all told? A. Well, there is a big place where they keep all the wine vats, a winery in general.

"Q. And then there are office buildings? A. Yes, sir. A still house and the sherry house and this pulp house.

"Q. And there are roadways into the winery and out? A. Yes, sir; there would have to be to get around those buildings.

"Q. And also a spur-track? A. Yes, sir.

"Q. And this preserving house which was built on these plans and specifications, which you and Anselmo built, is situated right next to the winery and the other buildings? A. Yes, right where they crush the grapes, within 16 or 20 feet.

"Q. How was it used in connection with the winery? A. You mean what they use the pumice for?

"Q. What is its connection with the rest of the building? A. In order to preserve the pumice after the juice is taken out of the grapes.

"Q. That is taken out of the grapes in the winery part? A. Yes, sir, and then this pumice is conveyed over a distance of about 15 or 20 feet and then dropped into this preserving house.

"Q. That is the house that you and Anselmo constructed? A. Yes.

"Q. How is it conveyed over? A. It has a little conveyor there.

"Q. Kind of an endless belt? A. And chain.

"Q. Do the winery and the preserving house use the same spur track? A. They would have to.

"Q. And the same offices? A. Yes.

"Q. And the same roadways where the trucks drive in there? A. Yes, sir.

"Q. Now, these buildings and improvements which you have mentioned, including the winery, office buildings and preserving house building and all other improvements which you have mentioned, practically cover the entire 8 acres? A. Yes, sir, the entire 8 acres.

"Q. Also a part of the 8 acres there used for dumps, pumice piles? A. Yes, sir; instead of it being put out like that, it is put into this house."

The ground floor of the preserving house was approximately 26x63 feet in area. We do not find any statement of the height of the building. From the testimony which we have quoted it is clear that the preserving building was intended for use in connection with the other buildings constituting the plant known as the "Woodbridge Winery," that the roadways, spur tracks, and drives referred to were and are all necessary for the use of the preserving building, and that at least a portion of the unoccupied tract of land described in the complaint was and is necessary for the piling of pumice and refuse matter after the alcoholic content and other by-products should be extracted therefrom. The pumice out of which the alcohol and by-products were to be extracted must come from other portions of the plant. The only testimony offered by the appellants on this question was that the preserving building stood at a distance of some 25 or 30 feet from the nearest structure on said tract of land. Not one word is offered concerning what might be necessary or convenient for its use, or as to any use to which said building might be devoted other than it was intended for preserving purposes, as we have stated. The preserving house, standing alone under the conditions disclosed, would have neither use nor salable value.

Section 1185, Code of Civil Procedure, authorizes the court to include in the order of sale in foreclosing a lien, not only the land upon which the building or structure is erected, but also a convenient space about the same, or so much as may be required for the convenient use and occupation thereof. We may here state that the record shows the building was erected with the knowledge of the owner of the premises, and that no limiting notice as to responsibility was ever posted on the premises or filed as required by law. The lease under which the defendant Salvatore entered upon the premises contemplated the erection of the building involved in this action.

[3, 4] Determining the area of land that shall be included in the order of sale upon the foreclosure of a lien for the erection of a building is largely within the discretion of the trial court, and, unless abused, will not be disturbed. The determination of this area must take into consideration the intended use for which the building is erected. If erected for the purposes of use as a separate and distinct unit, then the area of land required for its convenient use may properly be limited only to an area necessary for ingress and egress, but, if its use is dependent upon and connected with the uses made of other buildings or the uses made of other portions of the tract of land upon which it is situate, then, if all of the larger tract is required for the "necessary and convenient use" of the building involved, such larger tract may properly be included in the order of sale.

In the case of California Corrugated Culvert Co. v. Stewart, supra, the facts show the erection of a barn and the construction of an elevator to store a crop of rice that might be grown upon a tract of land embracing 729 acres. The trial court ordered a sale of the entire 729 acres. Subsequent thereto it made an order limiting the number of acres that should be sold. From this subsequent order the plaintiffs appealed. The last order was vacated and the cause remanded to the trial court to do one of two things: First, enter judgment for the plaintiffs and the findings of fact and conclusions of law as originally made; or, second, to again proceed and determine the extent of the area required for the convenient use and occupation of the barn and elevator. The cause just referred to was, as here, tried upon the theory that the whole of the farm was necessary for the convenient use and occupation of the buildings. The elevator could not be used for conveying rice into the barn for storage purposes unless there was rice raised for that purpose; nor could the barn be used for the storage of rice without the rice first being produced. In other words, the holding of the court in such cases should find a basis in the uses and purposes for which the building is erected, in determining the area of land necessary and convenient for its use. A residence might only require sufficient land to afford ingress and egress, which would not be a rule applicable to buildings intended for other uses.

The arguments of the appellants herein appear to be based upon the theory that all the land that can be included in an order of sale is only such as may be required for ingress and egress. As stated, the land required is a question of fact to be determined by the trial court. California Corrugated Culvert Co. v. Stewart, supra.

[5] As stated in 17 California Jurisprudence, 154: "The land about a building, required for its convenient use and occupation, is such as is necessary to the enjoyment of the building for the purpose of its construction. Accordingly, the use to which a building is to be put may determine the land necessary to its convenient use and occupation, but this does not include adjacent areas or structures necessary merely to create business or custom or furnish supplies for the enterprise conducted in the building." The purpose for which the building in question was erected is intimately and directly connected with the operations carried on in the adjacent buildings as to become an essential part and parcel of the plant known as the "Woodbridge Winery." The work carried on in the preserving house could not be carried on disconnected with the processes conducted in the other buildings. Nor could the complete process of extracting all of the commercial elements from the grapes crushed be completed in the adjacent buildings without the use of the preserving house.

Appellants call our attention to the case of Gregg v. H. & M. Drilling Co., a Corporation, et al., 92 Cal. App. 189, 267 P. 903, where it was sought to enforce a lien upon a larger tract of land for the value of gravel placed upon a short strip of roadway leading thereto. The conclusion was that the strip of land could be used as a roadway, disconnected with the larger tract of land. In that case reference is first made to Cowan v. Griffith, 108 Cal. 244, 41 P. 42, 49 Am. St. Rep. 82, where an attempt was made to establish a mechanic's lien on a forty-acre tract of land upon which a residence had been constructed. Likewise, reference is made to the case of Tunis v. Lakeport, etc., Ass'n, 98 Cal. 285, 33 P. 63, 447, where an attempt was made to foreclose a mechanic's lien on a sixty-acre tract of ground upon which an hotel had been erected.

In the case of Cowan v. Griffith, supra, the facts show that the residence could be occupied and used conveniently without any reference to the forty-acre tract. Likewise, in the case of Tunis v. Lakeport, etc., Ass'n, supra, the facts show that the hotel could be used irrespective of the race track, corrals, etc., situate upon the sixty-acre tract of land. There is a difference between the "necessary and convenient use," which includes the purposes for which the building is erected, and a distinct and separate use which may prove profitable in the operation or use of the building on which the lien is sought to be foreclosed. The fact that the use might prove profitable cannot be considered, unless it is a "necessary and convenient use," and one contemplated in the erection of the building.

Thus, as epitomized in 18 Ruling Case Law, p. 948: "Generally, however, a mechanic's lien is enforceable against the land on which the building or improvement stands and also the land thereabout, used with it, and necessarily or reasonably convenient to its use. As illustrating the different applications of this rule, it has been held in one case, under a statute extending a mechanic's lien on a building to the land necessary for the convenient use and occupation thereof, that the court cannot set aside forty acres with a dwelling as necessary for its convenient use, the court saying that the statute does not contemplate that the dwelling shall include lands sufficient to support the owner while living therein, while on the other hand, and on the idea that a farm is a unit and that it is immaterial whether it is large or small, a lien has been granted for farm buildings erected on a contiguous tract of 350 acres made up of several farms owned originally by different owners, where it was the intention to use the whole of the land with such buildings."

The question of use and purpose for which the improvement is intended, and therefore the area of land that should be included in the order of sale; is well illustrated in the case of Western Well Works, Inc., v. California Farms Co., 60 Cal. App. 749, 214 P. 491, where it was held that a small circle of land surrounding a well capable of furnishing 2,000 gallons per minute did not meet the requirements of "necessary and convenient use," and the whole tract of land upon which the well was dug, and for which the well had a capacity of furnishing sufficient water, should be included within the order of sale. A mere showing that the nearest building to the structure erected by the plaintiffs is 25 or 30 feet away has no bearing upon the question of "necessary and convenient use" or the purposes for which the structure was erected. That the purposes and intended use for which the building is erected or improvement made is to be considered in determining the tract of land necessary and convenient for its use is fully sustained by the extended notes appended to the case of Wirsing v. Pennsylvania Hotel & Sanitarium, 226 Pa. 234, 75 A. 259, as reported in 26 L. R. A. (N. S.) 831.

[6] Was it error for the court to allow interest from the date of the filing of the complaint? The record shows that, shortly after the filing of the complaint, the plaintiffs furnished to the defendants a bill of particulars showing every item of cost incurred in the erection of the preserving building. Section 3287, Civil Code, reads: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day," etc. The contention is made that the amount which the plaintiffs are entitled to recover in this case is unliquidated, and therefore interest should not be allowed until the entry of judgment. This contention, however, is not determinative of the question of interest. If the amount of the indebtedness or the amount owing can be calculated and determined from the statements rendered by the plaintiffs to the defendants, and that statement is found to be true and correct, it is a matter of mere calculation. The court in the instant case found the costs just as set forth by the plaintiffs in their bill of particulars furnished the appellants.

In 8 California Jurisprudence, 791, we find the following: "The fact that proof of the market value of goods is required to establish the amount of a claim does not render it incapable of being made certain by calculation, so as to prevent the allowance of interest under section 3287 of the Civil Code. Nor will the proof of two market values, as of goods if uninjured, and goods as injured, do so. The fact that the amount due depends upon whether the plaintiff had a third or a half interest in a partnership, but is certain in either case, does not render the amount unliquidable. And the existence of a setoff or counterclaim does not create such an uncertainty as will prevent the allowance of interest, even though it be itself unliquidated. A dispute as to the price agreed, or as to the amount of work done or its cost will not prevent the allowance of interest. * * * Where the data necessary to determine the amount due are supplied to the debtor by an invoice or statement, he will be charged with interest for failure to pay."

Again, in 15 Ruling Case Law, 7, the rule is thus stated: "While, as a general rule, interest is not allowable on unliquidated demands, yet it has frequently been held that interest may be allowed as damages, even in the case of unliquidated demands, where the latter are capable of ascertainment by calculation or where they may be determined by reference to well-established market values, together with computation."

It does not appear that the accuracy of the bill of particulars rendered by the plaintiffs to the appellants was questioned at the trial of this action. It was urged that certain work was not done, and that the work done was not of the value set forth in the bill of particulars, and a counterclaim was set up in the answer. All of these matters were found against the contention of the appellants. This brings the circumstances within the case of McCowen v. Pew, 18 Cal. App. 482, 123 P. 354, where, under similar circumstances, interest was allowed.

The action in this case is not based wholly upon quantum meruit; it is based primarily upon the contract to pay the cost of the building, plus 10 per cent. The value of the building after its construction, or its adaptability to the uses and purposes intended, is immaterial. The item of costs being presented, the amount thereof was easily ascertained. It appears that there was a payment of the sum of $500 made to the plaintiffs after the completion of the building, and some promises made as to the payment of the amount still remaining due to the plaintiffs. This we need not consider, further than to state that the court allowed a credit of $500 on the amount claimed by the plaintiffs. There is a difference between the amount claimed by the plaintiffs and the amount allowed by the court in the sum of $23.08. Appellants urge that this shows appellants' claim to be unliquidated and incapable of ascertainment by calculation. This sum is so negligible in quantity that we pass it by without further mention.

The case of Combs v. Eberhard, 120 Cal. App. 25, 7 P.(2d) 338, may be distinguished from the case at bar. In that case interest was allowed on account of claims and liens filed against the property belonging to the defendant, other than for work and labor and materials furnished by the contractor under the contract, and involved the question of quantum meruit only.

Nor is the case of Kimes v. Davidson Investment Co., 101 Cal. App. 382, 281 P. 639, controlling here. In the case just mentioned the defendant had breached its contract, and the plaintiff was suing for the value of the work and labor performed. It was clearly a case of quantum meruit. The amount due could not be calculated nor ascertained until the judgment of the court was entered.

It may be considered that time of payment was not mentioned in the contract, but under the rule enunciated in 17 California Jurisprudence, p. 220, the time would run from the date of filing the complaint, which date was taken by the trial court as the time from which interest should be calculated.

Nor do we think that the case of Mabrey v. McCormick, 205 Cal. 667, 272 P. 289, precludes the allowance of interest to the plaintiffs in this action. The contract in that case was not upon a cost-plus basis, as is shown by the following statement: "Plaintiffs claim interest from the date of the third bill rendered by them, at which time they state the amount due became certain (section 3287, Civ. Code). Had the court found for them, this contention would be sound. Here, however, the record shows no refusal of defendants to settle with plaintiffs under the true contract. Defendants being ready and willing to settle thereunder, were not at fault, because plaintiffs not only abandoned the work, but insisted on recovery upon a different basis. In other words, by reason of the action of plaintiffs, the amount due was unliquidated until determined by judgment of the court; hence interest prior to judgment, as damages, was not allowable" —citing cases. The opposite is the truth in the instant case as found by the trial court. We conclude that interest was properly allowed.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

218 Cal. 352

## RECHT v. STATE BAR OF CALIFORNIA.

L. A. 13993.

Supreme Court of California.

June 21, 1933.

**1. Attorney and client 🔑53(2).**

Evidence *held* to warrant findings of state bar committee that attorney solicited and obtained employment by investors in investment trust, without revealing his professional association therewith, and exacted exorbitant fee for recovering amount of their investments, though he knew trust intended to return money.

**2. Attorney and client 🔑58.**

Attorney, soliciting and obtaining employment by investors in investment trust, without revealing his professional association therewith, and exacting exorbitant fees for recovering amount of their investments, which he knew trust intended to return, *held* properly suspended for three months, instead of being disbarred, in view of his youth and brief practice.

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In Bank.

Proceeding by Alan Recht against the State Bar of California to review a recommendation of the Board of Bar Governors that petitioner be suspended from the practice of law for three months.

Petitioner ordered suspended from practice for three months.

Clyde P. Harrell, Jr., of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, and A. B. Bianchi, of San Francisco, for respondent.

IRA F. THOMPSON, Justice.

The proceeding is one to review the recommendation of the board of bar governors of the state of California to the effect that petitioner be suspended from the practice of law for the period of three months. The local administrative committee No. 9 made its recommendation that petitioner be given a private reprimand, which conclusion was arrived at after the committee had made its finding that the accused attorney, while representing the Pacific Investment Trust and gaining information of a confidential character, had solicited employment from two women investors therein, without revealing to them his professional association with the trust, and had secured them to sign contracts with him by which he would and actually did exact an exorbitant and unconscionable fee for demanding and receiving from the trust the amount of their investment; and had falsely represented to them, for the purpose of securing them to sign the agreements, that he had been investigating the trust and had tied up the money; and that he and no other attorney could make the recovery for them, although he knew at the time that the Pacific Investment Trust intended to turn the money back to them and that such conduct on the part of petitioner was dishonest and oppressive.

The petitioner claims that these findings are unsupported by the evidence and in his petition recites his version of the affair.

[1] We cannot but conclude, in view of the rule which requires a petitioner for a writ of review to "fairly state all the material evidence relative to the point," when his claim is founded upon the ground that the testimony is insufficient (204 Cal. XCV), that petitioner has not dealt fairly or frankly with the court. In view of his petition, we have read the entire transcript and even partisanship and zeal should not bind one to the fact that every finding of the committee is amply warranted. In fact, the findings fail to reveal completely the lack of appreciation and understanding by petitioner of the ideals and aspirations which should animate and the conduct which should characterize a member of the profession of the law. It is only when we review the evidence itself that we have a full and complete comprehension of petitioner's activities. Corroborating the testimony to the effect that he knew all he had to do in order to recover the money for Mrs. Liggins, one of the clients, was to make a demand, is his own statement that he told her to come back to his office the next or the succeeding day and he would have the money. And yet he exacted from her in the manner outlined a contract for one-third thereof. But worse than that was his conduct with the other client. He was not satisfied with one-third of the $1,500. According to the testimony of Mrs. Rudd's son, petitioner asserted that he had been compelled to lay out some expense money in connection with the negotiations and, for that reason, retained $600. He says he was not employed by the Pacific Investment Trust, but by a man named Shostak. Letters sent out by petitioner, however, establish conclusively that he was endeavoring to collect money for the concern and not for Shostak, who, it may be said, became the manager of the trust at about the same time petitioner was employed. There is a patent endeavor by petitioner to shift the blame onto the shoulders of Shostak. We are not inclined to detail the testimony of the two. It is sufficient to say that petitioner's cause is not benefited by a comparison of their statements. Some time was devoted in the oral argument to efforts made by petitioner to restore to the parties some of the exorbitant and excessive fee. When we read the proceedings, however, it appears that such a thought never entered his mind until the local administration committee, in an apparent

effort to do something for the two women who had thus been oppressed, suggested to petitioner and his counsel that their recommendation might be affected by some effort in this direction. For aught that appears, however, no restitution has been made.

[2] Should we approve the recommendation of the board of governors? Considerable emphasis has been laid upon the fact that petitioner had only been practicing four years and was only 27 years of age. This, however, is not a case of the mere violation of the rule against the solicitation of business, nor is it so much an infringement of the canon against representing conflicting interest, as it is a violation of the very fundamentals of common honesty and fair dealing. The license to practice is not a license to mulct the unfortunate, but to assist in righting their wrongs, so far as humanly possible. It is doubtful, in view of the record in this case, if petitioner can thoroughly appreciate the full significance of the foregoing statement in a period of three months. If he were older in the profession, we should have no doubt concerning his disbarment. As it is, the least disciplinary punishment, under the circumstances, was recommended by the board of bar governors.

It is, therefore, ordered that petitioner be suspended from the practice of law in all the courts of this state for a period of three months, said suspension to begin with the date of the filing of this order.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.; PRESTON, J.; SHENK, J.

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218 Cal. 325

## SMITH v. CALIFORNIA HIGHWAY INDEMNITY EXCHANGE.

S. F. 14865.

Supreme Court of California.
June 16, 1933.
Rehearing Denied July 14, 1933.

**1. Insurance** 🔑**435.**

Where neither jitney bus liability policy nor ordinance specified route of jitney bus, accident occurring while insured was on way from home in city to bus route *held* covered by policy.

> Policy indemnified subscriber against loss on account of damages for injuries sustained by any person resulting from use or maintenance of described automobile wherever it might be in service of subscriber, and indorsement provided that automobile was to be operated in service of subscriber as jitney bus within limits of city and not otherwise, and that policy would not cover any accident that might occur while automobile was being operated for any other purpose and at any other time or place than therein stated.

**2. Insurance** 🔑**535.**

Failure of one struck by jitney bus to give owner's insurer's attorney in fact notice did not bar injured person's action against insurer, where policy required no preliminary notice to insurer.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Vina Smith against the California Highway Indemnity Exchange. From a judgment for plaintiff, defendant appeals.

Affirmed.

Prior opinion, 17 P.(2d) 1005.

John Ralph Wilson and Carl E. Day, both of San Francisco, for appellant.

Daniel A. Ryan, Thomas C. Ryan, and George F. Snyder, all of San Francisco, for respondent.

SHENK, Justice.

On August 30, 1924, Ray H. Davis was the owner of a Chandler automobile which he operated as a jitney bus in the city and county of San Francisco. In operating the car on that day he injured the plaintiff, whose name was then Vina Nicol. She sued Davis alone and recovered a judgment for damages. On appeal, the judgment was affirmed. Nicol v. Davis, 107 Cal. App. 26, 290 P. 114. The judgment remained unsatisfied, and the plaintiff brought this action against Davis' insurance carrier, the defendant herein. At the close of all the evidence, the court instructed the jury to return a verdict for the plaintiff; hence this appeal.

[1] The first question presented is whether the accident was one covered by the insurance policy. Davis was operating his jitney bus on the "29th and Mission" route, which extended from the ferry at the foot of Market street to Valencia street, thence to Twenty-Ninth and Mission. He resided at 311 Jersey street, which is about five blocks from Twenty-Ninth and Mission streets. On the afternoon of the accident he had returned to his home for the purpose of taking a rest, in preparation for his night run. He parked his car in front of his home, on a grade. After his rest, he entered his car, released the brake, and backed down grade to the corner of Noe street, where he struck the plaintiff. It is contended by the defendant that the streets from Davis' home

to Twenty-Ninth and Mission streets were not on the route over which he was authorized to conduct the jitney bus, and therefore that the accident was not covered by the policy.

The policy indemnified the subscriber (Davis) against loss on account of damages for personal injuries suffered by any person resulting from the "use or maintenance" of the described automobile "wherever any automobile covered hereby may be in the service of the subscriber." In an indorsement it is provided that the automobile covered "is to be operated in the service of the subscriber as a jitney bus * * * within the city and county limits of the city of San Francisco, and not elsewhere or otherwise, and that this policy is not intended to, and shall not cover any accident that may occur while said car mentioned in the schedule attached hereto is being operated for any other purpose and at any other time or place than herein stated, but it is intended that this policy shall cover said car when used as in this paragraph provided." There is nothing in the policy which defines the route over which the jitney bus is to be operated. The schedule attached thereto specifies the address of the subscriber as 311 Jersey street, and that the use to which the automobile is to be put is "jitney bus or occasional rent car." It is further provided that the contract does not cover loss arising while the automobile "is being used or maintained for any purpose or business other than as specified in the schedule."

It cannot be doubted that the Chandler automobile was "maintained" by Davis for the purpose and business of a jitney bus at the time of the accident. It was operated at the time "in the service of the subscriber as a jitney bus * * * within the city and county limits of the city of San Francisco," and it may not fairly be said that the car was at the time operated for any other purpose than that of a jitney bus. Necessarily Davis was required to keep the car somewhere, and it was kept at his home, which was the place specified in his operator's permit where it was to be kept, and which was in the vicinity of the Twenty-ninth and Mission terminus of the route. At the time of the accident he was operating, using, and maintaining his car with the equipment, plates, and badge placed and displayed as required by local regulations. The policy did not specify the particular or any route over which the car should be operated. The limits of the operation thereof were the city and county of San Francisco. We have no hesitancy in concluding that the accident was included within the terms of the policy considered as an independent document.

The policy sued on was obtained by Davis in pursuance of the requirement of an ordinance of the city that before any person could operate a jitney bus he must obtain an operator's permit from the board of police commissioners, and should also furnish a policy insuring the owner or operator against loss by reason of damage resulting from the operation of the jitney bus. This ordinance defined a jitney bus as "a self-propelled motor vehicle, other than a street car, traversing the public streets between certain definite points or termini and conveying passengers for a fixed charge * * * between such and intermediate points, and so held out, advertised and announced."

It is insisted by the defendant that the terms of the ordinance are a part of the contract of insurance, and that its liability is limited to the operation of a jitney bus as defined in said ordinance and within the particular route assigned to Davis by the police department. It is assumed that the terms of the policy must be consistent with the terms of the ordinance which required its issuance, and that the provisions of the ordinance may be considered in connection with the terms of the policy in order to determine the liability of the defendant.

The ordinance provided that, "in order to insure the safety of the public, it shall be unlawful for any person to drive or operate such 'jitney bus'" unless he shall have furnished the contract of indemnity against loss to persons or property resulting from the negligent operation of the jitney bus. There is nothing in the ordinance which defines the routes in the city over which jitney busses might operate; and there is nothing in the policy which confines the effectiveness of its provisions within definite limits of operation as was the case in Interstate Casualty Co. v. Martin (Tex. Civ. App.) 234 S. W. 710, where the coverage of the policy was confined to the "Montgomery Avenue Route" in the city of Houston, Tex. The only justification for the argument of the defendant is the definition of a jitney bus as contained in the ordinance read in connection with the terms of the policy requiring that the car "be operated in the service of the subscriber as a jitney bus" within the city and county of San Francisco "and not elsewhere or otherwise," and providing that the policy shall not cover any accident that might occur while the car was "being used for any other purpose and at any other time or place than herein stated." Either the car was being operated "in the service" of Davis as a jitney bus at the time of the accident involved herein or it was not then so operated. Certain it is that the car at the time was not being operated for a purpose apart from the "service of the subscriber" as a jitney bus, as was the case in Heriter v. Central Indemnity Co., 109 N. J. Law, 313, 162 A. 573; but was within the general and incidental service of Davis' business as a jitney bus operator. It was not then used for any other purpose than in connection with the jitney bus business, and we are not inclined to apply the going and coming rule of certain industrial accident cases to the situation here presented.

[2] There is no merit in the contention of the defendant that the plaintiff is foreclosed from recovery by her failure to give notice to the attorney in fact of the defendant as a prerequisite to court action against him. This action is against the Exchange itself, and no preliminary notice to it was required by the policy.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; IRA F. THOMPSON, J.; CURTIS, J.

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218 Cal. 371

## SONTAG et ux. v. WELLS FARGO BANK & UNION TRUST CO.

S. F. 14749.

Supreme Court of California.

June 21, 1933.

**1. Specific performance** ⚷25.

Lessor's letter and receipt for rent, reciting that rent payment would be applied towards purchase price in event lessees purchased property, *held* leasing arrangement and not contract for sale that would entitle lessees to specific performance.

**2. Appeal and error** ⚷1011(1).

Reviewing court could not determine whether oral negotiations constituted contract to sell premises, where evidence as to what negotiations were was conflicting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Thomas M. Sontag and wife against the Wells Fargo Bank & Union Trust Company. From a judgment for defendant, plaintiffs appeal.

Affirmed.

A. M. More and E. B. Mering, both of San Francisco, for appellants.

Heller, Ehrman, White & McAuliffe, F. Whitney Tenney, and Lawrence C. Baker, all of San Francisco, for respondent.

SHENK, Justice.

This appeal is from a judgment in favor of the defendant in an action to obtain specific performance of an alleged agreement to sell real property.

If the agreement exists no question of the plaintiffs' right to the relief sought is raised. The complaint alleged a written contract, and the plaintiffs offered and relied upon the following as establishing an agreement to sell on the part of the defendant.

The record shows that prior to October 21, 1929, the plaintiffs had been the owners of the residence property situate at 25 Hartford street in San Francisco, upon which the defendant held a deed of trust in the principal sum of about $4,800. The plaintiffs were in arrears on the payments of principal and interest and a sale was duly conducted under the terms of the deed of trust, pursuant to which the defendant became the owner of the property. The plaintiffs expressed a desire to remain on the premises and, if arrangements could be made, to repurchase it. A rental of $50 a month was agreed upon and the following document was issued to the plaintiffs: "San Francisco, November 1, 1929. Wells Fargo Bank & Union Trust Co. hereby acknowledges receipt from Thomas Sontag and Irene Sontag, his wife, the sum of $50.00 for one month's rent, commencing October 21st, 1929, and ending November 20th, 1929. In the event said Sontags purchase the property it is agreed that this payment will be applied first to interest and the balance to principal as an instalment on the purchase price of $4,800 of said property; interest to begin October 21st, 1929."

Subsequently the plaintiffs received from the defendant a letter dated November 5, 1929, which reads: "On November 1, 1929, we issued to you our receipt covering one month's rent of $50 from October 21st to November 20, 1929, for occupying premises at 25 Hartford Street, this city. In the receipt it is (re-) cited that in the event you purchase the property all rent payments will be applied towards the purchase price. That is to say, it will be applied first on interest and any balance in reduction of principal. This is on the purchase price of $4,800 which you understand, includes accrued interest and costs."

On March 1, 1930, the plaintiffs sent the following letter to the defendant: "Pursuant to your receipt of November 1, 1929, for rent of the property known as 25 Hartford Street, together with right and option to purchase the same, as per receipt given by you to me, I hereby notify you that we accepted the option to purchase, and request that the said $50.00 paid by us on October 21st, 1929, and all subsequent payments made thereon to date shall be applied upon the purchase price of said real property, namely $4800.00."

Other evidence, oral and documentary, was received. The trial court found that no contract for the sale and purchase of the property involved existed, and that the only contract entered into between the parties was a month-to-month leasing arrangement at a rental of $50 a month. The court ordered judgment for the defendant on its cross-complaint for unpaid rental earned and for expenses of removing the belongings of the plaintiffs from the premises.

The principal contention of the plaintiffs is that the court erred in finding that no agreement of sale was made by the defendant. The plaintiffs urge that the writings signed by the officers of the defendant constitute an agreement on its part to sell the property involved at a price of $4,800 in installments of $50 per month with interest on deferred payments, which the plaintiffs alleged they were ready and willing and able to perform on their part; and that it is such a contract which the plaintiffs are entitled to have the defendants perform specifically.

[1] There is no foundation in the record to support the contention that the evidence bears the construction contended for as a matter of law, or that the court erred in its construction of the negotiations between the parties. The foregoing evidence, together with all the other documentary evidence and the oral testimony received, clearly supports the court's finding that the transaction contemplated only a rental of the premises at $50 a month. The inferential conclusion that the statements of the defendant concerning a purchase of the property by the defendants were only an invitation to negotiate in the future on the basis suggested, which obviously does not include all of the terms necessary to be agreed upon, is justified by the record. That such an interpretation and construction of their negotiations was correct is indicated by the conduct of the parties themselves, and particularly by the conduct of the plaintiffs. It is in evidence that the plaintiffs were engaged in a lawsuit as to which they had expressed to the defendant the expectation of recovering a substantial judgment. The court could properly infer from the plaintiffs' conduct that they were awaiting the outcome of that litigation before negotiating for the repurchase of the property from the defendant. Furthermore, the plaintiffs' understanding of the limited nature of the parties' negotiations is indicated by a letter dated February 17, 1930, written to the defendant by the plaintiff Thomas Sontag, wherein he requests that a cashier's check for $50 inclosed be applied "to my rent for the month of March," also requesting a receipt. It was not until the subsequent receipt by the plaintiffs of notices dated February 19 and 25, 1930, terminating the tenancy on March 20th following, that the plaintiffs framed and posted their letter of March 1, 1930, in an attempt to accept what they thereby declared to be an option to purchase. Even assuming that the writings of the defendant of November 1 and 5, 1929, could be so construed, or could be construed as an offer to sell, the record amply supports a conclusion that the option or offer had been duly withdrawn prior to any attempted acceptance on the part of the plaintiffs.

It may also be added that the writings upon which the plaintiffs rely are too indefinite and uncertain in their terms to become the basis of a claim for specific performance. Klein v. Markarian, 175 Cal. 37, 40, 165 P. 3.

[2] The plaintiffs also contend that the evidence compels a finding that an oral contract was proved as to which the defense of the statute of frauds was not pleaded. A substantial conflict exists in the evidence as to what were the oral negotiations between the parties. The presence of this conflict in the record, under well-recognized rules, forecloses this court from giving further consideration to this contention.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; THOMPSON, J.; SEAWELL, J.

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218 Cal. 321

## HILTBRAND v. HILTBRAND.

L. A. 13292.

Supreme Court of California.
June 16, 1933.

**1. Judgment** ⟹142.

Ordinarily defendant served by publication has right at any time during one year, upon tendering proper answer, to apply for order setting aside default upon such conditions as court may see fit.

**2. Judgment** ⟹142.

Relief against default after service by publication will not be granted where there is affirmative showing of laches or inexcusable neglect sufficient to create estoppel.

**3. Divorce** ⟹161.

Denying wife right to reopen default divorce decree *held* not abuse of discretion, where record showed that wife was guilty of inexcusable delay and neglect in not earlier presenting defense.

Record disclosed that divorce action was commenced on July 7, 1930, and that wife who resided in Switzerland received summons on July 24, 1930. On August 9, 1930, wife wrote to husband's attorney protesting against action to which attorney did not reply. On November 7, 1930, interlocutory decree of divorce was entered. On November 9, 1930, wife wrote to attorney in Los Angeles to investigate matter, but he took no active steps until May 15, 1931.

4. Divorce ⚿161.

Showing to set aside default in divorce action may rest upon slight evidence.

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In Bank.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron and Douglas L. Edmonds, Judges.

Action by Rudolph Hiltbrand against Julia Hiltbrand. From an order denying a motion to reopen a default and to set aside an interlocutory decree of divorce, defendant appeals.

Affirmed.

Ratzer, Bridge & Gebhardt and H. A. Gebhardt, all of Los Angeles, for appellant.

J. Robert Arkush, John C. Miles, and A. P. Coviello, all of Los Angeles, for respondent.

PRESTON, Justice.

Divorce action. Appeal from order of trial court denying motion to reopen a default and to that end to set aside the interlocutory decree of divorce theretofore made in the action.

The order appealed from is dated July 24, 1931. The action was instituted July 7, 1930. The affidavit of plaintiff husband showed defendant to be residing at Throd, Berne, Switzerland. The regular period of publication was had and copy of the summons and complaint was mailed to the address given and actually received by defendant on July 24, 1930. On August 9, 1930, defendant wrote a letter to the attorney for plaintiff protesting against the action, to which apparently no response was made. On November 7, 1930, her default was entered and on the same day interlocutory decree of divorce was entered. On November 9, 1930, defendant wrote to an attorney at Los Angeles requesting him to investigate the matter and represent her in the action. However, no active step was taken by him until May 15, 1931, when he filed notice of motion to set aside the default and reopen the cause, accompanied by a proposed answer denying the material allegations of the complaint. On May 28, 1931, the motion was heard and denied without prejudice. On June 30, 1931, notice was given of a second motion to the same effect. This motion was likewise heard and denied without prejudice on July 24, 1931. The appeal of defendant was filed on August 8, 1931.

The sole question for our consideration here is whether under these facts defendant was entitled as a matter of right to a reopening of the cause. Or, stating the question in another form, was there under these circumstances any room for operation of the discretion of the trial court in passing upon the motion?

[1, 2] Since the case of Gray v. Lawlor, 151 Cal. 352, 90 P. 691, 12 Ann. Cas. 990, it has been the settled law of this state that under all ordinary circumstances, a defendant, served by publication of summons, has the right, at any time during the period of one year, upon tendering a proper answer, to apply to the court for an order setting aside the default and to receive such an order as a matter of right, upon such terms and conditions as the court may see fit to impose. But even this case does not hold that such relief will be granted where there is an affirmative showing of laches or inexcusable neglect of sufficient strength to create an estoppel. Later, in the case of Boland v. All Persons, 160 Cal. 488, 490, 117 P. 547, 548, the court used the following language: "In applications for relief under this clause of the section there is no presumption of neglect, as in cases where there has been personal service. The party is not required, in the first instance, to do more than show that he has not been personally served and that he has a good defense to the action on the merits which he could have presented had he been informed of its pendency. Gray v. Lawlor, 151 Cal. 354, 90 P. 691 [12 Ann. Cas. 990]. But his opponent may show, in opposition to the application, that the applicant had actual notice of the action in time to have entered an appearance and present the defense, and that the failure to do so was owing to his neglect or to his consent to the judgment. In that event a case arises for the exercise of the discretion of the court, and it must determine whether or not the laches is of a character that should preclude the relief. Bogart v. Kiene, 85 Minn. 262, 88 N. W. 748; Mueller v. McCulloch, 59 Minn. 409, 61 N. W. 455; Keenan v. Daniells, 18 S. D. 102, 99 N. W. 853; Blyth v. Swenson, 15 Utah, 352, 49 P. 1027; Jordan v. Hutchinson, 39 Wash. 373, 81 P. 867." This doctrine was reaffirmed in the case of Palmer v. Lantz, 215 Cal. 320, 324, 9 P.(2d) 821, and also approved in the case of Application of Mercereau (Cal. App.) 14 P.(2d) 1019.

[3, 4] The case of Randall v. Randall, 203 Cal. 462, 264 P. 751, also apparently recognizes the exception in the assertion that there was in that case no presumption against the defendant of knowledge of the proceedings or of inexcusable delay on his part. We are therefore led to the conclusion that there was in the instant case a sufficient showing to sustain the action of the court below in that enough appeared from the facts to justify the conclusion that, having received knowledge of the existence of the proceeding in the courts of California, the defendant was guilty of inexcusable delay and neglect in not earlier presenting her defense. In making this hold-

ing we are not unmindful of the fact that this court has in Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020, and on various other occasions, shown its solicitude for the ordinance of marriage and to that end has held that the showing to set aside a default in a divorce action may rest upon slight evidence. But here the question in the first instance was one within the discretion of the court below and we are unable to say as a matter of law that such discretion was not properly exercised.

The order is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; THOMPSON, J.; SEAWELL, J.; CURTIS, J.

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218 Cal. 412

## HALL v. BARBER DOOR CO. et al.

L. A. 12166.

Supreme Court of California.

June 28, 1933.

Rehearing Denied July 27, 1933.

1. **Appeal and error** 🔑110.

Order denying new trial is nonappealable.

2. **Appeal and error** 🔑927(3).

On plaintiff's appeal following nonsuit, all reasonable inferences and presumptions in plaintiff's favor must be considered proved, and evidence must be viewed most favorably to plaintiff.

3. **Negligence** 🔑136(22).

Negligence of subcontractor in installing door in building without countersinking set screws and without warning occupant of resulting danger *held* for jury in occupant's action for injuries.

> The evidence disclosed that, after hanging the door, workmen who had installed it in presence of occupant worked it up and down several times and then left it open. During this time occupant was in possession of stall in the building and had moved merchandise therein and was doing business. It appeared, however, that the door was left by the workman without having countersunk set screws into shaft. Defendant subcontractor admitted that, though he knew the door had been hung and set screws had not been countersunk, he did not give instructions to his men to warn occupants of stalls or others rightfully on the premises of danger.

4. **Negligence** 🔑2.

No liability in tort for negligence can be imposed unless defendant owed duty of care.

5. **Negligence** 🔑32(2).

One taking possession of stall in newly completed produce building occupied status of tenant, though rent payments had not started, and subcontractor constructing doors owed such occupant duty of due care.

> The evidence disclosed that the occupant went into possession of stall in building with owner's knowledge and consent, and the fact that payments were not to start until later date was due to the fact that the parties, when they entered into contract, did not know when the building would be ready for occupancy.

6. **Negligence** 🔑55.

Independent contractor who negligently creates dangerous conditions during work, is liable for resulting injury to one rightfully on premises.

7. **Negligence** 🔑136(27).

Occupant of stall in newly constructed produce building *held* not guilty of contributory negligence as matter of law in using door not yet completely installed, where workmen had worked it up and down and left it.

8. **Negligence** 🔑69.

Forgetfulness of known danger is not of itself contributory negligence as matter of law.

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In Bank.

Appeal from Superior Court, Los Angeles County; Ruben H. Schmidt, Judge.

Action by John W. Hall against the Barber Door Company and others. From a judgment for defendants and an order denying motion for a new trial, plaintiff appeals.

Appeal from order denying new trial dismissed, and judgment reversed.

Prior opinion, 14 P.(2d) 549.

Hoye & Boehler and Walter W. Hoye, all of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and Tanner, Odell & Taft, all of Los Angeles (Philip C. Sterry, of Los Angeles, of counsel), for respondents.

WASTE, Chief Justice.

[1] Plaintiff appeals from a judgment entered upon the granting of a motion for nonsuit made by defendant at the close of plaintiff's case. Plaintiff also appeals from an order denying his motion for a new trial. The latter order is nonappealable, and, for that reason, the appeal therefrom is dismissed.

The facts upon which plaintiff bases his action are as follows: In the latter part of the year 1927 the Central Manufacturing District, as owner, entered into a contract with William P. Neil Company, whereby the latter, as general contractor, agreed to construct a building to be known as the Produce Terminal Building, in Vernon, Cal. The defendant corporation, the Barber Door Company, was one of the subcontractors, under contract to install the doors in the building. The plaintiff, in October of 1927, entered into a contract with the owner of the property for the use of one of the stalls in the building. This contract was entered into before the building was completed and obviously before either the owner or the plaintiff knew when the building would be completed. The agreement, pleaded as an exhibit to the answer, was not explicit as to the date when the tenancy was to start. It provided for a fixed payment, payable monthly, starting January 1, 1928, and continuing until January 1, 1948. The "Schedule of Terms" attached to the agreement and made a part thereof provided in part as follows:

> "1. In the event that the premises above described are available for occupancy by Purchaser prior to the first day of January, 1928, the Purchaser may take possession of said premises at such time and without the payment of any additional money other than that specified in this agreement.
>
> "2. The Purchaser agrees that its entry into occupancy of said premises shall constitute an acknowledgment that the same are suitable for its business and that the building and improvements thereon have been received by the Purchaser in good and first class condition. * * *"

It appears from the evidence that on December 1, 1927, plaintiff and his partner went into possession of the stall. It further appears that on that date the building was not entirely completed, but that plaintiff and his partner moved in with the permission and consent and, in fact, at the request, of the superintendent of the owner. Shortly after the plaintiff took possession, the defendant corporation installed the heavy door leading to the stall. On December 6th the door was hung, but on that date the installation was not entirely complete. Between December 6th and December 8th nothing further was done on the door. On December 8th, plaintiff, in attempting to leave the premises, raised the door, and, while stepping through the doorway, the door fell, seriously injuring his back. It is for the injuries so received that plaintiff brought this action against defendants. It was stipulated that defendant corporation was an independent contractor. At the close of plaintiff's case defendants moved for a nonsuit on the following grounds: (1) That there was no evidence tending to show any duty owed by defendant to plaintiff. (2) That there was no evidence tending to show negligence on the part of defendant. (3) That there was no evidence tending to show that defendant's negligence, if any, was the proximate cause of the accident. (4) That the evidence showed that plaintiff was guilty of contributory negligence as a matter of law.

The trial court granted the nonsuit; hence this appeal.

[2, 3] The rules applicable to such an appeal are so well settled and have been enunciated so frequently by this court that no useful purpose would be served in elaborating on them in this opinion. Suffice it to say that on such an appeal every favorable inference fairly deducible from the evidence, and every favorable presumption arising from the evidence, must be considered as facts proved by the plaintiff. If evidence is fairly susceptible to two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs. If contradictory evidence has been given, it must be disregarded. The evidence must be taken most strongly against the defendant. Berger v. Lane, 190 Cal. 443, 213 P. 45; In re Estate of Flood (Cal. Sup.) 21 P.(2d) 579. When the evidence in the instant case is tested by these standards, we have no hesitancy in holding that from such evidence the jury could have inferred that defendant was negligent in installing the door, that defendant left the door in such a condition as to constitute an implied invitation to use it, and that defendant was negligent in failing to warn the plaintiff and others lawfully on the premises of the hidden danger of which defendant had knowledge or, by the use of ordinary care, should have had knowledge. The evidence from which we believe the jury could have inferred negligence in the foregoing respects on the part of defendant is as follows:

The door in question was about 17 feet wide and about 14 feet high, in two sections; its total weight being approximately 300 pounds. At each end of the door was attached a cable which passed over a drum or pulley fitted near the end of a shaft located near the ceiling. These drums or pulleys were held on to the shaft by two set screws on opposite sides of the drum. Connected to the other end of each cable were heavy weights acting as counterbalances, weighing almost as much as the door. When the door was closed, these weights would be up, and, when the door was open, they would be down near the floor. At the time of the accident on December 8th, the door was, as alleged in the complaint, not entirely installed. The installation of the door began on December 3d, and the door was hung on December 6th. After hanging the door, the workmen who had installed it, in the presence of plaintiff, worked it up and down several times, and then left it suspended; that is, open. All during the period the workmen were installing the door, plaintiff and his partner were in possession of the stall and had moved in merchandise consisting of crates of fruits and vegetables, and were doing business. When the door was hung on December 6th, and the cables and weights attached, the set screws holding the drums or pulleys on the shaft were not countersunk into the shaft, but were simply screwed down against the shaft. Certain safety catches which would have held the door up even in the absence of counterweights had not yet been installed. Between December 6th and 8th the plaintiff opened and shut the door several times. At the time of trial it was stipulated "that at the time the door fell the setscrews holding the drum to which was attached the cable that supported the counter-balance weight had slipped; that the counterweight drum was held in position above the door by the two setscrews running through the collar of the drum, and pressing against the surface of the shaft; that said setscrews had not been countersunk into the shaft at the time of the accident." Attorney for the defendant qualified the above stipulation by the reservation that the stipulation did not include an agreement that the slipping of the set screws caused the door to fall. However, the inference that such was the fact is readily deducible from the record. The evidence shows that the purpose of countersinking the set screws into the shaft is to increase the safety factor. Defendant Barber testified that he knew that the door had been installed as it was and that the set screws had not been countersunk. The shaft, after the accident, was deeply grooved under the set screws, indicating where they had slipped around the shaft. The pulley or drum had turned on the shaft. An expert for plaintiff testified that on such a door the greatest strain or stress comes at the point of contact of the set screws with the shaft.

Defendant Barber also testified that the door was installed by his men, and therefore the jury could have inferred that such men knew plaintiff and his partner were occupying the stall in question, and had moved their merchandise therein and were open for business. Defendant also admitted that, although he knew the door had been hung and that the set screws had not been countersunk, he did not give instructions to his men to warn the occupants of the stalls, or to others rightfully on the premises, not to use the doors, or that it was dangerous to use them, nor did he cause any warning to be posted to that effect. Plaintiff testified, as already pointed out, that, after the men hung the door on December 6th, they worked it up and down in his presence. They at no time told him not to use it or that it was dangerous to use it. We think, from the above evidence, that the jury could have inferred that the door fell because the set screws were not countersunk and that defendant was negligent in not countersinking them. We think it is also a justifiable inference from the above facts that defendant left the door in such a condition as to constitute an implied invitation to any one rightfully on the premises to use it. The jury could also have inferred that under the circumstances it was negligence on the part of the defendant not to warn the plaintiff and others rightfully on the premises of the hidden danger which it had created and of which it had knowledge.

From this résumé of the evidence it is apparent that there was sufficient evidence in the record to go to the jury on the question of negligence, if, in fact, defendant owed any duty of due care to plaintiff. Defendant strenuously contends that it owed no duty of care to plaintiff, with whom it had no contractual relation.

[4] It is elementary, of course, that no tortious liability can be imposed on a defendant, even though he was negligent, unless defendant owed a duty of care to plaintiff. Dahms v. General Elevator Co., 214 Cal. 733, 7 P.(2d) 1013; Buckley v. Gray, 110 Cal. 339, 42 P. 900, 31 L. R. A. 862, 52 Am. St. Rep. 88. We turn now to a discussion of that question.

[5] Both parties to this appeal discuss at some length the question as to the status of the plaintiff in taking possession of the premises before January 1, 1928, as far as the owner, the Central Manufacturing District, was concerned. We have no hesitancy in holding that, when plaintiff went into possession on December 1, 1927, at the request, knowledge, and consent of the owner, he went in under the lease as a tenant and therefore as an invitee of the owner. Although it is true that, under the contract, payments were not to start until January 1, 1928, it is also true that, when the contract was entered into, the parties did not know when the building, then in the course of construction, would be ready for occupancy. They therefore provided that payments should start January 1, 1928, evidently a date they were sure the building would be completed, but also provided in effect that the tenancy should start at an earlier date if the building was ready for occupancy before that time. As between the landlord and tenant, they agreed it was ready for occupancy on December 1, 1927. On that date, plaintiff went into possession under the contract and became a tenant of the landlord. As such tenant, it is our opinion the defendant independent contractor owed to him a duty of due care.

[6] It cannot be doubted that an independent contractor is responsible to an occupant of a building rightfully on the premises at the request or consent of the owner for any wrongful acts that may be committed by himself or his employees while the stipulated work is in progress and resulting in injuries to such occupant. The ground upon which this liability is based is the implied duty which the law casts upon the independent contractor, as the person in charge and control of the work, to see that the rights of

other persons, rightfully on the premises, are not injuriously affected by the performance of the work. Charlock v. Freel, 125 N. Y. 357, 26 N. E. 262. See, also, Pettyjohn & Sons v. Basham, 126 Va. 72, 100 S. E. 813, 38 A. L. R. 403, where the cases are exhaustively collected and commented upon. Upon both principle and authority, it is clear that an independent contractor, who by his own negligence creates dangerous conditions during the progress of the work, should be held responsible for an injury occasioned by those conditions to one rightfully on the premises, and should be held liable for damage directly attributable to the failure to perform this duty. Oregon-Washington Ry. & Nav. Co. v. Branham (C. C. A.) 259 F. 555; Cummings v. C. W. Noble Co., 143 Wis. 175, 126 N. W. 664; Gardner v. Smith, 7 Mich. 410, 74 Am. Dec. 722.

In enforcing this liability, the decisions in this state and in other states have affirmed the existence of such a duty owed by an independent contractor to an occupant of a building upon which the contractor was working. In Donnelly v. Hufschmidt, 79 Cal. 74, 21 P. 546, a tenant in a lodging house was injured by stumbling over materials left on a pathway by a contractor employed to make repairs. It was held that such tenant could recover from the contractor. In Davis v. Pacific Power Co., 107 Cal. 563, 40 P. 950, 952, 48 Am. St. Rep. 156, the person injured was the son and employee of tenant. The defendant had negligently installed a shaft in the leased premises, resulting in the injuries. The court held that "the plaintiff having a right to be where he was, the defendant [independent contractor] owed him the duty of protection." See, also, Carey v. Baxter, 201 Mass. 522, 87 N. E. 901; Charles G. Robin v. Winslow (Sup.) 171 N. Y. S. 55; Crane Elevator Co. v. Lippert (C. C. A.) 63 F. 942; Kimber v. Gaslight & Coke Co., [1918] 1 K. B. 439. It has also been held that an independent contractor owes a duty of due care to an employee of another independent contractor rightfully on the premises, a situation closely analogous to the situation here involved. The leading case is Thrussel v. Handyside, L. R. 20 Q. B. Div. 359. See, also, cases collected 38 A. L. R. 471.

We think the principle of the above cases applies to the facts of the present case. We are of the opinion that plaintiff was an invitee of the owner rightfully on the premises and that the defendant, under the doctrine of the above cases, owed to him a duty of due care.

Defendant independent contractor contends that, as to it, plaintiff was a mere licensee. For reasons already stated, we do not think this is so, but, even if it were, the judgment of nonsuit would have to be reversed. As already pointed out, defendant installed the door and knew that the set screws had not been countersunk. Under such circumstances, the jury could have found that defendant knew, or should have known, that persons rightfully on the premises were likely to use that door; that defendant knew or should have known that it would be dangerous to use the door under those circumstances. We think the jury could have inferred that, as left by defendant, there was an implied invitation to use the door. The jury could also have found that, as left by defendant, the door was a dangerous instrumentality within the meaning of that doctrine as recently enunciated by this court in Dahms v. General Elevator Co., supra, and that, as constructed and left by defendant, it was in legal effect a trap of the existence of which it was defendant's duty to warn even licensees.

[7, 8] Defendants likewise contend the evidence conclusively showed plaintiff was guilty of contributory negligence as a matter of law in using the door, knowing it was not completely installed. This contention is without merit. Plaintiff had observed the men who installed the door work it up and down. Even forgetfulness of a known danger is not sufficient of itself to constitute contributory negligence as a matter of law. Meindersee v. Meyers, 188 Cal. 498, 205 P. 1078. We think that, under the facts of this case, the question of contributory negligence should have been left to the jury. Davis v. Pacific Power Co., supra.

The judgment appealed from is reversed.

We concur: SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

IRA F. THOMPSON, J., being disqualified, does not participate herein.

218 Cal. 364

### BALDWIN et al. v. STEWART.

L. A. 13817.

Supreme Court of California.

June 21, 1933.

As Modified on Denial of Rehearing July 20, 1933.

**1. Executors and administrators** 🔑383.

Order confirming administrator's sale, which had become final, *held* conclusive against purchasers duly notified of proceeding and having opportunity to present objections (Probate Code, §§ 785, 788, 1200, 1240).

**2. Executors and administrators** 🔑383.

Question whether property was free and clear of incumbrances could not be concluded by order confirming administrator's sale (Probate Code, §§ 785, 788, 1200, 1240).

**3. Executors and administrators** 🔑380(3).

In action by purchasers at administrator's sale to recover deposit made, evidence warranted finding that property was free and clear of incumbrances.

**4. Appeal and error** 🔑883.

Plaintiff could not complain on appeal of reception of affidavit, where counsel had stipulated that defendant could file affidavit to be answered with counter affidavit.

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In Bank.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by E. M. Baldwin and others against W. G. Stewart, administrator of the estate of Ferdinand Clement, deceased, in which defendant filed a cross-complaint. From the judgment, plaintiffs appeal.

Affirmed.

Gerald Bridges, of Los Angeles, for appellants.

A. Heber Winder, of Riverside, for respondent.

IRA F. THOMPSON, Justice.

The respondent herein is the administrator of the estate of Ferdinand Clement, deceased, and as such gave notice on May 26, 1930, of a proposed sale of real and personal property, to wit: 160 acres of land in Riverside county (specifically described) and approximately 40 stands of bees and miscellaneous household furniture, equipment, and tools located on the real property. The date of the proposed sale was set for June 16, and the terms announced as 10 per cent. upon submission of bid and balance upon confirmation. On May 29, appellants herein submitted a bid of $6,000 for the property, which bid was dated May 21, and permitted $600 theretofore deposited to apply on the bid. According to the findings, appellants' was the best bid received, and on June 16, the date set for the sale, it was accepted by respondent. Thereafter, and on June 26, the respondent made return of the sale and petitioned the court for an order of confirmation, which petition was set down for July 7. Respondent notified appellants of the filing of the petition and the date of the hearing, saying to them that the sale would undoubtedly be confirmed on that date. On June 25 a fire occurred in the brush on the hillside near the property. Two days later the appellants again inspected it, and on the following day, June 28, appellant E. M. Baldwin wrote H. M. Harford, the real estate agent, a letter as follows:

"I am enclosing a withdrawal of our offer on the Clement place.

"After carefully considering the situation as it now stands on the Clements place, and the danger of a re-occurrence of the recent fire which so nearly got the place, and the almost impossibility of preventing the repetition of the same, my sisters are absolutely off the deal, and say they would not live there now.

"I think you will understand the situation, they would always have a fear of what might happen.

"I want to thank you for your courtesy to us and hope you will be able to close with one of the other parties who liked the place."

This letter is set forth herein to show the real reason for appellants' efforts to withdraw from the bargain. The findings disclose that appellants attempted to withdraw their offer and demanded the return of the $600. It is also in evidence that the fire did no damage to the property here involved. On July 7, 1930, the court confirmed the sale, and respondent immediately prepared and executed a bill of sale and deed conveying the property to appellants, and delivered them to the title company to be delivered to appellants, together with a certificate of title upon payment of the balance of the purchase price. On December 6, 1930, the probate court denied the motion of appellants to vacate and set aside the order confirming the sale. Subsequently the appellants filed this action to recover the deposit of $600, and respondent countered with a cross-complaint in which he sought on behalf of the estate to recover the balance of the purchase price and compel appellants to perform their contract. Judgment was entered in favor of respondent administrator on February 19, 1932. A motion for a new trial was denied April 6, and at the same time the court amended the judgment, the amendment consisting of an adjudication that defendant execute and deliver to plaintiffs the instruments necessary to convey title and furnish a certificate of title to the real property. This appeal is from the judgment as amended.

In addition to claiming that certain portions of the findings are unsupported by the evidence, and that the court erred in admitting a particular bit of testimony, which assignments of error we will consider hereafter, it is contended by appellants: (1) That their offer "was not accepted by" respondent "before its withdrawal"; and (2) "a purchaser is entitled to receive such title as his contract calls for." It is an all-sufficient answer to these contentions to point out that the findings of the court are express upon the proposition that respondent accepted the offer for a title free and clear except for certain taxes and that respondent could deliver such a title. Therefore, unless the findings are unsupported, there is no merit in the argument.

[1] However, before proceeding to examine the sufficiency of the evidence in the questioned instances, we ought to determine whether an argument advanced by respondent to the effect that an order confirming sale cannot be collaterally attacked as appellants have attempted to do in the present action is sound. First, we observe, according to the provisions of section 1240 of the Probate Code, that an order "confirming the sale of property" is appealable. Next we may point out in the language of this court in Estate of Davis, 151 Cal. 318, 323, 86 P. 183, 184, 90 P. 711, 121 Am. St. Rep. 105: "The procedure of this state contemplates, in the administration of the estates of deceased persons, a series of different proceedings, each of which is, as to the matters embraced within its purview, separate. And an adjudication as to each step in this series is intended to be final in its nature, and not subject to review in a subsequent stage of the administration of the estate. Thus, an order appointing an administrator may be appealed from (Code Civ. Proc. § 963), or may be revoked on petition in certain instances (Code Civ. Proc. § 1383). But it cannot be said that an attack on an order appointing an administrator should, after the lapse of the time for appeal, be termed direct merely because made in some proceeding connected with the administration of the same estate, for example, on the settlement of an account, or an application for confirmation of a sale of real estate. So with other proceedings in the course of the administration of an estate, where the order or judgment made is appealable, such as orders admitting wills to probate, orders settling accounts of administrators or executors, or the like. Each can be attacked directly by appeal, or by some motion authorized by law for the purpose, or, perhaps, by bill in equity, but an attack made in a different proceeding in the same estate would clearly be collateral. Thus, in Estate of Devincenzi, 119 Cal. 498, 51 P. 845, it was held that an objection to a confirmation of sale of real estate, on the ground that the administrator's petition for the order of sale was defective, was a collateral attack upon the order of sale." We also direct attention to the fact that by section 785 of the Probate Code it is made the duty of the court to examine witnesses in relation to the sale and to determine that the sale "was legally made and fairly conducted" and, under all the conditions there named, to make its order "confirming the sale and directing conveyances to be executed." By section 788 of the same Code it is provided that, if the purchaser refuses to comply with the terms of the sale, the court may on motion of the administrator vacate the order, and direct a resale of the property, in which event, if the sum bid does not "cover the bid and the expenses of the previous sale, such purchaser is liable to the estate for the deficiency." By requiring the court to inquire into the regularity and fairness of the sale, by making specific provision for the liability of the purchaser for a deficiency in the event of his default and a possible resale, and by giving the right of appeal from an order confirming sale, the Legislature has evidenced a clear intent to make conclusive an order confirming sale which has become final. And we can see no good reason why parties who have been duly notified of the proceeding and extended every opportunity to present their objections, if any they have, should not be concluded thereby. In this connection it is to be borne in mind that by section 1200 of the Probate Code it is provided that notice of the time set for hearing of the petition for confirmation shall be given to all interested persons requiring them "to appear at the time and place mentioned in the notice and show cause, if any they have, why the order should not be made." In addition to the notice thus required, it is in evidence in the instant cause that appellants were officially notified of the time and place of the hearing and subsequently moved to vacate the order.

However, appellants rely upon an expression found in the case of Jerrue v. Superior Court, 7 Cal. App. 717, 720, 95 P. 906, to the effect that an order confirming sale is not an adjudication against the purchaser. An examination of that case discloses that it was an application for the writ of certiorari to review an order confirming a sale to petitioners, and the writ was properly deniable on the ground that there existed a plain, speedy, and adequate remedy by appeal. We cannot accept the language of the opinion relied upon as authoritative, especially in view of the manifest intent of the legislative enactments and the fact that the announced principle of Estate of Davis, supra, has been recognized and approved by this court in a long line of authorities, including Lane v. Starkey, 59 Cal. App. 140, 210 P. 277; Fletcher v. Superior Court, 79 Cal. App. 468, 476, 250 P. 195; Estate of Parsons, 196 Cal. 294, 237 P. 744; Estate of Barton, 196 Cal. 508, 238 P. 681; Luckey v. Superior Court, 209 Cal. 360, 287 P. 450.

The conclusion upon this branch of the case disposes of appellants' contentions that the evidence was insufficient to support those findings to the effect that theirs was the best bid for the property, that it was accepted, and that it was not withdrawn.

[2, 3] However, several others are attacked, all of which go to the proposition that the property was free and clear of incumbrances; it being the contention of appellants in this particular that the proffered certificate of title excepted "an easement in favor of the public for any public roads now existing on said property," although there was a finding specifically negativing the idea that such an easement existed, as well as certain others which are to the same general effect. Such a question would not, of course, be concluded by the order confirming sale. The response to this argument of appellants is that there is no testimony of the existence of such a road. An officer of the title company testified that his company had made a preliminary report of the condition of the title and found it to be free and clear of all incumbrances except the taxes for the year 1930 to 1931 (which appellants had agreed to assume), and except for any possible roads. Under a stipulation of counsel that it might be introduced as though the witness were testifying, there was filed an affidavit by this same officer that the records of the county of Riverside and the county of San Diego did not disclose any easement for road purposes over the property, and that the title to the property disclosed no such easement, and subsequently the same affiant made, and there was filed, another affidavit to the effect that the company had issued its guaranty of title and delivered it to respondent's counsel, which guaranty did not contain an exception for any easement existing in favor of the public for road purposes. The findings were therefore proper.

Furthermore, if such a road existed, and were open and visible, the presumption would be, under the authority of McCarty v. Wilson, 184 Cal. 194, 193 P. 578, that appellants had contracted to accept the land subject to the incumbrance.

[4] Finally, complaint is made by appellants of the reception of the affidavits to which we have referred. They cannot complain, however. The record discloses that, at the close of the argument of the case, counsel for defendant and cross-complainant said: "A question of fact—a matter of fact has just come to my attention with reference to the so-called easement or restriction referred to, and it is stipulated between counsel that defendant may file the affidavit of V. T. Lawson with reference to such easement being referred to in the preliminary report, and that said affidavit shall have the same force and effect as if the facts therein stated were testified to by Mr. Lawson at the trial."

Plaintiffs' counsel replied: "I do not want to be foreclosed from answering it with a counter-affidavit." And the court responded to both, "Very well."

It is clear that the first affidavit, as well as the second, bore directly upon the reference to the easement in the preliminary report, and under the stipulation the court properly took cognizance of them.

Judgment affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; SHENK, J.

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218 Cal. 395

## CHUTUK et al. v. SOUTHERN CALIFORNIA GAS CO. et al.

L. A. 14065.

Supreme Court of California.

June 26, 1933.

**1. Gas 🔑20(2).**

In action against gas company for damages to building from gas explosion when match was thrown near defendant's capped riser few inches from plaintiffs' building, res ipsa loquitur *held* applicable.

Facts disclosed that the thing which caused the injury was under the management of the defendant, and that the accident was such as in the ordinary course of things would not have happened if those who had the management used proper care, so that, in the absence of explanation by defendant, it might properly be inferred that the accident arose from defendant's want of care.

**2. Gas 🔑17.**

Gas company must use great care in management and control of gas.

**3. Gas 🔑20(4).**

In action against gas company for damages from gas explosion, evidence of defendant's negligence *held* for jury under res ipsa loquitur doctrine.

Facts that no complaint had ever been made relative to gas company's service pipe or riser near plaintiffs' building destroyed in the explosion, that the average length of service of gas pipes was much greater than the age of the pipe in controversy, that such pipe after explosion was generally still in good serviceable condition, and that defendant employed a watchman in every district to look after leaks, had no tendency to prove that defendant gas company was not negligent.

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In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Nick Chutuk and others, individually and as copartners doing business under the firm name and style of Chutuk, Kordich & Vukojevich, against the Southern California Gas Company and others. From the judgment for defendants, plaintiffs appeal.

Reversed.

For prior opinions, see 15 P.(2d) 782; 16 P.(2d) 272.

Earl E. Howard, Sherer & Howard, and Albert J. Sherer, all of Los Angeles, for appellants.

Sullivan, Roche, Johnson & Barry, of San Francisco, amici curiæ for appellants.

T. J. Reynolds and L. T. Rice, both of Los Angeles, and R. R. Blackburn, of Glendale, for respondent Southern California Gas Co.

Thomas J. Straub and Clinton F. Stanley, both of San Francisco, amici curiæ for Pacific Gas & Electric Co.

Paul Overton and Neil G. Locke, both of Los Angeles, amici curiæ for Los Angeles Gas & Electric Corporation.

PER CURIAM.

After further consideration of this appeal, we are of the opinion that the District Court of Appeal arrived at the correct conclusion in its decision of the case. At the time the petition for a transfer was before us, we were somewhat impressed by the statement of petitioner that the service pipe and riser were on the land of the plaintiffs and, therefore, the doctrine of res ipsa loquitur might not apply. There is some conflict in the evidence as to the correct location of said pipe line and riser. But conceding that they were located on plaintiffs' land, still they belonged to and were the property of the gas company, and the gas company had complete charge and control of them. Not only would the gas company be liable for any damage proximately arising out of the negligent manner in which they were left after they were disconnected with plaintiffs' building, but the company having the exclusive ownership and control of the service pipe and riser was in duty bound to explain the cause of any explosion that might be caused from gas escaping from said service pipe.

The opinion of the District Court of Appeal is, therefore, adopted by us as the opinion of this court. It was written by Mr. Justice Houser, concurred in by the other members of said court, and is as follows:

The plaintiffs were the owners of a frame building, one side of which was adjacent to the property line of the lot upon which the building was located. Several years preceding the date when the plaintiffs became the owners of said property, at the instance and request of the then owner thereof, the defendant Southern California Gas Company (hereinafter designated the defendant), which was engaged in the business of furnishing gas to the public generally, installed a service gas pipe from its gas main in the public street to the premises of such owner, and thereupon and thereafter by such means furnished gas to said owner for his use. At a later date, which also preceded the acquisition of the property by the plaintiffs, the gas service of the then owner was discontinued, and, with the exception of the service pipe which had been installed and was owned by the defendant, all gas pipes were removed from the premises. The service pipe "was located one foot east of the property line," which placed it just outside of the plaintiffs' building and property and within a few inches thereof. In discontinuing the service of the gas, the defendant caused to be capped the riser which extended perpendicularly from the service pipe above the surface of the soil for about four inches. The building was constructed "about six inches * * * above the ground surface." At no time did the plaintiffs have knowledge either of the location or of the existence of either the service pipe or the capped riser. Between the side of the building that was adjacent to the property line and the curb line of the street was a space of ten or twelve feet upon which a night watchman employed by the plaintiffs sometimes parked his automobile. Early in the evening of a certain day, which was several months subsequent to the date on which the plaintiffs became the owners of the premises, a boy with whom the watchman was conversing at the time, threw a burning match upon the ground near the place where the capped riser was located, and thereupon an explosion of accumulated gas occurred underneath the building, which was followed by a fire that resulted in a damage to the building, stipulated by the parties hereto to amount to the sum of $1,500. Thereafter, in an action brought by the plaintiffs against the defendant, the trial court denied to the plaintiffs any right of recovery against the defendant, but rendered judgment in favor of the latter. It is from such judgment that the instant appeal is prosecuted.

[1] In the leading case of Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146, the principle of law known as "res ipsa loquitur" was applied to a situation somewhat similar to that por-

trayed by the facts herein, since which time the rule therein announced has been generally recognized and followed by the courts of this state. See 19 Cal. Jur. 704 et seq.; Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 151 P. 286; Id., 180 Cal. 561, 182 P. 32; Phœnix Assurance Co. v. Texas Holding Co., 81 Cal. App. 61, 252 P. 1082, and especially Smith v. Southern Counties Gas Co., 89 Cal. App. 81, 264 P. 532.

In the instant case it appears that, since "the thing which caused the injury" was shown to have been under the management of the defendant, and that the accident was such "as in the ordinary course of things does not happen if those who have the management use proper care," in the absence of explanation by the defendant, it may properly be inferred that the accident arose from its want of care. In other words, in the situation as hereinbefore has been set forth, without further evidence on the part of the defendant, a prima facie case of negligence on the part of the defendant was established; and the plaintiffs were entitled to a judgment in their favor, unless it further appeared that, by substantial evidence introduced in behalf of the defendant, the trial court was authorized to conclude that the defendant was not negligent in the premises. See authorities cited, supra.

In substance, all the facts in evidence which in any manner even tended to warrant a surmise that the defendant had not been negligent, or that the accident was directly attributable to the negligence of either of the plaintiffs, or of some other person, were the location of the riser on the service pipe, which was shown to have been outside the property of the plaintiffs and a few inches from their building; that after the explosion and the fire the connecting threads between the riser and the service pipe were found to have been cracked; the possibility that on some indefinite and uncertain date the watchman may have driven his automobile upon or over said service pipe; that no complaints of leaks in the service pipe had ever been registered with the defendant; that the average life of gas pipes in the locality in which the one in question was located far exceeded the length of time that the particular service pipe and riser had been in use; and that, although no evidence was introduced to the effect that said service pipe and riser at any time had ever been inspected by any person, it did appear that the defendant had employed a man in "every district * * * looking for these leaks."

[2, 3] It is clear that, because of the nature and the dangerous qualities of gas, the defendant was required to use great care in its management and control. Considering the fact that the defendant simply capped the riser, rather than adopted a safer measure for its protection against liability for injuries or damages which might arise from "these leaks," especially in view of the fact that neither the service pipe nor the riser was located on the property of the plaintiffs, and that the latter neither had nor assumed to have any management or control of either the service pipe or the riser, in the absence of any substantial evidence in its defense, the responsibility of the defendant in the premises approaches a certainty. The mere possibility that the watchman may have driven his automobile over or upon or against the riser, and thus have caused the leakage of the gas, amounts to nothing more than a conjecture. For aught that appears, the breaking of the connecting threads between the service pipe and the riser may have resulted from any one or more of many different conditions which may have been present. If complaints had been made and no attention had been paid to them, such a fact might constitute additional evidence of the negligence of the defendant; but the fact that no complaints had ever been made relative to the situation would have no tendency to prove affirmatively that care had been exercised on the part of the defendant. And the same principle would apply with reference to the average length of the life of the gas pipe. If its age limit had expired, that fact might well be an item tending to show lack of care; but, because the pipe was generally still in good serviceable condition has no tendency to prove that in the circumstances present herein the defendant was not guilty of negligence. As to the inspection of the service pipe and the riser in question, the evidence merely shows that the defendant employed a man in "every district" whose business was "to look after these leaks." No evidence was presented to the effect that he had ever inspected this particular service pipe and riser. But even if it might be surmised that he had done so, the evidence contains no information as to the date when such inspection occurred—whether within a day, a week, a month, or even a year preceding the explosion and the fire. In determining the possible legal effect of such evidence as it was intended to bear upon the ultimate fact of either the care of the defendant or the lack thereof by some other person in the premises, this court is impressed with the suggestions made by the appellants in their brief herein with reference thereto, to wit: "We assert that such evidence falls far short of being substantial, and, in fact, is barely pertinent under the issue. True, we can speculate, or guess, that the watchman ran into the pipe, causing the damage. We can guess that, because of its break in the thread, something may have run over it. We might possibly hazard a guess that some time after installation, the gas company district man may have inspected for leaks. We can guess, because the average life of the gas pipe is from ten to fifteen years, that at all times this

pipe was in perfect condition. But such speculative indulgences do not present substantial evidence so as to create a conflict justifying the finding of the trial court. * * *" In the opinion of this court, the inference of negligence of the defendant, which arose from the application of the rule of "res ipsa loquitur," was not met by any substantial evidence which was introduced in behalf of the defendant.

The judgment is reversed.

Mr. Justice LANGDON, deeming himself disqualified, does not participate in the decision.

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218 Cal. 334

## AGG LARGE v. STATE BAR OF CALIFORNIA.

L. A. 14033.

Supreme Court of California.

June 19, 1933.

**1. Attorney and client** ⚷**1.**
**Constitutional law** ⚷**275(1).**

Statutory requirement of citizenship before admission to practice law *held* not unconstitutional (St. 1927, p. 41, § 24, as amended by St. 1931, p. 1761; Const. U. S. Amend. 14).

**2. Attorney and client** ⚷**4.**

Legislature may impose reasonable restrictions on practice of law, including manner, terms, and conditions of admission thereto.

In Bank.

Application by William Edward Agg Large to review an order of the Committee of Bar Examiners of the State Bar of California, refusing his application for admission to the practice of law.

Petition denied, and order approved.

G. Harold Janeway and S. T. Hankey, both of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

WASTE, Chief Justice.

[1, 2] Petitioner, a practicing solicitor in England, desires to come to the United States in the British quota, establish his residence in this state, file a declaration of intention to become a citizen, and practice law here. The board of bar examiners of the State Bar, in response to petitioner's inquiry, have duly notified him that under section 24 of the State Bar Act, as amended (St. 1931, p. 1761), he cannot be admitted to practice here unless and until he is a citizen. He was further informed that by the time he becomes a citizen, a transposition consuming approximately five years, he will not be in a position to show continuous practice of the law for a period of four years of the six years immediately preceding the filing of his application, as required by rule VI governing admissions to practice and relating more particularly to admissions on motion.

In this review proceeding petitioner challenges the constitutionality of the citizenship requirement, contending that it is discriminatory and therefore violative of the Fourteenth Amendment of the federal Constitution. We find no merit in the contention. The power of the Legislature to impose reasonable restrictions upon the practice of the law, including the manner, terms, and conditions of admission to practice, has long been recognized in this state. Brydonjack v. State Bar, 208 Cal. 439, 443, 281 P. 1018, 66 A. L. R. 1507. We entertain no doubt as to the propriety or reasonableness of the citizenship requirement found in section 24 of the State Bar Act. In our opinion it constitutes a proper exercise of the police power. The reason underlying such a requirement is obvious. In Ex parte Thompson, 10 N. C. 355, 363, it is couched in the following language: "There is no profession relative to which the public good more imperiously requires that its members should duly appreciate, and honestly maintain, the freedom, the purity, and the genuine spirit of our political institutions. These are so blended and interwoven with the civil rights of the citizen, they present themselves in such an infinity of relations, as additional abutments to the several charters of property and personal security, that it is difficult to conceive how a professional advocate, owing foreign allegiance and cherishing alien prejudices, can usefully vindicate principles in the abhorrence of which he may have been nurtured; how, on many important occasions, the most brilliant forensic talents can be successfully exerted, unless they are sustained and inspired by an ardent patriotism. The excellence of every human system of laws consists as much in their administration and practice, as in the theory itself." In this connection see, also, In re Admission to the Bar, 61 Neb. 58, 84 N. W. 611, 612.

In 2 Ruling Case Law, 943, it is stated that "it seems to be an invariable requirement in the various states relative to the admission of attorneys, that the applicant * * * shall be a citizen of the United States, or eligible to naturalization." Prior to the 1931 amendment of section 24, supra, it was sufficient if the applicant for admission to practice had declared, bona fide, his intention to become a citizen. (Code Civ. Proc. § 275). Howden v. State Bar, 208 Cal. 604, 283 P.

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

820. However, under the amendment, nothing short of citizenship will suffice.

The cases on this general subject are collected in 39 A. L. R. 346, 349, wherein the following appears: "That discrimination against aliens in legislation relating to the granting of a license to practice law is not contrary to the Federal or state Constitutions, although this precise question has apparently never been directly passed upon, finds support in the following cases: Re Hong Yen Chang (1890) 84 Cal. 163, 24 P. 156; Templar v. State Examiners (1902) 131 Mich. 254, 100 Am. St. Rep. 610, 90 N. W. 1058; Wright v. May (1914) 127 Minn. 150, L. R. A. 1915B, 151, 149 N. W. 9; Re Admission to Bar (1900) 61 Neb. 58, 84 N. W. 611; Re O'Neill (1882) 90 N. Y. 584, affirming (1882) 27 Hun, 599; Ex parte Thompson (1824) 10 N. C. (3 Hawks) 355; Re Yamashita (1902) 30 Wash. 234, 59 L. R. A. 671, 94 Am. St. Rep. 860, 70 P. 482. The right to exclude aliens from the practice of law was based in these cases, not only upon the ground that the right to practice law is a privilege, but also upon the fact that an applicant, upon his admission to the bar, becomes an officer of the court, who should be a citizen of the state."

Other cases that lend approval to the citizenship requirement, here assailed, are Bosque v. U. S., 209 U. S. 91, 28 S. Ct. 501, 52 L. Ed. 698, and In re Robinson, 82 Neb. 172, 117 N. W. 352, 17 Ann. Cas. 878.

In conclusion it might be added that the only effect of our statute is to require petitioner, upon becoming a citizen, to pass the bar examination. This would not appear to be an unreasonable requirement.

The petition is denied, and the action of the State Bar approved.

We concur: SEAWELL, J.; THOMPSON, J.; PRESTON, J.; LANGDON, J.; SHENK, J.

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218 Cal. 355

## DAVIS v. EDMONDS.

L. A. 14060.

Supreme Court of California.

June 21, 1933.

**1. Appeal and error ⚷1099(7).**

Decision on former appeal reversing judgment for defendant *held* binding on competency of account offered by plaintiff at both trials, concerning which objections were either not made or not preserved at first trial.

Judgment for reversal on the first appeal conclusively determined that evidence was admissible at subsequent trial in spite of absence of decision on the merits of the objections, since the decision was, in effect, though not expressly stated, that the objections were waived by not having been made or not having been urged.

**2. Appeal and error ⚷1099(7).**

Decision on former appeal establishes character and competency of evidence offered.

In Bank.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by W. Jefferson Davis against Douglas L. Edmonds, administrator with the will annexed of the estate of John W. Mitchell, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 15 P.(2d) 520.

Stearns, Luce & Forward, Gray, Cary, Ames & Driscoll, and Albert J. Lee, all of San Diego, for appellant.

Wright & McKee and C. M. Monroe, all of San Diego, for respondent.

PER CURIAM.

Appeal from a judgment in the plaintiff's favor in an action on a book account for services rendered as an attorney.

The original complaint was filed on May 21, 1926. It was based on a rejected claim of $10,000 filed in the matter of the estate of John W. Mitchell, deceased, for the reasonable value of legal services rendered by the plaintiff to the decedent in the latter's lifetime during the period from October, 1921, to February, 1922. Subsequently the plaintiff, by leave of court, filed an amendment to his complaint setting up two additional causes of action, one for the same sum based on a book account for services performed; and the other involving the same claim based on a balance due upon a mutual, open and current account. Judgment in the sum of $10,000 was sought against the defendant. In addition to general and specific denials, the defendant invoked the statute of limitations as to all three counts.

The issues were twice tried. On the first trial the plaintiff conceded the outlawed character of the claim based upon quantum meruit, and he abandoned the third count when it became apparent that there was no evidence of a mutual, open, and current account. It was conceded upon that trial that, if the plaintiff could recover at all, it must be on the cause of action based on the book account; and the bar of the statute of limitations has not since been urged as to this count.

On both trials there was offered and received in evidence, over certain objections of the defendant, the journal and ledger sheets of the plaintiff as constituting the book account. The items of charges for legal services rendered to the decedent consisted of an entry of a charge of $1,000 as a retainer, a credit of $250, and an additional entry of a charge of $1,500 for legal services.

Objection on the first trial was made to the plaintiff's testifying on his own behalf concerning transactions had with the decedent, on the ground that the plaintiff was not a competent witness pursuant to the provisions of section 1880 of the Code of Civil Procedure. The objection was sustained on that ground and on the further ground that the bar of that section had not been removed during the cross-examination conducted by the attorneys for the defendant. The absence of testimony of the plaintiff concerning transactions covered by the items in the book account was made the basis of the judgment for the defendant on the first trial. On appeal, the judgment was reversed. Davis v. Mitchell, 108 Cal. App. 43, 290 P. 887. The ground of reversal was that during the cross-examination conducted by the attorneys for the defendant the plaintiff was interrogated concerning transactions had with the decedent directly relating to the services rendered by him to the decedent and his compensation therefor, and that the court erroneously concluded that the bar of section 1880 of the Code of Civil Procedure had not been waived or removed. It was there determined that prejudicial error had been committed in excluding the plaintiff's testimony concerning the items set forth in his book account.

The decision on that appeal shows that the only contention made by the defendant in support of the judgment, in addition to opposing the grounds urged for a reversal, was that the plaintiff was not entitled to sue on a book account, inasmuch as his claim filed in the estate was based on quantum meruit, and that there was a fatal variance between the cause of action alleged in the original complaint and the cause of action attempted to be set up by the amended complaint. It was determined, however, that, inasmuch as the items set forth in the book account were the same as those alleged in the claim filed, there was no sufficient variance between the cause of action alleging a book account and the claim based upon the reasonable value of the services rendered. Davis v. Mitchell, supra, 108 Cal. App. 47, 290 P. 887.

On the second trial of the case the plaintiff recovered judgment in the sum of $2,354, based on the charges and credits comprising the book account, less $500 thereof which the court found was a charge made for services rendered subsequent to the period included in the plaintiff's rejected claim. On the present appeal from that judgment the grounds urged for a reversal are, first, that the court erred in overruling the defendant's objections to the introduction of the plaintiff's account made on the grounds that the items were not original entries because not shown to have been made contemporaneously with the transactions or services they purport to cover and that the items of charge are not the proper subject of a book account; and, second, that the court erred in overruling the defendant's objection that the plaintiff was not a competent witness, notwithstanding his incompetency had been waived on the former trial. The contention was urged by the plaintiff on the second trial and is urged on this appeal that by reason of the decision on the former appeal the stated grounds are not available to the defendant.

[1, 2] Various arguments are advanced by the defendant to sustain the grounds urged for a reversal, and in particular the grounds relating to the competency of the book account as evidence. Whatever merit there may be in the defendant's arguments in that behalf, it must be said that the objections come too late. The failure timely to make or urge the objections constitutes a waiver which is binding on the defendant on the record now presented. Argue v. Monte Regio Corp., 115 Cal. App. 575, 2 P.(2d) 54; J. & J. H. Peck & Co. v. Soragan, 27 Vt. 92; Bliss v. Allard, 49 Vt. 350; Perry v. Simpson Waterproof Mfg. Co., 40 Conn. 313; Town of Alton v. Town of Gilmanton, 2 N. H. 520; Jones on Evidence (3d Ed.) §§ 257, 259; 1 C. J. 672, § 218. Obviously, the objections either not having been made on the former trial or not having been urged as a ground or grounds for upholding the judgment, the merits thereof were not expressly decided by the decision on the former appeal. Nevertheless that decision necessarily is, just as effectually as though expressly so stated, that, inasmuch as the objections were waived by not having been made or not having been urged, the items constitute the proper subject of a book account. It may very well have been expressly so stated, and in such a case no question of its binding effect could have been entertained. In fact, without that decision having been made, it must be assumed that the judgment would not have been reversed. It was a necessary element in the final determination. The evidence involved is the same on this as on the former appeal. The decision on the former appeal, having established the character and competency of the evidence as the proper subject of a book account, is binding on the parties hereto on this appeal. See 2 Cal. Jur. p. 954 et seq., and cases cited. Upon the final determination of the appeal from the judgment rendered on the first trial, the only function of the court on a retrial was to receive the plaintiff's testimony concerning the items of the account (Deacon v. Bryans, 212 Cal. 87, 298 P. 30), and proof

of their correctness (22 C. J., p. 867), which was, in fact, the course followed. The record shows that in its rulings the trial court considered and interpreted the decision on the former appeal. No error in overruling the objections now urged is perceived. It may be said that all of the contentions and arguments of the defendant are concluded by the determination on the former appeal and need not be further specifically noticed.

The judgment is affirmed.

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218 Cal. 329

## GALBRAITH v. STATE BAR OF CALIFORNIA.

L. A. 14002.

Supreme Court of California.
June 19, 1933.

**1. Attorney and client ⟹44(1).**

Where attorney represented admittedly guilty offenders in certain criminal proceedings, attorney's institution of civil damage actions against such former clients on behalf of persons injured in transactions involved in the criminal proceedings *held* in violation of professional ethics (Rules of Professional Conduct of State Bar of California, rule 5; Code Civ. Proc. § 282, subd. 5).

> Rule 5 of Rules of Professional Conduct of the State Bar of California provides that a member of the state bar shall not accept employment adverse to a client or former client relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client. Code Civ. Proc. § 282, subd. 5, declares it to be duty of an attorney to maintain inviolate the confidence and, at every peril to himself, to preserve secrets of his client.

**2. Attorney and client ⟹44(1).**

Professional conduct rule *held* construable as forbidding subsequent representation of another against former client in every case when, by reason of such subsequent employment, attorney may be called upon to use confidential information obtained in course of former employment (Rules of Professional Conduct of State Bar of California, rule 5; Code Civ. Proc. § 282, subd. 5).

**3. Attorney and client ⟹44(1).**

Attorney's conduct in advising and procuring execution of fictitious chattel mortgage by client to attorney for alleged purpose of precluding client's wife from levying upon mortgaged chattel *held* within inhibition of statute prescribing attorney's duties (Code Civ. Proc. § 282, subd. 4).

> Code Civ. Proc. § 282, subd. 4, declares it to be duty of an attorney to employ, for purpose of maintaining causes confided to him, such means only as are consistent with truth.

**4. Attorney and client ⟹53(2), 58.**

Attorney's conduct in appearing as counsel in damage suits against former clients, arising out of same circumstances which led to criminal proceedings in which attorney formerly represented such clients, and attorney's taking of client's fictitious chattel mortgage to mislead adversary *held* to sustain finding of professional misconduct, warranting three months' suspension (Rules of Professional Conduct of State Bar of California, rule 5; Code Civ. Proc. § 282, subds. 4, 5).

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In Bank.

Proceeding on the petition of W. J. Galbraith to review an order of the Board of Governors of the State Bar of California recommending that petitioner be suspended from the practice of law for a period of three months.

Petitioner suspended from the practice of law in accordance with the recommendation of the Board of Governors.

W. J. Galbraith, of Santa Barbara, for petitioner.

Philbrick McCoy, of Los Angeles, and A. B. Bianchi, of San Francisco, for respondent.

WASTE, Chief Justice.

Proceeding to review an order of the Board of Governors of the State Bar of California recommending that petitioner be suspended from the practice of the law in this state for a period of three months.

This recommendation is based on a finding, made by a local administrative committee and approved by the Board of Governors, that petitioner "is guilty of professional misconduct by reason of the facts alleged in the first, second and fourth counts of [the] notice to show cause and admitted in the verified answer of [petitioner] on file. * * *" Examination of the first count discloses that petitioner was retained by a person admittedly guilty of driving an automobile while intoxicated, a felony, to procure a reduction of the charge to that of reckless driving, a misdemeanor, to which the offender was to plead guilty, and be released with as small a fine as possible. This was done, and petitioner was paid a fee for his services in procuring the offender's release. During the course of the employment, the offender admitted his guilt to petitioner and admitted that he was intoxicated at the time of the accident. Thereafter, and without his client's knowledge or consent, petitioner instituted an action for damages against said client on behalf of a person injured by said client in the accident out of which arose the penal charge. It does not appear that petitioner disclosed to the injured person his prior professional relations with the offending driver. Upon objection being made to petitioner appearing as counsel for the plaintiff in the damage suit, and under direction of the trial court before whom the cause was pending, petitioner withdrew as counsel of record.

The second count involves the same type of misconduct. After being retained to obtain probation for an offender admittedly guilty of assault with intent to commit robbery, and after severing his connection with the offender, petitioner commenced an action for damages on behalf of the victim of the assault against his former client. This was done without the former client's knowledge or consent and apparently without disclosing to the injured person petitioner's prior professional relations with the offender. Again petitioner withdrew from the case only after objection had been made and sustained by the court before whom the damage suit was pending.

In substance, the fourth count charges that petitioner advised and procured a client to execute to him a promissory note and chattel mortgage for the purpose of precluding the client's wife from obtaining or levying upon the mortgaged chattel. The transaction was purely fictitious, for at the time of its consummation the client was not indebted to petitioner. Despite this fact petitioner and his client, in an affidavit attached to the mortgage, averred that it was "made in good faith and without any design to hinder, delay or defraud any creditor or creditors."

**[1, 2]** Petitioner in his answer filed with the local administrative committee admitted the material portions of the foregoing charges, but sought to explain his conduct as being singularly free of any willful intent to do wrong. As to the two charges first above mentioned, he urges that he was retained by two admittedly guilty offenders for a specific purpose, viz. to procure their release as quickly and as easily as was consistent with orderly procedure. Having accomplished his objective in each instance, he states that he felt no compunction in subsequently appearing as counsel against said admitted offenders in damage suits arising out of the identical circumstances leading to the penal charges. By his conduct petitioner, a practitioner of many years' standing, displayed a complete lack of appreciation of the ordinary and accepted canons of professional ethics. Rule 5 of the Rules of Professional Conduct (213 Cal. cxiv) reads as follows: "A member of The State Bar shall not accept employment adverse to a client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client." Canon 37 of the Canons of Professional Ethics of the American Bar Association (Amer. Bar. Assn. Rep. 1931, vol. 56, p. 803) is to the same effect.

A reasonable construction of this rule suggests that the subsequent representation of another against a former client is forbidden not merely when the attorney will be called upon to use confidential information obtained in the course of the former employment, but in every case when, by reason of such subsequent employment, he may be called upon to use such confidential information. In subdivision 5 of section 282 of the Code of Civil Procedure it is declared to be the duty of an attorney "to maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client." See, also, Anderson v. Eaton, 211 Cal. 113, 293 P. 788. In Wutchumna Water Co. v. Bailey, 216 Cal. 564, 15 P.(2d) 505, 509, it is declared that "an attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him, nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." The circumstances giving rise to the first two charges of misconduct were such as might suggest or require that petitioner in the prosecution of the damage suits make use of information acquired by him while representing the respective defendants in the prior penal proceedings.

**[3]** Petitioner's conduct in advising and procuring the execution of a fictitious chattel mortgage, as charged in count 4, for the purpose of misleading or, as petitioner puts it, "bluffing," and adversary, would seem to fall within the inhibition found in subdivision 4 of section 282 of the Code of Civil Procedure, where it is declared to be the duty of an attorney "to employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth. * * *"

**[4]** We are satisfied that the material allegations in counts 1, 2, and 4 of the order to show cause, as admitted by petitioner in his answer, are ample to sustain the findings of the Board of Governors, and we are satisfied with its recommendation. It is therefore ordered that the petitioner herein, W. J. Galbraith, be and he is hereby suspended from the practice of law in this state for the period of three months beginning on the 10th day from and after the filing of this order.

We concur: SEAWELL, J.; IRA F. THOMPSON, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

218 Cal. 401

## FISHBACK et al. v. J. C. FORKNER FIG GARDENS, Inc., et al.

L. A. 13939.

Supreme Court of California.
June 28, 1933.

**Executors and administrators** 🔑523.

In absence of ancillary administration, California courts will recognize, as matter of comity, title vested by decree of distribution of state of deceased mortgagee's domicile to mortgage covering California land, where rights of local creditors are not involved.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Cornelia Fishback and others against the J. C. Forkner Fig Gardens, Incorporated, and others. From an adverse decree, defendant named and others appeal.

Affirmed.

Everts, Ewing, Wild & Everts, C. L. Clark, and L. N. Barber, all of Fresno, for appellants Vogel and Thompson.

James T. Barstow, of Fresno, for appellant J. C. Forkner Fig Gardens, Inc.

Louis C. Levy, of Fresno, for E. O. Thompson.

C. V. Caldwell, of Los Angeles, and G. L. Aynesworth, of Fresno, for respondents.

IRA F. THOMPSON, Justice.

This appeal is from a decree of foreclosure of a mortgage and sale of the mortgaged premises and for a deficiency judgment and is taken on the judgment roll alone. The note, secured by a mortgage on land in California, was the property of one Horace Fishback, now deceased, who was at the time of his death a resident of South Dakota. Administration was had in South Dakota in a court of general probate jurisdiction, and the note and mortgage were distributed to the plaintiffs as the heirs at law of the decedent.

Appellants contend that the complaint in the foreclosure suit did not contain facts sufficient to constitute a cause of action, in that it did not allege any administration of the estate in California; that, the situs of the property being in California, in order to maintain the action the heirs must have acquired title to the note and mortgage through administration in a California court.

Appellants rely almost entirely on the case of Murphy v. Crouse, 135 Cal. 14, 66 P. 971, 87 Am. St. Rep. 90, which holds that stock in a California corporation has its situs in this state for the purposes of administration where ancillary letters had previously been issued in this state. That case involved a controversy between the local ancillary administrator and the purchaser from the domiciliary executor. In the case at bar, it does not appear that any ancillary administration was ever commenced, nor are we here concerned with the rights of California creditors. In the absence of ancillary administration, the California courts will recognize, as a matter of comity, the title vested in the plaintiffs by the decree of distribution rendered by the South Dakota probate court.

The case of Murphy v. Crouse, supra, is not in point for a further reason. That case represents, with regard to intangibles, the sole exception from the rule of mobilia sequuntur personam, which is recognized in this jurisdiction; that is, certificates of stock in a domestic corporation. Chambers v. Mumford, 187 Cal. 228, 201 P. 588, 42 A. L. R. 342. With respect to other choses in action, the California courts have repeatedly held that the situs of the debt is that of its owner and that it is not property in the state of the debtor. Chambers v. Mumford, supra, and cases therein cited. See, also, Estate of Layton (Cal. Sup.) 19 P.(2d) 793.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; SHENK, J.; LANGDON, J.

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218 Cal. 359

## BELT-CASUALTY CO. v. FURMAN.

## MILLER v. BELT CASUALTY CO.

## NARINS v. SAME.

S. F. 14787.

Supreme Court of California.
June 21, 1933.

**1. Parties** 🔑40(4).

Persons with judgments for personal injuries against holder of automobile indemnity policy against liability for bodily injuries could intervene in suit by indemnitor to cancel policy as against objections of enlargement of equitable action and ability to maintain actions at law (Code Civ. Proc. § 387).

**2. Stipulations** 🔑14(10).

Failure of interveners seeking relief against insurer to allege that automobile indemnity policy involved was issued or delivered within state, or return of execution against insured unsatisfied, *held* immaterial, where doing of business within state was not denied, and there was express stipulation that policy was executed and delivered within state (St. 1919, p. 776).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by the Belt Casualty Company against William Furman, wherein Gertie Miller and Sadie Narins intervened and filed separate complaints against the Belt Casualty Company. From judgments for defendant and interveners, plaintiff appeals.

Affirmed.

Lasher B. Gallagher, of Los Angeles, and Edward D. Keil, of San Francisco, for appellant.

Everett B. Taylor, of San Francisco, for respondent Furman.

James F. Brennan, of San Francisco, for respondent Narins.

George F. Buck, Jr., of San Francisco, and Gumpert & Mazzera, of Stockton, for respondent Miller.

SHENK, Justice.

This is an appeal by the plaintiff from judgments in favor of the defendant, William Furman and the interveners in an action to rescind a policy of automobile indemnity insurance.

The policy was issued by the plaintiff to the defendant Furman in February, 1930. Under the contract, the plaintiff agreed to indemnify the defendant against liability for bodily injuries resulting from the defendant's operation of a certain De Soto automobile. In July, 1930, the defendant, while driving the automobile in San Francisco, collided with a street car. As a result of the collision, two passengers in his automobile, Sadie Narins and Gertie Miller, suffered bodily injuries. They filed suits against Furman, and on November 29, 1930, recovered judgments in the sums of $5,000 and $2,842.50, respectively. Those judgments have become final. On December 22, 1930, the present action was commenced by the insurance company against its assured, Furman, to rescind and cancel the contract of insurance by reason of the alleged breach by the defendant of a clause in the policy providing that the assured, when requested by the company, shall render all co-operation and assistance in his power in respect to any claim made or suit brought on account of bodily injuries resulting to persons by reason of the operation of said automobile.

On February 7, 1931, by leave of court, Sadie Narins and Gertie Miller filed complaints in intervention based on the judgments recovered by them and for affirmative relief against the plaintiff for the amounts thereof, with interest. Judgment was entered against the plaintiff Belt Casualty Company, on its complaint for rescission. Judgments were also rendered in favor of the interveners and against the company for the amounts of the judgments recovered by the former in their actions against the defendant Furman.

On its appeal from those judgments, the Belt Casualty Company makes two major contentions.

[1] The plaintiff does not contend that the interveners have not sufficient interest in the action or in the success of the defendant therein to give them the right to intervene. But, if we understand it correctly, its claim is that the interveners may not be permitted to join in an action in equity for rescission on the claims asserted by them, inasmuch as their complaints set up distinct causes of action which sound in contract and which seek affirmative relief that could be recovered in actions at law; that thereby the scope of the equitable action is enlarged contrary to the meaning and intent of section 387 of the Code of Civil Procedure. If such a general statement be declared as a correct proposition of law, the result would appear to be a denial of the benefit of said section to those directly interested in the subject-matter of the action, but who, though they be permitted to intervene in the action by virtue of their direct interest, nevertheless would be compelled to file separate suits to recover the affirmative relief to which they immediately would become entitled in the event the contentions with which they are aligned in the main action are finally sustained. The interveners here have an interest which is adverse or hostile to both parties, in the sense that each intervener has a cause of action against the defendant Furman, as to whom she has already established herself as a creditor, and a cause of action growing out of the same transaction against the insurance company on its contract of insurance, depending on the outcome of the present action. The fact that the established pecuniary interests of the interveners against both parties to the action are so directly affected by the result is the basis upon which the interveners were permitted to join in the action. The granting of affirmative relief to the interveners is but incidental to the main purpose of the section of the Code of Civil Procedure, which is to obviate delay and multiplicity of actions by creating an opportunity to those directly interested in the subject matter to join in an action already instituted. It has been stated that an intervener may be accorded affirmative relief which he could properly seek by way of cross-complaint were he one of the original parties to the action. Boskowitz v. Thompson, 144 Cal. 724, 729, 78 P. 290. See, also, 20 Cal. Jur. p. 526.

We are not referred to any theory of law or equity which would deny to the interveners the particular relief sought. Nor has the plaintiff shown that the issues of the complaints in intervention were not conveniently tried in the present action. The right to affirmative relief is not interfered with merely by reason of the fact that a separate action may have been maintained. Bogue v. Roeth, 98 Cal. App. 257, 263, 276 P. 1071; Tubbs v. Delillo, 19 Cal. App. 612, 620, 127 P. 514. As illustrated especially by the latter case, no good reason is shown here why the claims of the interveners against the plaintiffs, based on the judgments which have established them as creditors of the defendant, should not be presented through the agency of a complaint in intervention in an action by the plaintiff against the defendant wherein the very existence of the interveners' rights against the plaintiff is at stake. The fact that the action brought by the plaintiff sounds in equity and that the interveners seek a money judgment does not form a foundation upon which to base the contention that thereby the scope or function of the action has necessarily been enlarged. See 1 Pomeroy, Equity Jur. § 242. The case chiefly relied upon by the plaintiff (McNeil v. Morgan, 157 Cal. 373, 108 P. 69), was given credit in Wright v. Jordan, 192 Cal. 704, 714, 221 P. 915, for the broad proposition that, while interveners were permitted to join in the action for the purpose of sustaining or opposing the respective contentions of the parties, they would not be permitted to enlarge the scope or function of the special proceeding. In the McNeil Case the plaintiff brought an action to quiet title. All that was decided in that case bearing on the general proposition commented upon in Wright v. Jordan was that it was questionable whether an intervener may be permitted to interject issues in an action to quiet title wherein both parties had waived a jury and by which the parties would have a jury trial forced upon them; but, inasmuch as it appeared that the intervener was not entitled to a jury as a matter of right, the question was expressly not decided. McNeil v. Morgan, supra, at page 377 of 157 Cal., 108 P. 69. No similar question is raised in the present case. The question in each of the other cases relied upon by the plaintiff turned on the interest of the proposed interveners, and the order denying them the right to join in the action was upheld on the ground that their interest was not sufficient. Such cases are not in point on the question presented here.

[2] The plaintiff's second contention has no merit, in view of the state of the pleadings, stipulations on the trial, and the findings of the trial court. The contention is that the interveners are not entitled to base their causes of action on Statutes of 1919, p. 776, providing in effect for an action directly against the insurance company without the necessity of first showing that an execution against the insured was returned unsatisfied (Malmgren v. Southwestern A. Ins. Co., 201 Cal. 29, 255 P. 512), unless it is shown by their complaints that the policy of insurance sued on was issued or delivered to the insured in this state. The allegation of the plaintiff's complaint that it was doing an insurance business in the state of California was not denied. It was expressly stipulated by counsel for the insurance company on the trial that the policy of insurance was executed and delivered to the defendant in this state; and the court found that the policy was issued and delivered to the defendant in San Francisco. No further notice, therefore, need be given to this contention.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; IRA F. THOMPSON, J.; CURTIS, J.; PRESTON, J.

## KIMBALL v. GENERAL ELECTRIC CO.*

Civ. 4673.

District Court of Appeal, Third District, California.

June 16, 1933.

Rehearing Denied July 15, 1933.

Hearing Granted by Supreme Court Aug. 15, 1933.

**1. Master and servant 🔑354.**

Relation of trust and confidence exists between employee and employer requiring employer to make full disclosure of circumstances surrounding injury suffered by employee to show who was liable.

**2. Limitation of actions 🔑100(1).**

Statute postponing accrual of cause of action until discovery of facts constituting fraud *held* applicable to tort actions (Code Civ. Proc. § 338, subd. 4).

Code Civ. Proc. § 338, subd. 4, providing, in substance, that cause of action for relief on ground of fraud is not deemed to have accrued until discovery, by aggrieved party, of the facts constituting the fraud, is applicable to tort actions, whether fraud consists in initial act or in concealment of cause of action.

**3. Limitation of actions 🔑179(2).**

In action for injuries sustained by employee, based on negligence of another employee loaned to defendant, allegations of complaint *held* to disclose fraudulent concealment of defendant's liability to plaintiff, tolling one-year limitation for commencement of action (Code Civ. Proc. § 338, subd. 4; § 340, subd. 3; Civ. Code, § 1572, subd. 3).

Facts alleged in complaint in action for personal injuries sustained by employee disclosed, in substance, that plaintiff was injured through negligence of coemployee

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*For subsequent opinion see 30 P.2d 39.

> loaned to third party; that plaintiff had no knowledge of liability of third party for coemployee's negligence; that plaintiff was so incapacitated, as the result of the injuries sustained, that he was unable to carry on duties of his occupation or ascertain and investigate circumstances connected with his injuries and the party or parties responsible therefor; that employer and third party entered into an agreement whereby third party was to pay one-half of any amount which employer was required to pay to injured employee; and that employer and third party disclosed no facts showing latter's liability.

**4. Limitation of actions 🔑95(1).**

Mere ignorance of injury, or of facts constituting injury, or of identity of person liable therefor, will not toll running of statute of limitation (Code Civ. Proc. § 338, subd. 4; § 340, subd. 3).

**5. Limitation of actions 🔑100(1).**

In cases of fraud, limitation is tolled until discovery of fraud (Code Civ. Proc. § 338, subd. 4).

> In cases of fraud, statute of limitation is tolled until discovery of fraud, whether fraud be in act itself or in concealment of facts until discovery of fraud or until discovery should have been made by exercise of reasonable diligence.

**6. Corporations 🔑425(5).**

Where agents of corporation fail to speak, notwithstanding duty to speak, corporation is liable.

**7. Limitation of actions 🔑104(1).**

Right of action for personal injuries is not lost by plaintiff's failure to commence action within time limited, if accrual was tolled by fraudulent concealment of facts (Code Civ. Proc. § 338, subd. 4; § 340, subd. 3).

> Failure to commence action for personal injuries within time limited by Code Civ. Proc. § 340, subd. 3, did not defeat right of action where accrual thereof was tolled under section 338, subd. 4, by fraudulent concealment of facts, since right of action arises under the common law and is not conferred by statute.

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Appeal from Superior Court, Shasta County; W. E. Herzinger, Judge.

Action by Clarence B. Kimball against the General Electric Company and others. From a judgment in favor of the plaintiff, the defendant named appeals.

Judgment affirmed.

Charles A. Christin, of San Francisco, for appellant.

Jesse W. Carter and Glenn D. Newton, both of Redding, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

Other parties were made defendants in this action in the trial court, but do not appear upon this appeal, and our consideration is limited to the parties named.

The proceeding before us is an appeal by the General Electric Company, a corporation, from a judgment awarding damages to the plaintiff resulting from injuries received by the plaintiff on account of the negligent act of Dean Wilson, an employee of the General Electric Company. The injuries were received by the plaintiff on the 6th day of March, 1928, in the county of Shasta. The complaint in this action was filed on the 10th day of July, 1930. The appellant interposed the defense of the statute of limitations. The respondent relies upon fraudulent acts of concealment for the purpose of tolling the statute. No question is raised as to excessive damages awarded, nor as to the rulings of the court in instructing the jury.

Upon this appeal the following questions are presented: First, that the complaint does not state facts sufficient to constitute a cause of action; second, that the testimony does not support the verdict; and, third, that subdivision 4 of section 338 of the Code of Civil Procedure cannot be applied in actions founded upon tort. Other minor objections are urged, but the determination of the three issues above stated are decisive upon this appeal. The three issues above stated are so interrelated that in many instances what we have to say as to one is more or less an answer to the others.

The amended complaint, among other things, alleges that on the 6th day of March, 1928, the plaintiff was in the employ of the Pacific Gas & Electric Company, a corporation, as an electrician and general power house workman, at what is known as "pit 3 power plant" on Pit river in the county of Shasta, said power plant being then and there operated and controlled by the Pacific Gas & Electric Company. That on the same day the defendant, General Electric Company, a corporation, was engaged in repairing one of the generators in said pit 3 power plant, and had in its employ in making such repairs one Dean Wilson, who was then and there engaged in the discharge of his duties as an employee of the General Electric Company in repairing the generator just referred to. That on or about 4:40 p. m. of said day, while the plaintiff was at work in tightening a bolt on a by-pass pipe, the said Dean Wilson negligently and carelessly caused and permitted a large stay bolt, being a bolt about one-quarter inch in diameter, 54 inches in length, and weighing about 20 pounds, to drop a number of feet and strike the plaintiff a severe blow on the top of his head. That, as a result of being struck on the top of his head by said bolt, plaintiff received a compound fracture of his skull, which rendered him totally unconscious for a period of seventeen days, and in a semiconscious condition for several months thereafter. Plaintiff was required to undergo two surgical operations for the treatment of the fracture in his skull. In one of the surgical operations it was necessary to cut and remove a portion of the bone from his left shin and graft it into his skull. The result of the injury to the plaintiff caused the development of a form of pneumonia, from which he suffered for several weeks, and also a disease known as "phlebitis" of the right saphenous vein, all of which required medical and surgical treatment.

The complaint further shows that the plaintiff was under medical and surgical treatment from the date of the injury until the date of the commencement of the action. Other serious results following the injury are set forth in the complaint which we need not detail, but which appear with sufficient particularity to indicate that the plaintiff was, from the time of the injury until a short time before the commencement of this action, both mentally and physically incapacitated from attending either to the duties of his ordinary occupation or to any transactions relating or pertaining to the ascertainment of the facts or an investigation into the facts connected with his injuries, the party or parties responsible therefor, or to institute or prosecute an investigation which would lead to a disclosure of the parties responsible for his injuries, and the steps necessary to be taken by him.

The record does show that for a few months prior to the institution of this action the plaintiff acted as a watchman in the employ of the Pacific Gas & Electric Company, but, so far as disclosed, the record would indicate that at no time up to the beginning of the action was the plaintiff either physically or mentally able to perform the duties incumbent upon his former employment. So far as we read the record it does not appear that the injuries suffered by the plaintiff are seriously questioned.

The complaint further sets forth that, at the time the plaintiff received the injuries herein referred to, the plaintiff did not know, and had no means of knowing, that Dean Wilson was in the employ of the General Electric Company, a corporation; likewise, that the plaintiff did not know, and had no means of knowing, that the General Electric Company was repairing the generator upon which Dean Wilson was employed, and had no means of knowing or ascertaining that the injury which the plaintiff received was the result of the negligence of the defendant, General Electric Company. That the plaintiff received no information, and had no knowledge whatever, that the injuries which he received were caused by an employee of the General Electric Company, until on or about the 5th day of June, 1930, when there came into his possession a copy of a letter written by one J. D. McCarthy, claims adjuster for the Pacific Gas & Electric Company, to D. G. Martin, auditor for said company, which letter was found by plaintiff in the clubhouse at Volta power house, near Manton, in the county of Shasta, on or about the 5th day of June, 1930. This letter is in the following words and figures:

"Pacific Gas & Electric Company

"June 5, 1929

"Mr. D. G. Martin, Auditor

"Dear Sir: Herewith find check No. 12562 for $951.17 drawn on the Wells Fargo Bank and Union Trust Company by the General Electric Company in favor of the Pacific Gas and Electric Company.

"This check was issued to reimburse this company for one-half of the expense so far incurred for medical attention and compensation in the case of Clarence B. Kimball, an electrician and combination man who sustained a bad fracture of the skull on March 6, 1928, at Pit No. 1 Power House.

"At the time the accident occurred the General Electric Company had one of their electrical mechanics, L. A. Fitts, at Pit No. 1 supervising certain corrections and adjustments on one of the generators. To accommodate the General Electric Company and avoid the necessity of bringing extra help to the plant to assist Mr. Fitts with the work in hand, arrangements were made by which employees of the Shasta Division who were on this Company's payroll and employed at Pit No. 1, were loaned to the General Electric Company to help Mr. Fitts. It was also arranged whereby this Company would later bill the General Electric Company for the time of the employees so assigned. One of these men, Dean Wilson, accidentally permitted a large stay bolt, 4 feet 7 inches by 1¼ inches, to roll off the top of the generator and in falling it struck Kimball a glancing blow on the crown of his head, lacerating his scalp and badly fracturing his skull. Kimball's life was despaired of for several days and it became necessary to remove a section of the skull that was pressing on his brain. This operation evidently saved his life and he gradually recovered. To repair the large hole in his skull, however, it was found advisable to bring Kimball to San Francisco where a section of bone taken from his shin was grafted to his skull, thereby closing the hole which previously was only protected by thin scalp tissue. This latter operation was also a successful one and Kimball returned to work on October 10th, 1928. While he made a remarkable recovery he will be under the observation of Drs. Naffziger and Fleming for a long time to come.

"Although Kimball has sufficiently recovered to return to work he will never entirely regain his normal condition. Dizzy spells can be anticipated which will preclude him from doing his regular work of lineman and electrician. Injuries of this kind always leave some permanent disability and a disability rating will no doubt be requested at a later time and granted by the Commission when applied for.

"In addition to sharing the expense so far incurred the General Electric Company has verbally agreed to share all future expense and any permanent disability rating that may be made.

"Very truly yours,
"J. D. McCarthy, Claims Adjuster."

The complaint further shows that the plaintiff was taken to San Francisco, placed in a hospital, kept there for several months, and finally returned to his home in Shasta county; and further alleges that from the time of receipt of his injuries, to wit, on the 6th day of March, 1928, up to and including the 16th day of March, 1930, the plaintiff was neither physically nor mentally able to make any investigation as to the cause of the accident, or as to who was responsible therefor; that notwithstanding his physical and mental condition the plaintiff did make inquiries of the employees of the Pacific Gas & Electric Company, to wit, of W. A. Dunwoody, G. R. Milford, and J. D. McCarthy, relative to the manner in which he received the injury, care, treatment, and compensation to which he was entitled; that during all of said time Dunwoody was foreman of pit No. 3 power house; G. R. Milford was division manager of the Pacific Gas & Electric Company, and J. D. McCarthy was the claims adjuster for said company; that during all of said time plaintiff was informed and believed that Dean Wilson was an employee of the Pacific Gas & Electric Company, and plaintiff did not know, and had no means of knowing, that Dean Wilson was, at the time of the injury to plaintiff, an employee of, and was under the control, direction, and supervision of, the General Electric Company; that from 6th day of March, 1928, up to the 16th day of March, 1930, plaintiff caused inquiry to be made of Dean Wilson, W. A. Dunwoody, G. R. Milford, and J. D. McCarthy, for information relative to the cause of the accident which resulted in the injury to plaintiff, and also who was responsible for the injury, and plaintiff was at all times advised and believed that, at the time he received said injury, Dean Wilson was an employee of the Pacific Gas & Electric Company, and that said company was responsible to plaintiff under the provisions of the Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831, as amended), and at no time was plaintiff advised by any one from whom he made inquiry that defendant, General Electric Company, had any connection with the injury which the plaintiff had received, or was in any wise liable to the plaintiff therefor.

The complaint then alleges that the General Electric Company, well knowing its responsibility, and for the purpose of defrauding plaintiff out of his cause of action, fraudulently and deceitfully agreed with Pacific Gas & Electric Company to the effect that, if the facts in relation to plaintiff's said cause of action against said General Electric Company were concealed from plaintiff, etc., the General Electric Company would pay the Pacific Gas & Electric Company one-half of any amount which said Pacific Gas & Electric Company was required to pay to and on behalf of the plaintiff, for medical, surgical, hospital expenses, and compensation to which the plaintiff was entitled as an employee of the Pacific Gas & Electric Company under the provisions of the Workmen's Compensation, Insurance, and Safety Act. That the plaintiff had no knowledge of the agreement or understanding between the Pacific Gas & Electric Company and the General Electric Company, and no means of ascertaining the facts in relation thereto.

The answer of the appellant, while setting forth that Dean Wilson was in the general employ of the Pacific Gas & Electric Company, admits that Dean Wilson was, at the time the injury was inflicted upon the plaintiff, in the special employ of the General Electric Company.

The record shows that on the 10th day of March, 1928, Lester A. Fitts, the person in charge of the repairing of the generator referred to, an employee of the General Electric Company, reported to the appellant the circumstances which led to the injury of the plaintiff, and also stating the serious nature of the injuries. Thereafter, on March 23, 1928, at the request of the General Electric Company, Mr. Fitts went to San Francisco and made a personal report of the injury to officers of the appellant. Likewise, Mr. McCarthy, the claims adjuster for the Pacific Gas & Electric Company, advised the General Electric Company of the injury, and of the fact that Dean Wilson was assisting the engineer of the General Electric Company on the work being done at pit No. 3. This report was made to Mr. Mahoney and to Mr. Alvord, Alvord being the local manager of the appellant, Mr. Mahoney being the local auditor of the western branch maintained by the appellant.

A number of letters appear in the record as passing between the claims adjuster of the Pacific Gas & Electric Company and the auditor of the General Electric Company, relative to the amount of money expended by the Pacific Gas & Electric Company for medical and surgical attention given the plaintiff, and the settlement made by the Pacific Gas & Electric Company with the plaintiff, showing that the General Electric Company paid to the Pacific Gas & Electric Company one-half of the expenses just referred to, and also one-half of the amount of the settlement made by the Pacific Gas & Electric Company with the plaintiff, with the consent of the Industrial Accident Commission. Nowhere in the record does it appear that the Industrial Accident Commission was advised of the liability of the General Electric Company, nor of the fact that the General Electric Company was paying one-half of the expenses incurred by the Pacific Gas & Electric Company, nor of any part of the amount agreed upon in the settlement entered into between the plaintiff and the Pacific Gas & Electric Company. The agreement of settlement submitted to the Industrial Accident Commission, approved by the General Electric Company in the letters to which we have referred, is entirely silent as to the liability of the General Electric Company, or its responsibility to the plaintiff on account of the injuries sustained by him. We quote from the agreement the following: "The undersigned, Clarence B. Kimball, employee, and Annie B. Kimball, his wife, and Pacific Gas and Electric Company, employer, desiring to compromise and settle all liability which may exist against said employer in favor of said employee, and to obtain the approval of the Industrial Accident Commission thereto, hereby submit to said Commission the following agreed statement of facts: 1st. That said employee claims an industrial injury on the 6th day of March, 1928, while in the service of said employer, consisting of a fractured skull; 2nd. That at such time said employee received a wage of $135.00 per month; 3rd. That said disability is partial and permanent; 4th. That compensation has been paid to said employee up to the date of this agreement in the total sum of $593.72; 5th. That the parties hereto are desirous of compromising the liability for the following reason: A question exists as to the nature and the extent of disability caused by the injury, and whether the present disability is due to said injury." The agreement then proceeds to fix the amount of the settlement at the sum of $3,500.

The record shows that following the execution of this agreement the Pacific Gas & Electric Company acknowledged receipt of a check from the General Electric Company in the sum of $1,826.50, covering one-half of the settlement, and other small items of expense incurred by the Pacific Gas & Electric Company. The record shows that plaintiff in this action had no knowledge of the negotiations being carried on between the appellant and the Pacific Gas & Electric Company, nor did he have any means of ascertaining the contents of the letters passing between the Pacific Gas & Electric Company and the General Electric Company until he accidentally discovered the copy of the letter to which we have hereinbefore referred. All of these letters and the negotiations carried on between the two companies being of a private and secret nature, it is evident that the plaintiff could not have, by the exercise of ordinary diligence, discovered any facts in relation thereto. As we have stated, the mental and physical condition of the plaintiff and the serious nature of his injuries must be taken into consideration in determining whether he did or did not, under the circumstances, exercise due diligence in endeavoring to discover the facts relative to his injury and the company responsible therefor.

The record shows that when Dean Wilson, employee of the appellant, was requested, by the wife of appellant, for a statement of the injury, he mentioned only the fact of the injury being caused by the falling of a bolt, and did not disclose for whom he was working at the time of the injury.

[1] In arriving at the true facts as to whether there was privity of action between the Pacific Gas & Electric Company and the General Electric Company, and the inferences that might properly be drawn by the jury therefrom that the two companies were acting in concert, and that a tacit understanding existed between them that the liability of the General Electric Company should be kept concealed, and therefore the amount of damages that should be awarded to the plaintiff held down to the minimum, consideration may properly be given to section 26 of the Workmen's Compensation, Insurance, and Safety Laws. By the terms of that section, under the circumstances disclosed in the record before us, the Pacific Gas & Electric Company was, during all the times mentioned herein, entitled to have and recover from the General Electric Company every dollar of expense incurred by it under the provisions of the act referred to, in caring for and making payment to the plaintiff in this action. No such action was begun. If any such action had been begun, it would have fully disclosed the liability of the appellant to the plaintiff in this action, and also the liability of the appellant to pay in full whatever should be allowed to the plaintiff under the provisions of the Workmen's Compensation, Insurance, and Safety Laws. Being an employee of the Pacific Gas & Electric Company, a relation of trust and confidence existed between that company and the plaintiff. It is unnecessary to cite authorities to the effect that, wherever a relation of trust and confidence exists, a full disclosure of all the facts and circumstances necessary to show who was liable for the injury suffered by the plaintiff should have been made by the Pacific Gas & Electric Company. This disclosure was not made to the plaintiff, nor does the record show it was made to the Industrial Accident Commis-

sion. The record shows, through the negotiations therein set forth, that the General Electric Company was advised of what was being done by the Pacific Gas & Electric Company, and by reason of the privity shown to have existed between them, and the payment of one-half of the expenses, that the General Electric Company ratified and approved what was being done by the Pacific Gas & Electric Company. These are inferences which, from the circumstances disclosed by the record, the jury was fully warranted in drawing.

The text found in 12 R. C. L., page 310, § 71, applies not only to the Pacific Gas & Electric Company, but also to Dean Wilson as the employee of the General Electric Company, to wit: "Subject—'Half Truths': Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all he must make a full and fair disclosure. To tell a half truth has been declared to be equivalent to a concealment of the other half. A partial and fragmentary disclosure, accompanied by the wilful concealment of material and qualifying facts, is not a true statement, and is as much a fraud as an actual misrepresentation, which in effect it is."

**[2, 3]** We conclude, in view of the authorities hereinafter cited, that the complaint states a cause of action, and the testimony is sufficient to support the verdict that subdivision 4 of section 338, of the Code of Civil Procedure, is applicable to actions based upon tort, whether the fraud consists in the initial act or in the concealment of the cause of action.

In Kane v. Cook, 8 Cal. 449, the facts upon which the court held the plea of the statute insufficient were as follows: The plaintiffs, residents of New York, consigned certain goods to the defendant, a resident of this state. The goods were received by the defendant at San Francisco on June 20, 1853, and were sold by him on the same day. No account of sale was ever rendered to the plaintiffs. In 1856, a demand was made upon the defendant at San Francisco, and, upon his refusal to pay over the proceeds, this suit was commenced. The defendant pleaded the statute of limitations. The court in overruling the plea of the defendant stated the law as follows: "It does not necessarily follow that the Statute of Limitations runs against the plaintiffs, from the day the proceeds of the consignment came into the defendant's hands. It appears from the evidence, and it is stated as a fact in the opinion of the Court below, that the defendant never rendered any account of sales to the plaintiffs, and there is nothing in the record which shows that they ever had any knowledge of the sales until shortly previous to the commencement of this suit. * * * It was the duty of the defendant not only to inform the plaintiffs of the sales, but to remit the proceeds. His neglect not only deprived them of their funds, but kept them in ignorance of their rights. To hold that the Statute of Limitations ran against them under such circumstances, would be to permit the defendant to take advantage of his own wrong; and to sustain a defence which, in conscience, he ought not to be permitted to avail himself of." The opinion further, in speaking of the diversity of the opinion of different courts, ruled as follows: "In this diversity of opinion on the question, we are free to adopt that rule which will best tend to advance justice, and prevent the perpetration of fraud; and we therefore hold that in all cases a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good answer to the plea of the Statute of Limitations."

In Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann. Cas. 1913C, 1093, the Supreme Court had before it the question as to whether, in an action for damages resulting from negligence, the statute begins to run from the fact and date of the act or from the discovery of the negligence, or of the negligent person. It was there held, in the absence of fraud in the act, or of fraudulent concealment, the statute begins to run from the date of act and fact of negligence. A long list of cases are cited to the effect that, notwithstanding fraudulent concealment, the limitation runs from the commission of the injury. However, on page 697, as the case is reported in vol. 161 Cal., 120 P. 774, a large number of cases are cited showing that fraudulent concealment delays the running of the statute until the injured parties discover, or with reasonable diligence might have discovered, the facts constituting the injury and cause of action.

On the question of fraudulent concealment the court quotes from the opinion of Bailey v. Glover, 21 Wall. (88 U. S.) 342, 349, 22 L. Ed. 636, as follows: "We are of opinion * * * that the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common-law side of the court's calendar as to those on the equity side. * * * We hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to the party suing, or those in privity with him."

The decision in Kane v. Cook, supra, is cited and approved.

[4, 5] Without further analyzing or referring to the opinion in the case of Lightner Mining Co. v. Lane, supra, it is sufficient to state that that case and the authorities there cited establish the law in this state that mere ignorance of the existence of the injury, or of the facts constituting the injury, or of the identity of the person liable therefor, will not toll the running of the statute, but, in cases of fraud, the statute is tolled until the discovery of the fraud, whether it be in the act itself or in the concealment of the facts until the discovery of the fraud or until discovery should have been made by the exercise of reasonable diligence.

A number of cases are cited by the appellant to the effect that the statute begins to run from the date and fact of the injury. An examination of these cases, however, discloses that they are all malpractice cases in which the plaintiff knew at all times the party committing the act and the injury committed, and we find nothing in any of the California malpractice cases cited holding that the statute of limitations cannot be tolled by fraudulent concealment in actions, based upon tort or negligence. The facts involved in the malpractice cases are such as to render them readily distinguishable from the case at bar, and also clearly indicate that, while the rulings in the respective cases set forth the law as generally followed, when applied to similar facts, the rule announced therein is neither controlling nor applicable here.

The case of Becker v. Porter, 119 Kan. 626, 240 P. 584, decided by the Supreme Court of Kansas, does hold that the statutory provision awarding relief on the grounds of fraud by tolling the statute until discovery of the fraud is had does not apply to tort actions for negligent personal injuries. The weight of authority, however, is clearly against the holding had by the Kansas court. A reading of the opinion in the case of Becker v. Porter, supra, leads to the conclusion that the holding of the court would have been the same upon the pleadings presented to it, irrespective of what is said therein as to the tolling of the statute in tort actions. Being directly contrary to the rule followed in this state, the case of Becker v. Porter, supra, cannot be considered as authority.

In 12 Cal. Jur., page 777, the text on jurisdiction in actions involving fraud, supported by numerous citations, reads as follows: "Where, in cases involving fraud, the only relief which can be granted is equitable, the jurisdiction of equity is, of course, exclusive. In other cases, both law and equity have concurrent jurisdiction. It is clear that where adequate relief cannot be granted in a court of law the case is a proper one for equitable relief. Conversely, where an action at law will afford adequate relief, equity may refuse to act." To the same effect is the text in 37 C. J., page 974, to wit: "Fraudulent concealment of a cause of action does not toll the statute where the latter creates the right and makes the cause of action conditional upon suit being brought within a specified time. In many jurisdictions the exception is incorporated in the statute itself, whereby in various although similar terms the operation of the statute is postponed, where the cause of action is fraudulently concealed by defendant, until the discovery of the cause of action, or for a time fixed after such discovery. The statute applies both at law and in equity, and indeed it has been declared that the statute was enacted for the purpose of enabling parties to set up the fraud of defendant in a court of law as well as in a court of equity." In the same volume of C. J. on page 972, we find the following: "But in actions at law, where the question whether a fraudulent concealment of the fact upon the existence of which the cause of action accrues would avoid the statute of limitations has also frequently arisen, there has been considerable conflict of opinion. In the absence of a statutory exception it is held in some jurisdictions that such concealment does not postpone the operation of the statute of limitations. The weight of authority, however, supports the contrary view and follows the rule which obtains in equity, under which such a concealment is a good reply to a plea of the statute of limitations." On page 978 of the same volume, it is said: "Fraudulent concealment may consist in fraud connected with or constituting a cause of action, or it may consist of subsequent acts designed to conceal the cause of action originating without fraud. The concealment of a cause of action as contemplated by the rule suspending for that reason the operation of the statute of limitations is considered as distinct from the fraud in the cause of action itself, fraud as the ground of relief, from the discovery of which the statute begins to run." A fraudulent concealment, of course, must refer to acts or conduct after the commission of the act resulting in the injury. It is further said: "Although a fraud may give the right to an action it will not for that reason, in the absence of a trust relation, or some subsequent active concealment, constitute a fraudulent concealment of that cause of action."

In Waugh v. Guthrie Gas, Light, Fuel & Improvement Co., 37 Okl. 239, 131 P. 174, L. R. A. 1917B, 1253, a well-considered case and one in which innumerable authorities are cited, it is held in an action for damages based upon personal injuries that "fraudulent concealment constitutes an implied exception to the statute of limitations, and a party who wrongfully conceals material facts, and thereby prevents a discovery of his wrong, or the fact that a cause of action has accrued against him, is not allowed to take advantage of his own wrong by pleading the statute, the purpose of which is to prevent wrong and fraud." It is further held therein that "the mere failure to disclose that a cause of action exists is not sufficient to prevent the running of the statute. There must be something more; some actual artifice to prevent knowledge of the fact; some affirmative act of concealment, or some misrepresentation to exclude suspicion and prevent inquiry."

From the facts set forth in the record we think the jury had a sufficient basis to find that there is something more in the instant case than the mere failure to disclose the fact that Dean Wilson was an employee of the appellant at the time of the injury. In the first place there was a trust relation between the Pacific Gas & Electric Company and its employee, the plaintiff in this action, which imposed upon the Pacific Gas & Electric Company the duty of making a full disclosure. To all the inquiries made by the plaintiff, no information was vouchsafed, other than as to the liability of the Pacific Gas & Electric Company under the Workmen's Compensation, Insurance, and Safety Laws. To all of these acts the jury had a right, from the facts disclosed, to draw the inference that the appellant was, not only a silent, but an active, participant therein, paying half the expense, through negotiations had with the Pacific Gas & Electric Company, in such manner that the plaintiff could not, by reasonable diligence, ascertain the true facts. The plaintiff had no means, and no right to inquire into the private correspondence or negotiations taking place between the two companies, until the institution of the action which brought to light what the record herein discloses.

[6] Dean Wilson, also, as an employee of the appellant, concealed the true facts when inquiry was made of him. Corporations only act through their agents, and, where agents fail to speak where it is their duty to speak, a corporation is liable. Subdivision 3 of section 1572, of the Civil Code reads: "The suppression of that which is true, by one having knowledge or belief of the fact" constitutes actual fraud. Being privity to all the acts of the Pacific Gas & Electric Company and of its agents, in suppressing the true facts as well as the suppression of the true facts by its employee, the appellant is shown to have actively participated in the concealment alleged in plaintiff's complaint.

In Brookshire v. Burkhart, 141 Okl. 1, 283 P. 571, 67 A. L. R. 1059, it is held that fraudulent concealment constitutes an implied exception to the statute of limitations, and a party who wrongfully conceals material facts, and thereby prevents a discovery of his wrong, or the fact that a cause of action has accrued against him, is not allowed to take advantage of his own wrong by pleading the statute. Also, if the fraud itself be secret in its nature and such that its existence cannot readily be ascertained, or if there be a fiduciary relation between the parties, there need be no evidence of fraudulent concealment other than that implied from the transaction itself—citing 17 R. C. L. 861, 862.

The opinion in the case of Brookshire v. Burkhart, supra, expressly overrules the case of Kerley v. Hoehman, 183 P. 980, in so far as it is held that concealment does not toll the statute of limitations.

In support of its contention that the complaint does not set forth sufficient facts to toll the statute, our attention is particularly called to the case of Lady Washington Consolidated Co. v. Wood, 113 Cal. 482, 45 P. 809, which, upon the question of sufficiency of the pleadings, appears to have been followed in all the subsequent California cases. It is held in that case that it is not enough that the plaintiff merely avers that he was ignorant of the facts at the time of their occurrence, and had not been informed of them until within three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them, and that they were done in secret, or were kept concealed; and he must also show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged, and as the means of knowledge are equivalent to knowledge if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which if followed would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts. The Supreme Court, in Lightner v. Lane, supra, approved this holding, and in the recent case of Consolidated Reservoir & Power Co., a corporation, v. Scarborough et al., 216 Cal. 698, 16 P.(2d) 268, the holding in the Lady Washington Case is approved, and practically all the other California cases so holding are cited. The record in this case, as we have set it forth, completely answers these objections. The plaintiff did make inquiry of the parties having knowledge of the actual facts, but the facts were not disclosed to him. He made inquiry of his employer, or of the agents of his employer, where we have shown a trust relation existed, and the true facts were suppressed. The manner in which the plaintiff discovered the true facts, or was given a lead which led to the disclosure of the true facts, is set forth in the complaint. The privacy of the transaction which concealed the true facts, and the privity existing between the two companies, is fully disclosed.

The appellant's contention that the right of action is given to the plaintiff in this case by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure is without merit, the contention being that the right is conferred in that subdivision of the section of the Code of Civil Procedure, and that it is conditioned upon the beginning of an action within one year, and that, where a right is conferred, coupled with a condition, the condition becomes a part of the right, and, unless enforcement is sought within the time limited in the condition, the right is barred or ceases to exist. In support of this contention, the case of Western Fuel Co. v. Garcia, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210, is relied upon, and likewise the cases therein cited, which hold that an action for the death of a person caused by the negligence of another is a right given by statute which must be brought within one year, and that the right and the condition must be raised together.

A large number of cases are cited in the annotations following the case of Brookshire v. Burkhart, 67 A. L. R., beginning on page 1070, holding that, where a right is conferred by statute, coupled with a condition as to the time when the right may be exercised, the right of action ceases at the end of the year or of the time specified. That the time specified is a condition and not a limitation. In the same annotations are found a number of cases announcing a different rule and holding that the time specified is a limitation and not a condition. The case of Brookshire v. Burkhart, supra, is one of the leading cases holding that the time specified in the statute is a limitation and not a condition.

[7] Irrespective of the cases which hold that a right of action for the death of one caused by the negligence of another, given to heirs, is conditioned upon the action being begun within a certain length of time, the argument of appellant is unsound, based upon any of the cases involving the death of the injured person, for the simple reason that the right of action for personal injuries inherent in the individual himself who is injured is a common-law right of action, and is not given by the statutes.

The only authority which we need to cite in support of the foregoing statement is volume 2, page 119, Cooley's Blackstone (4th Ed.), where the right of action for personal injuries is shown to have existed long before the enactment of any statutes relating thereto, or of any statute giving a right of action based upon the death of any one caused by the negligence of another.

The minor objections urged by the appellant, while considered, are not such as to call for the further lengthening of this opinion.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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132 Cal.App. 621

## WANN et ux. v. MOUNT DIABLO FINANCE CORPORATION.

Civ. 4871.

District Court of Appeal, Third District, California.

June 16, 1933.

**1. Banks and banking 🔑312½.**

Buyer of loan company's stock under representation that loan would be made to qualify insurance company, whose directors were loan company's directors, as legal reserve company, could rescind for voluntary abandonment of plan to make loan.

> Although buyer consented to abandonment of plan to make loan to insurance company, he did so on assurance that he was to be director and officer in new corporation to be organized, and on failure of proper parties to make him such officer his original consent to abandonment was without consideration and could be revoked and buyer restored to his original status.

**2. Corporations 🔑83.**

In action to rescind stock purchase for failure of consideration, fraud is not essential element.

**3. Corporations 🔑83.**

In action to rescind stock purchase, evidence warranted finding of nonperformance of promise to elect buyer director.

**4. Appeal and error 🔑1010(1).**

On appeal challenging sufficiency of evidence, appellate court need only examine record to determine if sufficient evidence exists justifying finding.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Raymond C. Wann and wife against the Mount Diablo Finance Corporation. Judgment for plaintiffs, and defendant appeals.

Affirmed.

C. M. Gill and D. P. Eicke, both of Stockton, for appellant.

McNoble, Parkinson & Coblentz, of Stockton, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiffs, husband and wife, brought this action to rescind the purchase of stock in defendant corporation on two separate grounds: First, failure of consideration in that the stock in question was purchased upon an express agreement and representation by certain officers of defendant that the funds of the corporation to the extent of $25,000 were to be held and used exclusively as a deposit with the state of California, to qualify the Mount Diablo Mutual Benefit and Life Association as a legal reserve insurance company, which plan was abandoned; and, secondly, on the ground of fraud in that it was promised to R. C. Wann that he would, upon the purchase of stock in defendant corporation, be elected a director and vice president therein, which promise was not performed.

Judgment was rendered for plaintiffs, from which judgment defendant prosecutes this appeal.

The testimony discloses that at the time plaintiffs became interested in defendant corporation it was operated exclusively as a personal loan company. The directors of the defendant corporation were also directors of Mount Diablo Mutual Benefit & Life Association, and it was represented to plaintiffs at the time of their subscription of the stock, that the money they would pay into the defendant corporation, together with other funds, would be accumulated to loan solely to the life association in order that it might be deposited with the state as a legal guarantee required by law, thus permitting the life insurance company to qualify as the legal reserve insurance company, to the profit and advantage of defendant corporation.

[1] The evidence shows that the fund instead of being built up as agreed, was loaned to individuals, repayable in ten-month periods. Also a new corporation was formed under the laws of Nevada, which omitted plaintiff R. C. Wann from the management thereof and which changed the general purposes of the Mount Diablo Finance Company and abrogated the plan of the defendant corporation to accumulate a fund of $25,000 for the purposes above mentioned. Plaintiff consented to this reorganization upon the assurance that he was to be a director and officer in the Nevada Holding Company, the new company, but this was not done, and upon the discovery that he was neither an incorporator, director nor officer of the Nevada company, he promptly rescinded. The fact that the fund of $25,000 was not built up does not of itself give plaintiff cause for complaint, for many reasons might arise whereby the accumulation of that amount might be legally impossible, but he may properly protest against the voluntary abandonment of the project without his consent, and on that ground rescind. It is true he consented to the abandonment of the first plan. but conditionally, and upon the failure of the proper parties to perform the promised conditions, his original consent to the abandonment was without consideration and could be revoked and he restored to his original status.

[2] Upon the ground of failure of consideration, fraud is not an essential element. The promises by the officers of defendant to plaintiff may have been in good faith and with intent to perform, but if they failed of completion in a material aspect, plaintiff has a right to rescind for such failure. We believe the facts here show such a change in the status between the plaintiffs and the defendant, that should justify a rescission.

[3] In order to induce plaintiff to purchase stock in the corporation, the president of the corporation and the salesman who dealt with plaintiff promised him he would be elected a director and vice president and that he would continue in such office so long as his investment continued. Plaintiff, relying upon these promises, and believing that he had been duly elected a director, attended the various meetings of the board of directors and took part in their deliberations.

Certain minutes were introduced in evidence by the defendant which purported to show Wann had been elected a director and second vice president of the corporation. These minutes, however, were discredited, and the trial court found upon ample evidence to support the finding, that R. C. Wann had never been elected a director of defendant corporation.

Examination of the records of the corporation shows that there was no vacancy on the board of directors at the time the meeting set forth in the minutes referred to. At the same meeting and evidenced by the same minutes, it was attempted to be shown that plaintiff Wann was elected second vice president of the corporation, but an examination of the by-laws discloses that there was no such office as second vice president provided for in the organization and that there was no vacancy in the office of vice president at that time.

Therefore the court found, and we believe justly, that the said Raymond C. Wann had never been elected a director of the defendant corporation and had never been elected a vice president thereof, all of which facts were well known to the officers of defendant corporation, and by them fraudulently concealed from plaintiffs, and it was further found that except for such promises and representations respondents would not have purchased the stock in question.

[4] Appellant's ground for appeal being solely on the insufficiency of the evidence to support the verdict, we need only examine the record to determine if there exists therein sufficient evidence to justify the finding of the trial court. We believe that we have set forth enough to clearly indicate that such evidence is to be found and it will serve no useful purpose to prolong this opinion by long quotations from the evidence. It is sufficient to state that the findings are amply supported and the judgment should be affirmed.

It is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.

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132 Cal.App. 636

## PEOPLE v. FOSTER.

Cr. 87.

District Court of Appeal, Fourth District, California.

June 16, 1933.

**Criminal law** ⚿1071.

Failure to present application stating grounds of appeal and portion of phonographic reporter's notes to be transcribed *held* to warrant dismissing appeal (District Court of Appeal Rule 2, subd. 7).

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Frank Foster was convicted of robbery, and he appeals. On motion to dismiss appeal.

Appeal dismissed.

Thomas J. Dunnigan and Wm. M. Rains, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, of Los Angeles, for the People.

BARNARD, Presiding Justice.

This is a motion by respondent to dismiss the appeal on the ground that the appellant has failed to conform to the requirements of subdivision 7 of rule II of the rules established by the judicial council for the Supreme Court and District Courts of Appeal, in that an application stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designating what portion of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon, was not made within five days of giving notice of appeal or at all.

It appears that the appellant was convicted by a jury of the crime of robbery, and judgment was pronounced on March 31, 1933. On April 3, 1933, the appellant filed a written notice of appeal, and on the same day filed a request for a transcription of the phonographic reporter's notes. The record before us fails to disclose any application or statement containing the grounds of the appeal and the points upon which the appellant relies, or any designation of the portion of the phonographic reporter's notes necessary to be transcribed in order to fairly present the points relied upon.

The appellant relies upon the case of People v. Bryant, 207 Cal. 450, 278 P. 1025. That case related to an appeal taken after section 1247 of the Penal Code had been repealed and before the judicial council had promulgated the rules of procedure which, in effect, replaced that section. The opinion in that case pointed out that section 1246 of the Penal Code continued the provisions of section 1247 in effect until such time as such rules were adopted by the judicial council, and stated that the form of the then recent legislation was such as might easily mislead an appellant.

Prior to the decision of the case referred to, appeals had frequently been dismissed for failure to comply with those provisions of section 1247 of the Penal Code which were similar in effect to the provisions of the rule here under consideration. After the promulgation of the rules of the judicial council containing the rule here in question, a compliance with the same has in many cases, only a few of which need here be cited, been held essential. People v. Davis, 103 Cal. App. 318, 284 P. 516; People v. Riga, 104 Cal. App. 477, 285 P. 1069; People v. Martin (Cal. App.) 15 P.(2d) 202. No particular difficulties are involved in complying with this rule now long established, and no reason appears why the rule should now be changed or modified by judicial decision.

The appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

132 Cal.App. 655

## UNITED STATES FIDELITY & GUARANTY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

et al.

Civ. 8846.

District Court of Appeal, Second District, Division 2, California.

June 19, 1933.

**1. Stipulations 🔑14(4).**

Under stipulation, Industrial Accident Commission could consider letter from its physician on question of percentage of compensation claimant's disability, where copy of letter was sent to insurance carrier's attorney, though through inadvertence he was not informed of its arrival.

> Stipulation recited that in event "referee should so desire a report may be obtained from Medical Department of this Commission and/or from an Expert Medical Examiner to be appointed by the Medical Department of this Commission with full authority to take such supplemental means of observation as may be necessary" to determine claimant's present condition, and that in event such report should be obtained copy thereof should be served on parties, who should have five days thereafter in which to request further proceedings otherwise submitted, and that defendant should have five days in which to produce further medical reports from attending physicians.

**2. Master and servant 🔑416.**

Opinion expressed in letter to Industrial Accident Commission by physician employed by commission respecting probable outcome of operative treatment of compensation claimant *held* not to raise conflict in evidence or constitute new evidence; hence commission was not authorized to change order finding percentage of claimant's total permanent disability.

**3. Stipulations 🔑14(1).**

Stipulation purporting to substitute for Industrial Accident Commission, as such, commission as board of arbitration for purpose of determining claimant's percentage of disability and necessity of treatment, having been acted on by parties as mere waiver of statutory time limitation, will be treated as such by court (Code Civ. Proc. § 1280 et seq.; St. 1917, p. 850, § 20(d).

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Certiorari to Industrial Accident Commission.

Certiorari proceeding by United States Fidelity & Guaranty Company against the Industrial Accident Commission of California, to review an order of the Commission awarding compensation for injuries to Paul A. Shrader, employee.

Order annulled, with instructions.

Mills, Hunter & Dunn and John W. Holler, all of Los Angeles, for petitioner.

Arthur I. Townsend, of San Francisco, for defendants.

STEPHENS, Justice.

Petitioner herein is the industrial accident insurance carrier.

A petition was before the Industrial Accident Commission for an industrial award, and the hearing developed that the percentage of disability of the applicant might be affected after certain treatment had been administered. A great part of the period of 245 weeks of continuing jurisdiction of the commission, section 20 (d), Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 850), had elapsed, and it was thought by all concerned that the remaining part of this jurisdictional period would be insufficient to demonstrate the effect of the proposed treatment. Accordingly the following stipulation was agreed upon: "It is stipulated by and between the parties hereto that the Industrial Accident Commission of the State of California shall assume continuing jurisdiction over the herein matter as a Board of Arbitration for a period of two years from and after the date hereof with full power and authority to alter, rescind and/or amend the Finding and Award herein upon the request of any party in interest, and to provide for a permanent disability rating resulting from the herein injury as in similar cases provided under Section 20 (d) of the Workmen's Compensation, Insurance and Safety Act of 1917. The parties hereto expressly waive all limitations of time and jurisdiction herein as above set forth and will retain such rights and liabilities in respect to the herein claim as would exist if the 245 week period had not elapsed. The parties hereto request said Industrial Accident Commission of the State of California to act as a Board of Arbitration in the herein matter for the purpose hereinabove set forth."

This stipulation was subsequently amended by extending it sixty days and thereafter by substituting "a reasonable time" for and instead of the two-year limitation contained therein. On May 14, 1930, the commission made its award and formally found that medical treatment was needed and reasonable, as not being dangerous to life or limb. On June 6, 1930, applicant moved for a rehearing, and on July 1, 1930, this petition was denied. Petitioner repeatedly offered the additional medical and surgical treatment contemplated by the order of May 14, 1930, but applicant at all times refused the same.

[1, 2] Accordingly, after waiting nearly two years applicant petitioned that his percentage of permanent disability be fixed, asserting that his disability had become permanent, and a hearing was had. On June 14, 1932, the commission entered its "Order Amending Findings and Award," which included the fixing of permanent disability of 69 per cent. on maximum earnings and that any greater percentage of disability was the result of the declination of the applicant to submit to treatments. The applicant petitioned for a rehearing, and on September 2, 1932, the rehearing was granted and coincidentally and without any additional hearing the commission found the percentage of permanent disability to be 89 and that the refusal of applicant to submit to further treatment was not unreasonable. Subsequent to the commission's finding of June 14, 1932, the commission caused the medical report of the case by Dr. Harbaugh, a physician in its employ, to be filed and took such report into consideration in arriving at its order of September 2, 1932. Indeed, this report, being the only additional matter before the commission, would seem to have been the determining factor, as the latter order is just the opposite from the former one in the matter of the proposed treatment and very different in its effect on the percentage of disability. The commission claims that a copy of this physician's report was sent to counsel for petitioner, who denied that he had ever received it. Petitioner herein, the insurance carrier, claims that the commission had no right to receive this letter in evidence because it had never seen a copy thereof and because it had no opportunity to object to its introduction, to cross-examine the author of the letter or to rebut the contents of the letter. We think the evidence establishes the fact that the copy was sent to the attorney for the insurance carrier and that through some inadvertence he was not informed of its arrival. In these circumstances the insurance carrier cannot be heard to complain, for it stipulated under date of November 6, 1929, as follows: "It is stipulated and therefore ordered in the event the Referee should so desire, a report may be obtained from the Medical Department of this Commission, and/or from an Expert Medical Examiner to be appointed by the Medical Department of this Commission, with full authority to take such supplemental means of observation as may be necessary to determine the present condition of the applicant, all at the expense of the defendants herein. In the event such reports be obtained, copy shall be served on the parties hereto, who shall have five days thereafter in which to request further proceedings; otherwise submitted. It is further ordered that the defendant shall have five days in which to produce further medical reports from the attending physicians." We think this stipulation continued in full force so long as any phase of the case remained legally unsubmitted. But the content of the letter did not constitute any new evidence. It was merely another opinion of a physician who looked over the proceeding and the applicant more than two years after the commission had found the basic facts upon which the award was made and long after a rehearing had been denied thereon. In fact, the letter does not negative the commission's finding of more than two years before it was written that operative treatment was indicated and was not unreasonable and that such treatment might affect the percentage of disability. The doctor merely expresses his opinion that the outcome of operative treatment *now* would be *doubtful*. Under the doctrine pronounced in Winthrop v. Industrial Accident Commission, 213 Cal. 351, 2 P.(2d) 142, 144, such evidence, if evidence it is at all, "does not present a true conflict of evidence." Neilsen v. Industrial Accident Commission, (Cal. App.) 21 P.(2d) 445.

It should also be borne in mind that this petition for a rehearing which was granted was for a rehearing of the order of June 14, 1932, which did not purport to cover the basic facts disposed of in the order of May 14, 1930. In the hearing which led to the June 14, 1932, order, the commission sustained objections to questions pertinent to the original hearing and confined the evidence to the issue reserved as above indicated.

We think in the instant case the "continuing jurisdiction" extended as it was by stipulation for a reasonable time on all issues presented by the pleadings gave applicant the right to make his motion for a rehearing and after a rehearing had been granted, of course, any proper evidence should have been received. Since the Harbaugh letter, as we have seen, was no evidence at all upon the fundamental change in the commission's order, and since substantially all of the evidence in the case is the other way, it follows that the order of September 2, 1932, is wholly unsupported by the evidence.

[3] We have been somewhat puzzled with the matter of substituting the commission as such by the commission as a board of arbitration. If, as counsel for the commission says in his brief, it is strictly an arbitration under the provisions of the Code of Civil Procedure (section 1280 et seq.), it is quite evident that there is much lacking to connect the final order of the commission with the arbitration. As arbitrators they could not appoint a referee for the taking of and determining the purport of evidence which they did do. However, both parties and the commission have acted upon the stipulation as being simply a waiver of time limitation on the commission. As such we have treated it herein and therefore hold that the commission was within its

jurisdiction in entertaining applicant's last petition for rehearing.

The order of the commission under date of September 2, 1932, is annulled. The commission is instructed to consider the rehearing and to make its findings and award.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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132 Cal.App. 612

## SPITZER et al. v. PATHE EXCHANGE, Inc.

Civ. 8995.

District Court of Appeal, First District,
Division 2, California.

June 16, 1933.

**1. Principal and agent 🔑44.**

In action for breach of contract, whereby defendant agreed to distribute motion pictures made by plaintiff, evidence warranted court's finding that picture made was of quality called for by contract.

**2. Principal and agent 🔑44.**

In action for breach of contract whereby defendant agreed to distribute motion pictures made by plaintiff, evidence supported finding that defendant consented to assignment by plaintiff to finance corporation which advanced money to plaintiff.

**3. Principal and agent 🔑44.**

In action for breach of contract whereby defendant agreed to distribute motion pictures made by plaintiff, and which provided that compensation of actors should be subject to defendant's approval, evidence showed defendant gave its approval of compensation paid to actors.

**4. Principal and agent 🔑44.**

Where by contract plaintiff for fixed term employed defendant as agent to distribute motion pictures produced by plaintiff and to finance undertaking, and before end of term defendant wrongfully abandoned contract, it became liable in damages.

**5. Principal and agent 🔑44.**

Natural damages for breach by agent of contract of agency were cost and expenses of getting another agent to render service specified in contract.

**6. Principal and agent 🔑44.**

In action for breach by agent of contract of agency, burden was on plaintiff to plead and prove impossibility of obtaining another sales agency.

**7. Appeal and error 🔑172(1).**

Plaintiff could not contend on appeal that parties, when making contract, knew if contract was broken by defendant plaintiffs would lose cost of making picture, which was known approximately, without having pleaded and proved such facts and bringing up finding thereon.

**8. Principal and agent 🔑44.**

In action for breach of agency contract, record, not showing what parties knew respecting plaintiffs' possible loss if defendant breached contract, authorized recovery of damages naturally resulting from act complained of.

**9. Damages 🔑124(3).**

Where breach consists in preventing performance of contract, without fault of the other party, who is willing to perform, latter's loss consists of what he has already expended towards performance and profits he would realize by performing whole contract.

**10. Principal and agent 🔑44.**

In action for breach of contract whereby defendant agreed to distribute motion pictures made by plaintiffs and to pay certain sum on acceptance of each picture, defendant's liability was not limited to damages that would be awarded against one breaking contract to loan money.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by N. H. Spitzer and another against the Pathe Exchange, Inc. From a judgment for plaintiffs, defendant appeals.

Reversed and remanded.

Bauer, MacDonald, Schultheis & Pettit and Fred E. Pettit, Jr., all of Los Angeles, and Coudert Brothers, of New York City (Lewis A. R. McInnerarity, of Los Angeles, of counsel), for appellant.

J. F. T. O'Connor and C. J. Mulvane, both of Los Angeles (Lord, Day & Lord, of New York City, of counsel), for respondents.

STURTEVANT, Justice.

The plaintiffs commenced an action against the defendant to obtain relief for the nonperformance of a contract. The defendant answered, and the trial was had before the trial court sitting without a jury. The court made findings in favor of the plaintiffs, and, from the judgment based thereon, the defendant has appealed.

In the early part of the year 1925, N. H. Spitzer, one of the plaintiffs, entered into a contract with the defendant under the terms of which the plaintiffs agreed to make several motion pictures. The defendant agreed to pay on the acceptance of each picture a certain sum of money and thereafter to distribute the picture through its sales channels and out of the proceeds to pay certain additional sums to the plaintiff N. H. Spitzer. The main office of the defendant was located in New York. The studio and laboratories of the plaintiff N. H. Spitzer were located in Los Angeles county. Soon after the contract was executed, the plaintiff Spitzer came from New York to Los Angeles and entered upon the performance of the contract. The first picture he undertook was one entitled "Heirloons." To create a picture, the plaintiff N. H. Spitzer was compelled to employ many prominent actors, numerous persons as assistants, and to make large expenditures. To enable him to meet his expenses, it became necessary for him to obtain financial assistance. He applied to the plaintiff Cinema Finance Corporation, which undertook to make the advances under the terms of a certain assignment which will hereinafter be more specifically discussed. About the middle of August, 1925, the first picture, hereinafter called the first version, had been finished, and the plaintiff N. H. Spitzer took it to New York and tendered it to the defendant. In an Eastern theater before a committee selected by the defendant the picture was exhibited. Basing its action on the report of its committee, the defendant declined to accept the picture. After some oral discussion between the plaintiff N. H. Spitzer and Mr. Elmer Pearson, the manager of the defendant, it was agreed that certain alterations and changes should be made in the picture. Thereupon the films were shipped back to Los Angeles and the plaintiffs undertook to make the changes which Mr. Pearson had asked to be made. The changes consisted of certain deletions and some additions. After the changes had been made, the picture, as changed, and hereinafter called the second version, was again delivered to the defendant. The second version was then exhibited to a committee selected by the defendant. The report of the committee was adverse. On December 16, 1926, Mr. Pearson telegraphed Mr. Spitzer, "Our rejection of Heirloons on ground that it is not of quality called for by contract is definite and final." After that date and before the date of the trial some other changes were, by consent, made in one copy of the picture, and there resulted what will hereinafter be termed the third version. That copy was made to fill an order from abroad. After the telegram just mentioned, the films were never returned to the plaintiffs. While the trial was being held, acting on the request of the defendant and with the consent of the plaintiffs, one version of the picture was exhibited at Culver City before an audience including the judge of the trial court, the officers of the court, and the parties and their counsel. As we understand the record, the fact does not clearly appear whether the picture so exhibited was the first, second, or third version. No additional pictures were taken and added to the first version. It is therefore apparent that the picture so exhibited was at least a part of if not the first version.

[1] The defendant contends that there is no evidence whatever in the record supporting the allegations of the complaint that the picture Heirloons, as referred to in said complaint, was of a quality called for by the contract. One of the covenants contained in the contract was, "Each of said pictures shall be of the highest quality as regards acting, action, directing, photography, and consistency of story." As we understand the defendant, it asserts that the evidence did not show that the picture as tendered complied with any one of the calls of the contract which we have just quoted. The plaintiffs reply that the trial court made findings which, among other things, found as follows: "That the picture Heirloons was and is a feature comedy as contemplated by said contract, and was and is of the highest quality as regards acting, action, direction, photography and consistency of story. * * *" Continuing, they quote the telegram sent by Mr. Pearson as supporting the finding. They go further, and they quote the testimony of Mr. Pearson given on the trial, which was to the effect that his objection was based solely on the ground of quality. Furthermore, they quote the evidence of Mr. Pearson to the effect that he had no objection to the picture by reason of the direction, acting, or photography. Moreover, they quote the testimony of other witnesses who testified in language highly commendatory of the picture. In another place the plaintiffs stress the fact that the trial court saw the picture exhibited, and after seeing the picture exhibited the court made findings in favor of the plaintiffs. Thereupon the plaintiffs contend that at the very least it must be conceded that there was evidence supporting the court's findings, and, if there was any conflict in the evidence, a court of review will not undertake to disturb the finding. We think these replies are abundantly sustained by the record.

In this connection the defendant vigorously contends that the plaintiffs should be confined to the tender and offer made in December, 1925. The point is untenable. There is no evidence in the record that the picture as produced was rejected prior to December 16, 1925. Furthermore, there was evidence that the first version fulfilled every call of the contract and that all changes subsequently made were made on the request of the defendant.

[2] In the next place, the defendant contends there is no evidence supporting the findings that the conveyance given by the plaintiff Spitzer to the Cinema Finance Corporation, including copyright, was ever consented to by the defendant. It is perfectly clear that in paragraph 25 of the contract there are certain provisions against assign-

ment. Furthermore, during the trial much time was devoted to the introduction of evidence showing or tending to show the nature of the assignment made by the plaintiff Spitzer to the Cinema Finance Corporation and the consent, if any, given by the defendant to that transaction. Several of the findings made by the trial court deal with that conveyance and its effect on the rights of the parties. In substance, the findings of the trial court were that the conveyance was in its nature temporary and as a mere matter of security for the advances made by the Cinema Finance Corporation, in other words, a lien. The defendant in writing executed a document expressly consenting to a lien. The defendant does not in its brief show that the transaction was not as stated in the findings of the trial court or that it was otherwise than a mere lien and consented to by the defendant. We think that the finding is supported by the evidence.

[3] The next contention of the defendant is that there was no evidence that the defendant ever gave its approval of the compensation paid to the actors other than Wallace McDonald and Stuart Holmes. The contract contained a covenant that "the leading artists and the principal members of the cast for each of the same and their compensation shall be subject to Pathe's approval." After Mr. Spitzer commenced his work, a formal written contract showing the compensation was executed by each actor. Those formal contracts as so executed were at once sent to the defendant. No objection was made to any one of them except as to two actors. Later those objections were withdrawn and an approval was expressly given. In this same connection there was at least some evidence showing that a written approval was expressly given as to each and every one of the actors. However, the evidence regarding the consents lastly mentioned was unsatisfactory, as it is not altogether clear whether the documents were lost or destroyed. Nevertheless, some of them were not produced at the trial. Although there was a vast amount of correspondence introduced in evidence, there was not a particle of evidence to the effect that the defendant did not receive copies of the contracts with the actors, nor was there any evidence that it disapproved the compensation or the employment of any actor except as we have mentioned.

During the trial and when the foregoing matters were being discussed, the trial court called attention to the telegram dated December 16, 1925, in which the defendant rejected the production tendered by the plaintiffs. Thereupon the court remarked: "I have always assumed that where an offer of performance was refused, and a statement of refusal was made that there was a certain specified ground for that refusal, then the party making that refusal could not be heard, in case of litigation over the transaction, to say that it was refused on some other and different ground." In no place did the trial court decline to receive evidence of other grounds. In no place did the defendant undertake to introduce any evidence limiting the force and effect of the language contained in the telegram. As hereinabove stated, the findings were to the effect that the plaintiffs did and performed those things which the contract called upon them to do and perform. In view of all these circumstances, we are not inclined to hold that the point last discussed finds support in the record.

[4-8] In the next place the defendant asserts that the amount of the damages awarded to the plaintiffs is materially in excess of the amount warranted by the pleadings and the facts in the case. In computing damages the trial court computed the expenditures of the plaintiffs. It found they amounted to $111,695.25. It then found that the plaintiffs, by consent of the defendant, had sold certain foreign rights and had received $9,196.50, which the trial court deducted from the amount of the expenditures and, for the balance, $102,498.75, it gave judgment as for damages. The defendant's contention requires a statement as to the nature of the contract. That instrument is very long, and it will serve no purpose to quote extensively. By its terms the plaintiff N. H. Spitzer for a fixed term employed the defendant as his agent to exploit and distribute the pictures produced by the plaintiff and to finance the undertaking. The defendant agreed to make certain advances at an agreed rate of interest, and the plaintiff agreed that such advances should be repaid. Loss by fire was at the risk of the plaintiff, and insurance was at his expense. Title to the negatives at all times was to remain in the plaintiff. The defendant was to have title to certain positives only. Incidentally Pathe agreed to loan moneys. Before the end of the term Pathe, according to the findings, wrongfully abandoned the contract. Under all of the authorities it became liable to the plaintiff in damages. III Sedgwick on Damages § 824; I Mechem on Agency § 641; 2 C. J. 542; Story on Agency § 478. The natural damages for the breach by an agent of his contract of agency were the cost and expenses of getting another agent to render the service specified in the contract. Cannon Coal Co. v. Taggart, 1 Colo. App. 60, 27 P. 238, 240; John Hetherington & Sons v. William Firth Co., 210 Mass. 8, 95 N. E. 961, 966; F. E. Atteaux & Co. v. Mechling Bros. Mfg. Co., 245 Mass. 483, 140 N. E. 271, 278; 2 C. J. 542. In so far as anything is contained in the briefs or has been called to our attention, we do not find that any evidence was introduced proving, or tending to prove, the natural damages. If by reason of any

peculiar circumstances it was impossible by reason of the nature of the commodity or the nature of the market for the plaintiffs to have obtained another sales agency, the plaintiffs should have pleaded and proved the facts. The burden was on them. F. E. Atteaux & Co. v. Mechling Bros. Mfg. Co., supra. This they made no attempt to do. The plaintiffs cite and rely on the doctrine stated in Hadley v. Baxendale, 156 Eng. Rep. Reprint, 145. In doing so it is their claim that when the parties entered into the contract both knew that the cost of the picture would be approximately as found by the trial court, $111,695.25; that, if the contract was broken by the defendant the plaintiffs would lose said sum. However, before the plaintiffs may be heard to make this contention, it was necessary that they plead and prove the facts and that they bring up a finding thereon. Mitchell v. Clarke, 71 Cal. 163, 169, 11 P. 882, 60 Am. Rep. 529. As to what the parties, or either of them, knew or communicated one to the other of the plaintiffs' possible loss, if any, in obtaining finances or assistance in distribution and exploitation in the event that the defendant should breach its contract, the record is wholly silent. Therefore this record does not present facts allowing the application of any rule except that applicable to the damages which naturally and necessarily resulted from the act complained of. Overstreet v. Merritt, 186 Cal. 494, 200 P. 11, strongly relied on by the plaintiffs, contains nothing at variance with what we have said.

[9] In this same connection the plaintiffs cite Cederberg v. Robison, 100 Cal. 93, 34 P. 625. However, we do not understand them as contending that the plaintiffs were entitled to recover their outlay necessarily incurred in producing the picture because the defendant refused to perform. The doctrine of the case cited rests on United States v. Behan, 110 U. S. 338, 4 S. Ct. 81, 28 L. Ed. 168, which is one of the leading cases on that subject. At page 344 of 110 U. S., 4 S. Ct. 81, 83, Mr. Justice Bradley, speaking for the court, said: "The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely,—First, what he has already expended towards performance, (less the value of materials on hand;) secondly, the profits that he would realize by performing the whole contract." In the instant case there was no evidence of profits. There was no evidence that the picture produced by the plaintiffs was of no value; but, as the plaintiffs earnestly contend, it was of great value. It is clear, therefore, that their damage, as the record now stands, may not be said to be the amount of their total expenditures less $9,196.50, the amount received from the sale of certain foreign rights.

[10] The defendant claims that its liability should be limited to the amount of damages that would be awarded against one who breaks a contract agreeing to loan money. Hedden v. Schneblin, 126 Mo. App. 478, 104 S. W. 887. While that element enters into this case and would be a proper subject of inquiry, the contract clearly shows that the liability of the defendant would not be limited to that sum.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with what has been said above on the single issue of damages. As to that issue, both parties should be allowed to make such amendments to their pleadings as they deem necessary.

I concur: NOURSE, P. J.

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132 Cal.App. 743

## SHIGERU HAYASHIDA v. TSUNEHACHI KAKIMOTO et ux.

Civ. 7816.

District Court of Appeal, Second District, Division 2, California.

June 23, 1933.

**1. Malicious prosecution 🔑16.**

Action for "malicious prosecution" is one to recover damages caused by judicial proceeding instituted from wrongful or improper motives and without probable cause.

[Ed. Note.—For other definitions of "Malicious Prosecution," see Words & Phrases.]

**2. Malicious prosecution 🔑10.**

Gist of action for malicious prosecution is putting of legal process in force, regularly, merely to vex or injure.

**3. Malicious prosecution 🔑14.**

Legal damage constituting basis of action for malicious prosecution is inconvenience or harm resulting naturally or directly from prosecution.

**4. Malicious prosecution 🔑1.**

"Action for malicious prosecution" is supported only by showing malicious prosecution of legal proceeding before judicial officer or tribunal; remedy being trespass, not action on case, if proceedings are extrajudicial.

**5. Malicious prosecution 🔑47.**

Complaint for malicious prosecution must affirmatively show judicial proceeding instituted by defendant.

**6. Aliens 🔑44.**

In determining whether alien is entitled to admission, immigration authorities act in administrative, not judicial, capacity (Immigration Act 1917, §§ 3, 11, 15, 17 [8 USCA §§ 136, 147, 151, 153]).

**7. Aliens 🔑44.**

Immigration inquiry board is unauthorized to initiate alien's detention but merely inquires into cases where alien is duly detained for examination (Immigration Act 1917, §§ 3, 11, 15, 17 [8 USCA §§ 136, 147, 151, 153]).

**8. Malicious prosecution 🔑1.**

Immigration inquiry board receiving defendants' letters and telegram allegedly procuring alien's detention for investigation of right to admission, *held* to perform only administrative, not judicial, function, precluding alien's recovery against defendants in action for malicious prosecution (Immigration Act 1917, §§ 3, 11, 15, 17 [8 USCA §§ 136, 147, 151, 153]).

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Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Shigeru Hayashida against Tsunehachi Kakimoto and wife. Judgment for defendants, and plaintiff appeals.

Affirmed.

Coleman E. Stewart, of Santa Barbara, for appellant.

Schauer, Ryon & Goux, of Santa Barbara, for respondents.

ARCHBALD, Justice pro tem.

A demurrer to plaintiff's second amended complaint for damages for alleged malicious prosecution was sustained without leave to amend. From the judgment entered thereafter plaintiff has appealed.

The complaint alleges in substance that defendants, "by sending" letters dated April 1, 1930, and April 27, 1930, and a telegram dated April 28, 1930, to the "Board of Special Inquiry of the United States Department of Labor, Bureau of Immigration," "the contents of each being unknown to plaintiff, instigated and procured the detention of plaintiff by the Board of Special Inquiry of the United States Department of Labor, Bureau of Immigration, on the charge of being an alien who was likely to become a public charge"; that plaintiff was "imprisoned on said charge" from April 28, 1930, to May 26, 1930, in the immigration detention ward at San Pedro, Cal.; that in so doing defendants acted maliciously and without probable cause; that on May 26, 1930, said department of labor, bureau of immigration, dismissed said charge and released plaintiff from custody. The demurrer was both general and special. Among the grounds of the latter were ambiguity and uncertainty in that it could not be ascertained from the complaint with what, if any, judicial body defendants filed any charge; whether there was a hearing before the original body before which said charges were filed and what the outcome of said hearing was, and whether the dismissal alleged was a dismissal on appeal of a decision of the original body or by the original body itself; what action or means were used to obtain the arrest of plaintiff or the nature of such action, whether civil or criminal, or in what judicial tribunal, if any, the charges were filed.

It is apparent that the general demurrer was sustained without leave to amend for the reason that the trial court adopted the contention that the proceeding alleged to have been instigated by defendants was not shown to be a "legal proceeding," and the special board of inquiry referred to was not shown to have been exercising judicial functions.

[1-4] The action for malicious prosecution is a remedy that has come down to us from the common law. It undoubtedly grew out of the malicious use of the courts for the purpose of vexation or injury and not for the bona fide prosecution of a civil or criminal cause. As was said in the case of Wass v. Stephens, 128 N. Y. 123, 28 N. E. 21, 22: "The action for malicious prosecution is very ancient. The law puts no direct restraint upon the institution by one person of a civil action or a criminal prosecution against another. He may put in motion the civil or criminal law, at his pleasure, for the enforcement of an alleged private right, or the punishment of an alleged public wrong; but if he acts from malice, and institutes a groundless prosecution against another, either civil or criminal, the law affords to the injured party a remedy through an action for damages for malicious prosecution." Such action may be defined as one brought for the recovery of damages caused by "a judicial proceeding instituted by one person against another from wrongful or improper motives, and without probable cause to sustain it." Hicks v. Brantley, 102 Ga. 264, 268, 29 S. E. 459, 460. The wrong to be righted must be based on a judicial proceeding. The gist of the action "is the putting of legal process in force, regularly, for the mere purpose of vexation or injury; and the inconvenience or harm resulting naturally or directly from the suit or prosecution is the legal damage upon which it [the action] is founded." Cooper v. Armour (C. C.) 42 F. 215, 216, 8 L. R. A. 47. Such action can only be supported by showing a malicious prosecution of some legal proceeding, before some judicial officer or tribunal, and, if the proceedings complained of are extrajudicial, the rem-

edy is trespass and not an action on the case. Turpin v. Remy, 3 Blackf. (Ind.) 210, 216.

[5] The complaint in such an action must affirmatively show a judicial proceeding instituted by defendant. In the case of Maskell v. Barker, 99 Cal. 642, 34 P. 340, the complaint alleged only that defendant "maliciously and without probable cause sued out a writ of attachment against plaintiff's property, and extorted from him the money sued for, upon a threat made by defendant that if the same was not paid he would cause the writ to be levied on certain real property" of plaintiff which the latter was about to sell, and thus prevent the sale. It was held that the general demurrer was properly sustained because it was incumbent upon plaintiff to "allege and prove that the writ of attachment was executed by attaching his property." In other words, it was necessary to allege that the damage was done in and by the judicial proceeding, and not merely by threat of it.

Section 3 of the act of February 5, 1917 (39 Stat. 875, section 136, 44 Stat. pt. 1, p. 131 [8 USCA § 136]), excludes from admission into the United States certain classes of aliens, among which are persons "likely to become a public charge." Section 15 of such act (39 Stat. 885, section 151, 44 Stat. pt. 1, p. 137 [8 USCA § 151]), makes it the duty of the proper immigration officer at any port of entry, upon the arrival of a vessel bearing aliens, to inspect such aliens, and provides that such immigration officials "may order a temporary removal of such aliens for examination at a designated time and place," such removal not to be considered a landing. Section 11 of the act (39 Stat. 881, section 147, 44 Stat. pt. 1, p. 135 [8 USCA § 147]) provides that for the purpose of determining whether aliens arriving at ports of the United States belong to any of the excluded classes *the commissioner general of immigration, with the approval of the secretary of labor, may direct that said aliens shall be detained* on board the vessel bringing them, or in a United States immigrant station at the expense of such vessel, a sufficient time to enable the immigration and medical officers to make an examination sufficient to determine whether or not they belong to the excluded classes. Section 17 (39 Stat. 887, section 153, 44 Stat. pt. 1, p. 138 [8 USCA § 153]) provides for the appointment by the commissioner of immigration or inspector in charge at the various ports of arrival of such "boards of special inquiry * * * as may be necessary for the prompt determination of all cases of immigrants *detained* at such ports under the provisions of the law." (Italics ours.) Each such board is to consist of three members "who shall be selected from such of the immigrant officials in the service as the Commissioner General of Immigration, with the approval of the Secretary of [Commerce and] Labor, shall from time to time designate as qualified to serve on such boards." Such boards "shall have authority to determine whether an alien *who has been duly held* shall be allowed to land or shall be deported." (Italics ours.) The hearings of the board are private and a record is kept of the proceedings and testimony produced before it. The decision of two members prevails, but either the alien or dissenting member may appeal to the secretary of commerce and labor and such appeal operates to stay any action in regard to the final disposal of the alien in question until the receipt by the commissioner of immigration at the port of arrival of the decision on appeal. The decision of such board is final "unless reversed on appeal to such secretary."

[6] It will be seen from the foregoing that in determining whether an alien is entitled to admission into the United States the immigration authorities are acting in an administrative and not in a judicial capacity, and such is the holding of the federal courts. U. S. ex rel. Mylius v. Uhl (C. C. A.) 210 F. 860, 862. Appellant herein admits that the board of special inquiry is not a court or judicial body, but urges that the test is not whether or not it is such court or body but whether it performs a judicial function.

The case of Cosulich v. Stempel, 81 Cal. App. 278, 253 P. 344, 345, seems to us to be applicable here in principle. In that case the *action* charged to have been maliciously prosecuted was the *act* of defendant in filing an affidavit accusing the plaintiff of dishonesty and misconduct, in opposition to plaintiff's application for a license as a real estate broker, which charge, the complaint alleged, was without probable cause and resulted in delaying the issuance of said license. The court there said, the italics being ours: "The general rule is that the action will lie only when a party has instituted or prosecuted with malice and without reasonable or probable cause *some judicial proceeding* against another," and that the authorities are in accord "that they *must be judicial proceedings* and *brought before some judicial tribunal.*" It was argued in that case, as here, that because the commissioner was acting quasi judicially with jurisdiction to entertain proceedings of a judicial character, the action was a "judicial proceeding" within the rule applicable to malicious prosecutions. With respect to such contention the court observed that the complaint merely showed that plaintiff had applied to the commissioner for a license, and that though that officer delayed action because of defendant's affidavit until he satisfied himself that the applicant was a suitable person to be awarded a license, there were no proceedings of a judicial nature either instituted or determined. The court necessarily refused to decide whether or not if the proceeding had been one for revocation of a license already issued it would have been a judicial proceeding.

[7, 8] The case as alleged by plaintiff's complaint is that of an alien presenting himself at a port of entry into the United States for admission into the country. The function of the board of inquiry does not appear to be that of initiating detention but to inquire into cases where the alien is detained for examination before such board. Under the law, as we read it, we fail to see how there could have been any detention by the board of special inquiry. The detention is made by the commissioner general of immigration, and the authority of the board is to determine whether an alien "*who has been duly held* shall be allowed to land or shall be deported." On the face of the complaint, in the light of the law, the statement that defendants, by sending the letters and telegram "instigated and procured the detention of this plaintiff by the Board of Special Inquiry" is an erroneous conclusion, and the complaint on its face, with the law applied to it, shows but a detention and administrative investigation instituted by the department whose duty it was so to do. If the complaint showed that such letters and telegram had been sent to the commissioner general of immigration or the secretary of labor; that the alien was in possession of papers showing that he had formerly entered the United States and had the right to return; that the actions of defendants caused the commissioner general to make such detention; and that the real issue before the board of special inquiry was the right to enter under the papers held by the alien, appellant would be in a better position to urge that the board performed a judicial function in the instant case. On the facts alleged, however, we are of the opinion that the complaint fails to show that the board of special inquiry performed anything more than an administrative function, even assuming that something more than a conclusion is alleged in the statement that by sending letters and a telegram, the contents of which are not shown, the detention was caused and the investigation instigated.

Appellant urges that even though he is mistaken in the theory adopted for the redress of a wrong done him it is the duty of the court to indicate the correct theory if it can be stated with "slight amendment." The difficulty is that appellant made no attempt to amend but insisted in standing on his complaint; and as we are of the opinion that both general and special demurrers were properly sustained, the order of the trial court in that respect must be affirmed on appeal. Haddad v. McDowell, 213 Cal. 690, 3 P.(2d) 550.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

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132 Cal.App. 720

## COLORADO PAC. LAND CO. v. CLINTON E. WORDEN CO.

Civ. 1216.

District Court of Appeal, Fourth District, California.

June 22, 1933.

Hearing Denied by Supreme Court Aug. 21, 1933.

**1. Adverse possession 🔑71(3).**
**Deeds 🔑8.**

Grantee in deed of quarter section, including tract to which grantor had no title, acquired no title thereto by deed or adverse possession, though remaining acreage, on which grantee paid taxes, was described in his property statement and assessment book as including such tract.

**2. Adverse possession 🔑86.**

To acquire title to land by adverse possession, claimant must pay taxes thereon.

**3. Adverse possession 🔑93.**

Statute, permitting party paying taxes on land, owned by another, for five years, to acquire title by adverse possession, must be strictly construed and doubts resolved against claimant's contention.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by the Colorado Pacific Land Company against the Clinton E. Worden Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Borton & Petrini, of Bakersfield, for appellant.

Siemon & Garber and Alfred Siemon, all of Bakersfield, for respondent.

ANDREWS, Justice pro tem.

This is an action to quiet title, based on adverse possession. During the time adverse possession is claimed to have been running in favor of plaintiff on the tract of 4.85 acres involved defendant was the record owner thereof. It was also owner of 80.65 acres lying in the northwest quarter of section 4, north of Kern river. During said time plaintiff was the record owner of 78 acres lying in said northwest quarter of section 4, south of the Kern river, being all the land in said quarter south of the river, except the said 4.85-acre tract. The Kern river runs through the quarter from its northeast corner to the southwest corner, dividing it into nearly equal parts. The quarter contained 163.50 acres according to government survey. The tax receipts introduced in evidence show the lands of the parties listed for taxation in said section 4, as follows: To defendant, all north of river in section 4, 85 acres; to plaintiff, the northwest quarter, section 4, south of river, 78 acres. In which assessment did the assessor include the 4.85-acre tract?

The law requires each person to make a statement of property owned by him and deliver it to the assessor, from which, with such additional information as he may require the parties to produce, and such investigation as he may make on his own account, he enters in the assessment book the data by and upon which is fixed the value of such property for taxation purposes. The primary concern of the assessor is that all property in the county shall be listed for taxation and that there is no duplication which would result in double taxation. The reason for requiring an estimate of the acreage of lands listed under government surveys to be included in the assessment books is thought to be that as to such lands the value, which is the final goal of an assessor, is commonly determined, as is shown by all the tax receipts in evidence, by applying a price per acre to arrive at the value, and in adjacent areas the same price is commonly used, as is shown in this case by the tax receipts.

Assuming that the parties each made the statement in the form above set forth or that the assessor on special investigation made, or corrected the assessment to its present form, what intent should be inferred therefrom? The assessor was interested to see that 163.50 acres were taxed for that quarter, and not in how it was described or to whom assessed or who paid it.

It is argued that the excess in acreage found in defendant's listing might be accounted for in the fact that it might own other land in section 4 north of the river not in this quarter, but absence of proof in this regard, with sufficient incentive to produce such proof if it existed, and an inspection of the maps put in evidence, seem to make such a claim untenable. It might more reasonably be assumed that the assessor knew or ascertained the fact to be that in that quarter defendant in fact owned 85 acres and plaintiff 78 acres and, as they could be required by law to pay only on what they owned, and each had correctly given in their statements of the acreage they owned, even if under rather loose descriptions, that he fixed the value for taxation purposes upon that understanding and basis.

In both descriptions, the parties simply ignored the 4.85-acre tract rather than go to the trouble of noting it by exception, and for long years—indeed always by these parties—it had been done that way with no misunderstanding or complaint, or reason to change, because each thereby paid the correct amount of tax according to the land owned. The accuracy of the description did not affect the assessor's problem at all, which, as suggested, is to find what property a person owns and its value. Of course, in conveyances of land the description controls where the acreage differs from what would be indicated by it.

Here the only inquiry is what was the basis or reason for fixing the value upon plaintiff's property at an amount produced by multiplying 78 acres by a certain price per acre and the defendant's value at 85 acres by using the same figure. Neither estimate of acreage is justified by the manner of describing the land. The contention that, because the land of plaintiff was described in a form which included the 4.85-acre tract, it was therefore in law assessed to plaintiff, gives no significance to the statement as to the acreage and the use made thereof.

It is obvious that a description indicating 100 acres, and specification of only 10 acres or a description which would include only ten acres with a declaration of 100 acres for taxation, would require the assessor to ascertain the facts as to ownership and intention, and if the investigation disclosed the acreage right as corresponding to ownership, and descriptions wrong, the assessor would be bound to proceed upon that fact and assess upon the acreage, and the description might be disregarded. While this should be corrected, and if not, might invalidate the tax lien, that would have nothing to do with the duty to fix the value for taxation of each owner's land by the method being used, which was by acres.

The plaintiff corporation is attempting to obtain from its adjoining neighbor, the defendant corporation, not by bargain and sale, or for any compensation, but by trespass so long continued that the law of adverse possession permits plaintiff to keep it, this 4.85 acres of sand and brush in the river bottom, mostly incapable of any use, and the use of which, surrounded as it was by plaintiff's other land, might, if it could have been discovered, have been too trifling to suggest a purpose to acquire title thereby.

[1] Plaintiff's original deed was for all the land in this quarter south of the river, which included the 4.85-acre tract, which was thereby ignored, as it seems always to have been. But, as its grantor had no title to the 4.85 acres, plaintiff acquired no title, but simply took title to the 78 acres which the grantor owned. The 4.85-acre tract had belonged to defendant for years before plaintiff's deed. Plaintiff used this deed as color of title at the trial to extend such occupancy as it could show of a minor part of the tract to a claim of use of the whole tract.

[2, 3] In acquiring title by this method the law requires the taxes to be paid. This safeguard is very important as affording a defi-

nite kind of notice, particularly to nonresident owners, that some one is paying their taxes and therefore probably trying to obtain their land by bold and persistent trespass. The policy of the law would require strict construction of a statute which permitted title to be acquired as in this case, and resolve matters of doubt against plaintiff's contention. That is, plaintiff must make it clearly appear that it was, during five years, paying defendant's taxes upon this tract.

In the present case the defendant, while possibly not appreciating the technical question involved in description, did know it was paying taxes every year on 85 acres, which would include this small tract, and which was all the land it owned in that section. In the same way it should be reasoned that the plaintiff knew it was paying taxes on 78 acres, which was all the land it owned, and was not paying on the 4.85 acres.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

132 Cal.App. 593

## PEOPLE v. OJEDA et al.

Cr. 1263.

District Court of Appeal, Third District, California.

June 15, 1933.

Hearing Denied by Supreme Court July 14, 1933.

**1. Larceny** ⚷23.

"Grand theft" necessitates participation in taking and appropriating live animal mentioned in statute, not mere taking of carcass worth $200 or less (Pen. Code, § 487).

[Ed. Note.—For other definitions of "Grand Theft," see Words & Phrases.]

**2. Criminal law** ⚷511(1).

In prosecution for grand theft, accomplice's testimony *held* sufficiently corroborated (Pen. Code, §§ 487, 1111).

**3. Criminal law** ⚷739(1).

In prosecution for grand theft committed by killing and appropriating hog, question whether defendants' accomplice, who killed hog, was drunk, *held* for jury, as regards intent (Pen. Code, § 487).

**4. Criminal law** ⚷741(5), 742(2).

Weight and credibility of accomplice's testimony *held* for jury in grand theft prosecution (Pen. Code, §§ 487, 1111).

**5. Larceny** ⚷27.

Defendants, if aiding and abetting killing of hog, intending to appropriate part of meat, were guilty of grand theft, though accomplice who killed hog was allegedly drunk and thought that hog was sheep (Pen. Code, §§ 487, 1111).

**6. Criminal law** ⚷829(1).

Refusing instruction covered by instruction given *held* not error.

**7. Criminal law** ⚷793.

In grand theft prosecution, instruction requiring proof that defendants, "and each of them," took or carried away hog, *held* erroneous as suggesting that each defendant must kill and separately carry away whole hog (Pen. Code, § 487).

> Jury might get impression from language of instruction in question that it was necessary for each individual defendant to kill and separately carry away whole hog, or, in other words, that taking and carrying away of less than whole hog by any one defendant, regardless of his participation in original plan to kill and appropriate hog, did not constitute grand theft.

**8. Larceny** ⚷27.

Participating in killing of hog with felonious intent to kill hog and wrongfully deprive owner thereof constitutes grand theft, though defendant obtains no part or only small portion of carcass (Pen. Code, § 487).

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Arthur Ojeda and another were convicted of grand theft, and they appeal.

Affirmed.

George R. Anderson, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The appellants, Arthur and Manuel Ojeda, were charged jointly with Elmer Harley with the crime of grand theft committed by killing and appropriating a hog belonging to George Scally. These three defendants and Samuel Maynard participated in the commission of the offense. Maynard shot the hog. The four individuals dressed and divided the pork among themselves. The crime was discovered and they were apprehended. Maynard pleaded guilty to grand theft. Harley and the Ojeda brothers were jointly tried and convicted. In pronouncing judgment against them the court administered fines with the alternative that if the fines were not paid they should be imprisoned in the county jail until the penalty was satisfied at the rate of one day for each $2 of the fine imposed. Harley failed to appeal from the judgment. Arthur and Manuel Ojeda, however, perfected an appeal therefrom.

The appellants contend the verdict and judgment are not supported by the evidence, chiefly because the testimony of Maynard, an accessory to the crime, was not adequately corroborated by other evidence so as to conform to the requirement of section 1111 of the Penal Code. It is also asserted the court erred in refusing to give to the jury certain instructions which were offered by the appellants.

[1, 2] We are satisfied the testimony regarding the details of the crime which were related by Maynard, the accessory, is sufficiently corroborated by other evidence to adequately connect the appellants with the charge of grand theft so as to fulfill the requirements of section 1111 of the Penal Code. It is true that the crime of grand theft under the provisions of section 487 of the Penal Code may be accomplished only by participating in the actual taking and appropriating of a live animal therein mentioned and not by the mere taking of a dead carcass, having a value of $200 or less. People v. Smith, 112 Cal. 333, 339, 44 P. 663. It follows that if the evidence in the present case fails to connect the appellants with the purpose of taking and appropriating the hog while it was still alive, independently of the testimony of the accomplice, then the requirements of section 1111 of the Penal Code have not been fulfilled and the evidence of their guilt is insufficient to warrant their conviction of the crime of grand theft. But corroborating evidence of their presence and association with Maynard, who shot the hog in the nighttime, at the very time and place when and where it was killed, together with their assistance in skinning, dressing, and dividing between themselves the carcass of the animal, is ample evidence to adequately connect them with the original intention formed while the hog was still alive of killing and appropriating it.

Substantial evidence was adduced, in addition to the testimony of their accomplice in the crime, of material circumstances tending to connect the defendants with the original purpose formed while the hog was still alive of killing and appropriating it. This is sufficient to warrant their conviction under the provisions of section 1111 of the Penal Code. People v. Negra, 208 Cal. 64, 280 P. 354; People v. Davis, 210 Cal. 540, 558, 293 P. 32, 40. In the case last cited it is said, quoting from People v. Negra, supra: " 'The law does not require that the evidence necessary to corroborate the testimony of an accomplice shall tend to establish the precise facts testified to by the accomplice; and strong corroborative testimony is not necessary to support a judgment of conviction founded on the testimony of an accomplice. Even though circumstantial and slight, the evidence is, nevertheless, sufficient if it tends to connect the accused with the commission of the offense.' "

George Scally testified that he owned a ranch in Wooden Valley, Napa county, upon which he kept a band of sheep and some hogs; that the particular hog which is involved in this criminal proceeding was kept in a corral on the premises; that he was informed of the disappearance of the hog and in company with a deputy sheriff he discovered and identified its hide which, to conceal the crime, had been thrown in the well located on the property occupied by the accomplice Maynard.

Maynard made a complete confession of the entire transaction. He testified at the trial of these appellants that he met them at the Wooden Valley ranch the night of the theft and went with them to the corral accompanied by the defendant Elmer Harley, where they found the hog; that Manuel Ojeda chased the hog about the corral, trying to kill it with a hammer, but failed to accomplish his purpose; that a shotgun was then brought to him by one of the parties, by means of which he shot and killed the hog; that the four men then hauled it to a shed on the premises where they all participated in skinning and dressing the carcass; that they took the meat to the house of Samuel Herrera, where they cooked and ate some pork chops; that they then divided the remainder of the meat among themselves and separated, the appellants taking a portion of the hog with them, and that the hide was then taken home and thrown in a well to conceal the crime. He testified regarding the presence and participation of the appellants in the commission of the offense, as follows:

"Q. Who was with you, if anyone, at the time that hog was shot? A. Mr. Harley and the Ojeda boys, sir. * * * We was talking about the hog in the lot there. * * * When we saw the hog there, and we got to talking about killing it and there wasn't any gun to kill it with there, and a gun was brought there to kill it with. * * *

"Q. Some one of these three defendants handed you that gun? A. Yes sir. * * * In a way it was said (for me) to kill it."

He further testified regarding their participation in the affair:

"Q. And when you killed it, who was there? A. The two Ojeda boys and Harley was there. * * *

"Q. Who was it that helped hang it up (in the shed, for the purpose of skinning and dressing the carcass)? A. Arthur Ojeda and Manuel."

The circumstances above related were substantially corroborated by Elmer Harley. Both appellants denied they were present when the hog was shot. They denied that they helped to plan the killing of the hog or that they participated in the skinning or dressing of the carcass, or in a division of the meat.

Both Rudolph and Helen Maynard, children of the accomplice, Samuel Maynard, testified they saw the hog hauled in an automobile by their father and the two appellants from the corral to the shed and that they watched them skin and dress the animal. They also told of the subsequent cooking and eating of some of the pork by all of the parties implicated in the theft. This furnishes corroboration of the testimony of the accessory ample to support the verdict and judgment.

The jury was fully and properly instructed regarding the necessity of adducing substantial evidence to corroborate the testimony of an accessory so as to satisfactorily connect the defendants with the commission of the crime of grand theft.

[3] It is asserted the necessary intent to steal the hog was not shown because Maynard was in search of a sheep and that he was too drunk to be responsible for his conduct and thought the hog which he proposed to kill was a sheep. It was not contended the appellants were drunk. The question of the sobriety of Maynard was a problem for the jury to determine. Evidently the appellants did not rely upon that defense at the trial, for no instructions were offered by them on the subject of drunkenness. The witness Maynard thought that he fully comprehended everything that transpired during the entire affair. He testified in that regard:

"Q. As a matter of fact you don't know clearly what happened that night? A. I know the things I have told you. I know they happened. * * *

"Q. You were rather under the influence of liquor, weren't you? A. I had a few drinks, yes.

"Q. As a matter of fact, you were drunk weren't you? A. I wouldn't say that I was drunk."

[4, 5] Moreover, it is immaterial whether Maynard was drunk or sober at the time of the commission of the offense, except so far as his intoxication may have impaired his recollection of the facts and therefore affected the weight or credibility of his testimony at the trial. These were also matters for the determination of the jury. There is sufficient corroboration of the testimony that the appellants were present and helped to plan the theft and to kill the hog. If they aided and abetted in the killing of the hog with the intention of appropriating a part of its meat to themselves, then they were guilty of grand theft regardless of Maynard's condition of sobriety.

The appellants assign as reversible error the refusal of the court to give to the jury the following two instructions which were offered by them. These proffered instructions read as follows:

"II. The mere fact that the defendants ate some of the meat or, after having been given some of the meat, took it away with them is not sufficient to convict them of the crime charged. The people must prove beyond a reasonable doubt that the defendants, *and each of them*, took or carried away a hog, with the criminal intent to do the act, and there must be a joint union or operation of this act and intent. The defendants cannot be found guilty of eating a portion of the hog, or carrying away a portion of the hog."

"III. If, therefore you find that the defendants had no such joint union of act and intent to commit the crime charged, you will find them not guilty."

[6] The jury was informed that the defendants were charged with willfully, unlawfully, and feloniously stealing, taking, and carrying away one sow, the property of George Scally. They were then clearly instructed that before the defendants could be convicted the jury must find that there existed "a union or joint operation of act and intent" of the accused persons in order to commit the crime. The last instruction above quoted which was refused by the court was adequately covered by the charge which was given.

[7, 8] The first instruction complained of may well have been remodeled and given under the theory of the appellants that they were not present when the hog was killed and did not participate in the grand theft, but merely accepted a portion of the meat after the crime was executed by Maynard. But it will be observed this instruction is erroneous and misleading. It charges the jury that the defendants may not be convicted unless it appears that "each of them" took away a (whole) hog. It is apparent the jury might get the impression from this language that it was necessary for each individual defendant to kill and separately carry away a whole hog to justify a conviction of grand theft. Or, in other words, that the taking and carrying away of less than a whole hog by any one defendant, regardless of his participation in the original plan to kill and appropriate the animal, does not constitute grand theft. This is not the law. The participation in the transaction with a felonious intent to kill the hog and wrongfully deprive the owner of the animal constitutes the crime of grand theft, even though the accused shares in only a small portion of the carcass or obtains no part of it at all.

The jury was fully instructed regarding the law governing principals and accessories to a crime, and of the necessity of finding that these appellants committed the act of "grand theft" with which they were charged, possessing the intention then and there to "wilfully, unlawfully and feloniously steal, take and carry away a sow, the property of George Scally." They were further instructed that: "An accomplice is one who is liable to prosecution for the identical offense charged against the defendants on trial in the cause in which the testimony of the accomplice is given."

The jury must have understood that the crime of grand theft of an animal consists of the felonious taking from the owner of a live hog and not the mere eating of a portion thereof, or of the innocent sharing of the meat without any knowledge that it had been stolen by another person. As accomplices to the theft, the jury was told by inference that it was necessary to find that the Ojeda brothers were guilty of all the elements of the crime necessary to warrant a conviction of Maynard of the identical offense.

The record on appeal necessarily convinces the reader that the appellants knowingly participated in the plan to kill and appropriate the hog. The jury must have been satisfied of that fact. There appears to have been no miscarriage of justice in this case. Even though the rejected instruction last mentioned be deemed not to be fatally misleading, still its omission is not reversible error. Under the circumstances of this case the judgment should be sustained under the provisions of section 4½ of article 6 of the Constitution.

The judgment and the order are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

132 Cal.App. 675

## JOHNSON v. ROSENSTEIN.

Civ. 7984.

District Court of Appeal, Second District, Division 2, California.

June 20, 1933.

**Partnership 🔑108.**

Partner could maintain action against another partner for advancements to copartnership without first seeking accounting, where both amount and duty to repay were made certain by partnership contract.

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Appeal from Superior Court, Santa Barbara County; Percy S. King, Judge.

Action by Harley C. Johnson against Daniel Rosenstein. From a judgment for plaintiff, defendant appeals.

Affirmed.

Butcher & Haines, of Santa Barbara, for appellant.

Fred A. Shaeffer, of Santa Maria, for respondent.

CRAIG, Justice.

In an action by an ex-partner for advancements alleged to have been made pursuant to an agreement of copartnership, judgment was rendered in favor of the plaintiff, from which the defendant appealed.

The determination of questions presented by appellant depends upon the language of a contract in writing between the parties. The facts are not disputed, but he contends that the action should have been an equitable one for accounting. By the provisions of said contract it was agreed that both parties should deliver to the enterprise all fixtures, office equipment, and merchandise share and share alike, to be used in common to their mutual benefit; that the respondent had invested $500 and would furnish additional sums, but not to exceed $1,500 in all, which should be repaid to him "out of the profits of said business before any division of profits shall be made by the parties hereto." And further: "In the event said partnership business shall not be successful, second party agrees to take over all of the stock and fixtures and repay to first party all the moneys put into said business by first party and return to first party all of said office equipment contributed by said first party as aforesaid."

The project proved unsuccessful, and at the end of six months ceased to function. The appellant concedes that his defense and the grounds of his appeal were "all made upon the general proposition that an accounting and settlement between copartners is a condition precedent to an action by one partner against another upon partnership claims and transactions." By the financial agreement of the parties as recited in their contract, the respondent furnished certain amounts of money which, in the event that said business should not be successful, the appellant would "repay to first party," the respondent. "It is well settled in this state, as elsewhere, that one partner cannot sue another upon a demand arising out of the partnership transactions, in the absence of a settlement of the accounts. But by the terms of this rule it does not apply where the transaction is not a partnership matter. And it seems plain that a loan from one partner to another is not a partnership transaction, notwithstanding the fact that the borrower intends to put the money into the firm and does so. Accordingly it is well settled that the lender in such a case can maintain an action for the recovery of the money, although there has been no settlement of the partnership accounts." Bull v. Coe, 77 Cal. 54, 18 P. 808, 810, 11 Am. St. Rep. 235. The record does not disclose whether or not the appellant was able to finance the business, although he agreed to repay his copartner all amounts advanced by the latter out of profits to the exclusion of the partnership, or, in the event of its termination if not successful, "all moneys put into said business." The object and purpose of advancements cannot in such a case be said to affect positive contractual obligations arising by virtue of the occurrence of an event upon which they were by the parties made contingent. Wilson v. Brown, 96 Cal. App. 140, 273 P. 847; Johnstone v. Morris, 210 Cal. 580, 292 P. 970. Nor can it successfully be asserted that ascertainment of the agreed amount due from the appellant to the respondent in such event could be effected only by an accounting. Both the amount and the duty to repay were made certain by their contract, regardless of the outcome.

The judgment is affirmed.

We concur: WORKS, P. J.; PARKER, Justice pro tem.

132 Cal.App. 708

**RETON v. J. D. MILLAR REALTY CO. et al.**

**Civ. 4883.**

District Court of Appeal, Third District, California.

June 22, 1933.

**1. Appeal and error ⚷994(3), 1012(1).**

Appellate court cannot weigh evidence or pass on credibility of witnesses who testified at trial.

**2. Vendor and purchaser ⚷37(4).**

Statement of value may constitute a fraudulent representation warranting rescission where intended and understood as positive affirmation of fact.

**3. Vendor and purchaser ⚷37(4).**

Representations of vendor's agent as to value, where false, warranted rescission as representations of fact, where agent stated to purchaser as a fact that property was worth more than vendor was asking for it.

**4. Equity ⚷72(1).**

Laches is available as defense only when it appears that delay has prejudiced rights of opposing party or others.

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Appeal from Superior Court, Los Angeles County; Claude F. Purkitt, Judge.

Action by Frances Dewey Reton against the J. D. Millar Realty Company and another. Judgment for plaintiff, and defendant named appeals.

Affirmed.

L. B. Stanton, of Los Angeles, for appellant.

James E. Fenton and Harold D. Geffen, both of Los Angeles, and Ralph W. Swagler, of Burbank, for respondent.

TUTTLE, Justice pro tem, delivered the opinion of the court.

Appellant appeals from a judgment rescinding a contract for the sale of real property, and providing for the reimbursement of the plaintiff in said action in the sum of $1,874.05.

On May 29, 1926, plaintiff entered into a contract with appellant for the purchase of a lot in the city of Hermosa Beach. The purchase price was fixed at $6,000. $300 was the initial payment, and a similar amount was to be paid on June 6, 1926, and on August 29, 1926. Thereafter $60 per month was to be paid, until the balance of the purchase price was discharged. Interest was fixed at 7 per cent. and the buyer assumed the payment of all taxes and assessments.

Plaintiff paid all of the $300 payments upon the purchase price and in addition made expenditures for taxes and interest. The money judgment allowed her was the total of these items.

The alleged false representations upon which rescission was adjudged were as follows: (1) That the lot was of the market value of $6,000; (2) that immediately appellant would procure a lessee who would lease the lot for a rental sufficient to pay all payments under the contract; (3) that appellant would pay rental for the site of its tract office on the lot as long as it remained there, in an amount sufficient to pay all interest payable on the contract.

The trial court found that the value of the lot never was $6,000, and that it was not worth any amount in excess of $4,000; that appellant did not, at the time the contract was entered into, intend to procure a lessee for said lot, and that said promise was made without the intention of performing the same; that appellant did not, while its tract office was upon said lot, pay any interest upon the contract, and that its promise to pay for the use and occupancy of the lot for the purpose of a tract office was made without any intention of performing the same; that said representations were made fraudulently, for the purpose of inducing plaintiff to enter into said contract.

Respondent, a widow fifty years of age, came to Southern California in July, 1925. She had never had any business transactions prior to coming to California. She was solicited to go to Hermosa Beach and look over the property of appellant. Upon her arrival there she was given a luncheon and attended a "lecture" by a Mr. Lashley, who pictured in the glowing and inimitable phraseology of a resident of the southland, the advantages of purchasing this property. Thereafter she was introduced to a Mr. Nolan, agent of appellant, who made the representations mentioned and secured her name to a preliminary contract with the terms as indicated. Nolan went on to state that "if you can pay one or two or three months, I will get you a lessee who will come in here and lease this property, and he will come in and put up a chicken dinner place here." Respondent replied: "I will have to rely entirely upon your judgment." Nolan's reply was: "You can rely upon my judgment, and it is a fact that this property is worth more than they are asking, and if you want to make some money this is the property for you to make money on by investing in it."

On August 29, 1926, a second and formal contract was entered into with the trustees for appellant, the terms and conditions being identical with those of the preliminary contract of May 29, 1926. It seems to be conceded by all parties that this second contract took the place of the first informal contract, which was more in the nature of a receipt.

[1] The sufficiency of the evidence to support the findings is challenged. We have examined the record and find that there is ample testimony to sustain these findings. The argument of appellant is based upon the theory that we can weigh the evidence here, and pass upon the credibility of the witnesses who appeared before the trial court. Upon the question of the value of the lot, appellant says, for instance, that a deputy assessor who testified for plaintiff "had no knowledge of market prices or sales; he had figures on values for assessment purposes and gave what must be considered as his personal opinion on a fair market value." The testimony of plaintiff's witnesses is characterized as "purely theoretical, conjectural and personal." It requires no citation of authorities when we state that an appellate tribunal is absolutely foreclosed from projecting any inquiry into such matters, which are peculiarly within the exclusive province of the trial court. There is no merit in the attack upon the finding, based upon their lack of evidentiary support.

[2, 3] Appellant contends that the representations as to value were merely matters of opinion, and hence not actionable. It is true that a bare and naked statement as to value is ordinarily deemed the opinion of the party making the representation. Meeker v. Cross, 59 Cal. App. 512, 211 P. 229. On the other hand, such statement may be a positive affirmation of a fact, intended as such by the party making it, and reasonably regarded as such by the party to whom it is made. When it is such, it is like any other representation of fact, and may be a fraudulent representation warranting rescission. Crandall v. Parks, 152 Cal. 772, 93 P. 1018. The representations as to value in the instant case are very similar to those made in the latter case. For instance, Nolan, the agent for appellant, stated to plaintiff: "I can assure you that I know that it is a fact that this property is priced very, very reasonable, and in fact it is worth more than the company is asking for it." Such representations as to value will warrant a rescission.

The other two "representations" are really promises made without any intention of performing them. This constitutes actual fraud under the provisions of section 1572, subdivision 4, of the Civil Code. The essence of the fraud, under such circumstances, is not the breach of the promise, but the fraudulent intent not to perform. The subsequent conduct of appellant is sufficient in this case to show that there was no intention to perform the promises.

[4] The contention that plaintiff was guilty of laches is likewise without merit. The trial court found against appellant upon this issue. While considerable time elapsed between the execution of the contract and the service of the notice of rescission, there were many facts and circumstances which appear in the record and which would tend to excuse the failure of plaintiff to take immediate steps to rescind, and which are sufficient to form the basis for the finding upon this question. Furthermore, laches is only available as a defense when it appears that the delay has prejudiced the rights of the opposing party, or others. Newport v. Hatton, 195 Cal. 132, 231 P. 987. Appellant here has made no showing of prejudice, as a result of the delay of which it complains.

Other points raised by appellant have been considered, but they are devoid of substantial merit and hence no discussion of them is necessary.

No sufficient cause having been shown for disturbing the judgment, it is accordingly affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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132 Cal.App. 677

## BONESS et ux. v. HELPHINSTINE.

Civ. 4698.

District Court of Appeal, Third District, California.

June 20, 1933.

**1. Automobiles 🔑245(80).**

In intersectional automobile collision action, plaintiff's contributory negligence *held* for jury.

**2. Appeal and error 🔑979(2).**
**New trial 🔑70.**

Grant of new trial for insufficiency of evidence to support judgment is largely within trial court's discretion, conclusive unless abused.

**3. New trial 🔑70.**

In intersectional automobile collision action, granting plaintiff new trial for insufficiency of evidence to sustain verdict for defendant *held* not abuse of discretion.

**4. Appeal and error 🔑854(6).**

On review of order granting new trial for insufficiency of evidence to support judgment, trial judge's statement in rendering opinion granting new trial that testimony other than that given by human beings had influenced jury *held* immaterial.

**5. Appeal and error 🔑854(6).**

Appellate court cannot consider extraneous remarks of judge in passing on motion for new trial to upset order which specifically assigns statutory grounds on which new trial is granted (Code Civ. Proc. § 657).

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Jay J. Boness and wife against Charles W. Helphinstine. From an order granting plaintiffs a new trial, after judgment for defendant, defendant appeals.

Affirmed.

Butler Van Dyke, Desmond & Harris, of Sacramento, for appellant.

J. Oscar Goldstein, of Chico, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant has appealed from an order granting a new trial after judgment was rendered in his favor pursuant to the verdict of a jury. The suit was brought to recover damages for personal injuries sustained as the result of an automobile collision at the intersection of streets in Chico. The appellant contends that the court abused its discretion in granting a new trial, and that the evidence conclusively shows that the plaintiff Jay J. Boness was guilty of contributory negligence which bars him from the right to recover judgment.

About 6:30 o'clock in the evening of December 4, 1930, a collision occurred between the automobiles of the plaintiff and defendant at the intersection of Sacramento avenue and the Esplanade in Chico. The plaintiff, accompanied by his wife and child, were driving northerly on Sacramento avenue. He executed a left-hand turn on the Esplanade. As his car reached the intersection of these streets, the defendant's machine, which was running southerly on Sacramento avenue, struck plaintiff's car and drove it into the left-hand gutter. The plaintiff's wife sustained injuries, and his automobile was badly demolished.

Both the plaintiff and his wife testified to substantially the same facts. They said that their machine entered the intersection of the streets traveling on the proper side thereof at about the rate of 15 miles an hour; that when they first entered the intersection they observed the defendant's car coming toward them along Sacramento avenue. He was then about 150 feet away and running at the rate of 35 miles an hour. After diminishing their speed to permit another machine to pass ahead of them, and observing that the defendant was bearing down upon them at a rapid rate of speed, the plaintiff stepped on his accelerator to avoid the collision, but was struck as above related. The plaintiff testified in that regard:

"Q. Who was in the intersection first * * *? A. I was. * * *

"Q. How fast were you going across that crossing when you made the turn? A. Fifteen miles. * * *

"Q. When you got into the intersection how was he coming at you, fast or slow? A. Fast. * * *

"Q. What can you say as to his speed? A. I would say he was going 35 miles an hour or more. * * *

"Q. Why didn't you stop when you saw him coming at you at that high rate of speed? A. Because I knew he was going to hit me. * * *

"Q. What did you do? A. I stepped on the gas and kept going fast.

"Q. Could you have done anything else? A. No sir."

The chief defense was directed toward the contention that the plaintiff's wife was not seriously injured as a result of the accident. It was also claimed the plaintiff made a left-hand turn on the wrong side of the central intersection of the streets and that his conduct constituted contributory negligence which precludes his right of recovery. There is a conflict of evidence regarding this contention of the defendant. When the evidence of the plaintiff was closed, the defendant made no motion for a nonsuit. By this failure he appears to have recognized the fact that contributory negligence was not shown by the evidence of the plaintiff as a matter of law. The defendant's attorney recognized the fact that he expected a conflict regarding the cause of the accident, by saying to the jury, in his opening statement, after the plaintiff's evidence was closed: "The defendant will produce an eyewitness to that accident and * * * will show you how this accident actually occurred; * * * we will show that Jay J. Boness started to make that turn from a point approximately fifty or fifty-five feet south of that intersection; that at no time did he ever reach the right-hand side of Sacramento avenue; that on the contrary he cut that corner very sharply."

The cause was tried with a jury. A verdict was returned in favor of the defendant. A judgment was entered accordingly. The plaintiff moved for a new trial on the ground among others, that the evidence fails to support the judgment. This motion was granted "because of the insufficiency of the evidence." From this order the defendant has appealed.

[1-3] The record in this case dicloses a conflict of evidence on the material issues which are involved. The contributory negligence of the plaintiff is not shown as a matter of law. The granting of a new trial for the insufficiency of the evidence to support the judgment is largely discretionary. Except for an abuse of discretion, an order granting a new trial may not be disturbed on appeal. There is no abuse of discretion shown by the record in the granting of a new trial in the present case. 2 Cal. Jur.

905, § 533; Johnson v. Ostrom (Cal. App.) 16 P.(2d) 794; Peri v. Culley, 119 Cal. App. 117, 6 P.(2d) 86; People v. Driggs, 111 Cal. App. 42, 295 P. 51.

[4, 5] It is immaterial that the judge may have used the following expression in the rendering of his opinion granting a new trial, to wit: "Testimony other than that given by human beings has influenced the jury in this case." The order was in fact granted "because of the insufficiency of the evidence." If the previous statement of the judge should be considered, it apparently indicates that he was satisfied the verdict of the jury was in conflict with the reliable evidence. An appellate court may not consider extraneous remarks of a judge in passing upon a motion for new trial to upset an order which specifically assigns the statutory grounds (Code Civ. Proc. § 657) upon which the new trial is granted. In People v. Driggs, 111 Cal. App. 42, 295 P. 51, 52, it is said in that regard: "When the cause is brought to an appellate court, argument as to what the trial court may have thought, as given utterance by the words used before final action is taken, cannot be considered, unless directly in line with the subsequent orders made. * * * If the opinion contains expressions foreign to the order actually entered, the order entered only is controlling."

The order granting a new trial is affirmed.

We concur: PLUMMER, J.; PULLEN, P. J.

132 Cal.App. 653

## GREENWELL et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 9132.

District Court of Appeal, Second District, Division 1, California.

June 19, 1933.

Rehearing Denied July 17, 1933.

Hearing Denied by Supreme Court Aug. 17, 1933.

**Master and servant** ⚷416.

Question whether employee's widow refused autopsy being evidentiary matter, commission need not make specific finding; implied finding being that autopsy was refused (St. 1917, p. 850, § 19(e).

YORK, J., dissenting.

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Petition by Grace Violet Greenwell and others for a writ of review, opposed by the Industrial Accident Commission and others, to review the Commission's decision denying compensation by way of death benefit in a proceeding under the Workmen's Compensation Act for the death of Arthur C. Greenwell, the named petitioner's husband, following a compensable injury occurring while he was employed by the Santa Barbara Yacht Club.

Petition for writ of review denied.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Robertson & Crawford, of Santa Barbara, for petitioners.

Arthur I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

PER CURIAM.

Complainants are the widow and minor child of Arthur C. Greenwell, who on April 21, 1931, received a compensable injury while working for the Santa Barbara Yacht Club. His death occurred on September 27, 1931. The award by the commission allowed compensation for 2 2/7 weeks for temporary total disability caused by the injury. But the commission decided that the evidence does not establish that the death of the employee was proximately caused by the injury. For this reason compensation by way of death benefit was denied.

On application made by the insurance carrier the commission, on September 28, 1931, made its order for an autopsy to be performed upon the body of the deceased. This order was served on the widow, Mrs. Greenwell, who refused to permit the autopsy to be made. In the reply filed by the attorneys for petitioners to the answer filed by the commission in this proceeding, they state that it is their conclusion from the evidence of certain witnesses that an autopsy was not refused. But they do not state the evidence of those witnesses on this question, although it appears from other portions of the reply that they had before them the transcript of the testimony taken before the commission. This being an evidentiary matter, it was not necessary for the commission to make a specific finding on this point. The implied finding would be that the autopsy was refused. In that event it became "a disputable presumption that the injury or death was not due to causes entitling the claimants to benefits under this act." Workmen's Compensation Act of 1917, § 19(e) (St. 1917, p. 850).

In our opinion sufficient evidence has been produced by respondents to justify the commission in deciding that the presumption above mentioned was not overcome by the other evidence in the case. That the commission did so decide is necessarily implied in its finding that the evidence does not establish that the death of the employee was proximately caused by the injury.

The petition for writ of review is denied.

YORK, J., dissents.

132 Cal.App. 633

### BAKERSFIELD SANDSTONE BRICK CO. v. CASCADE OIL CO. et al.

Civ. 1259.

District Court of Appeal, Fourth District, California.

June 16, 1933.

**1. Costs 🔑169.**

Costs pertaining to attachment *held* taxable as necessary disbursements (Pol. Code, § 4300b).

**2. Appeal and error 🔑918(3).**

Where findings and judgment recite that order was made giving leave to file new complaint, and there being no record overcoming recitals, it will be presumed in support of judgment that order was made to file such pleading to conform to proof.

**3. Pleading 🔑236(2).**

Court may permit amendment at or after trial to conform to proof.

**4. Judgment 🔑248.**
**Trial 🔑396(1).**

If court permits filing of new complaint to conform to proof, findings and judgment should relate to the new pleading.

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Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by the Bakersfield Sandstone Brick Company against the Cascade Oil Company and another. From the judgment and from an order taxing costs, defendants appeal. On motion to dismiss the appeal or affirm the judgment.

Judgment affirmed.

Robert J. Sullivan, of Los Angeles, and J. R. Dorsey, of Bakersfield, for appellants.

Brittan & Mack, of Bakersfield, for respondent.

ANDREWS, Justice pro tem.

The appeal is from the judgment and from an order taxing costs. Appellant contends three points are involved: (a) Are costs pertaining to attachment taxable as necessary disbursements; (b) Was it error to deny motion to strike a new complaint filed after judgment without leave; (c) Will findings based on such complaint support the judgment?

Respondent bases his motion on the ground that the questions presented are not substantial and require no further argument than is involved in the motion.

[1] 1. It seems to be the right to tax and not the amount taxed that appellant regards as proper to present for adjudication. That matter has been settled. The provisions of section 4300b of the Political Code would be enough, but it was determined in Nisbet v. Clio Mining Co., 2 Cal. App. 436, 83 P. 1077, and Unwin v. Barstow-San Antonio Oil Co., 36 Cal. App. 508, 172 P. 622.

[2] 2. The findings and judgment recite that an order was made giving leave to file the new complaint and there being no record brought to this court by that transcript overcoming the recitals it will be presumed in support of the judgment that an order was made to file such pleading to conform to the proof.

[3] A motion was also made before judgment to strike out the pleading, but this was denied. This should be equivalent to leave to file. The validity of the order to file the new pleading does not seem to be one of appellants' claims but if thought to be here involved the right to permit to amend at or after trial to conform to the proofs has long been established in this state.

[4] 3. If the new pleading was allowed, it was the one to which the findings and judgment should relate. These being all the questions presented by this appeal and all now fairly presented and easy of solution, the judgment should be affirmed.

Judgment of the trial court affirmed.

We concur: JENNINGS, Acting P. J.; MARKS, J.

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132 Cal.App. 468

### MITCHELL, Insurance Commissioner, et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 8929.

District Court of Appeal, First District, Division 1, California.

June 8, 1933.

Hearing Denied by Supreme Court Aug. 7, 1933.

**Injunction 🔑223(1).**

That friends of insurance brokerage corporation's officer, on visiting office of insurance commissioner and inquiring concerning right of corporation to do business, were truthfully informed that license had been refused by commissioner, that they would do business with corporation on their own responsibility, and that corporation's right to do business was before courts, *held* not to show disobedience of injunction against interference with brokerage business so as to subject commissioner and his deputy to punishment for contempt (Pol. Code, § 633a7, as added by St. 1931, p. 574).

Certiorari proceeding by E. Forrest Mitchell, as Insurance Commissioner of the State of California, and another, against the Superior Court in and for the City and County of San Francisco and John J. Van Nostrand, Judge thereof, to review an order adjudging petitioners guilty of contempt in violating an injunction.

Order vacated and annulled.

Frank L. Guerena, of San Francisco, for petitioners.

Joseph A. Brown, of San Francisco, for respondents.

TYLER, Presiding Justice.

This is a proceeding to review a judgment of the superior court adjudging petitioners guilty of contempt for violating a certain injunction.

Petitioner E. Forrest Mitchell is the qualified and acting insurance commissioner of the state of California, and Bernon F. Mitchell is his qualified analyst or deputy. The petition recited E. J. Carroll Company, Limited, to be a corporation, licensed to act as an insurance broker, and that its license expired on July 1, 1932. Prior to the expiration of the same, the company applied for a renewal thereof, covering the period from the date last mentioned to July 1, 1933. Said application was made under section 633a7 of the Political Code (as added by St. 1931, p. 574). The application was denied for the reason the insurance commissioner determined, after due investigation and hearing, that the company had been guilty of rebating, contrary to the provisions of section 633b of the Political Code, and for the further reason that it had attempted to place business with a company not authorized to do business in this state, an act condemned under the provisions of section 596 of the Political Code (as amended by St. 1929, p. 373).

Thereafter said corporation filed in the superior court in and for the city and county of San Francisco an action against said insurance commissioner under section 633a22 of the Political Code (as added by St. 1931, p. 579). In its complaint said corporation alleged its qualification to receive a license under section 633a7 of said Code, and prayed that the court order the insurance commissioner to forthwith issue a license to said corporation, the same to be effective until the final determination of the action. Upon the filing of the complaint an order was issued by the court requiring the commissioner to appear and show cause why he should not grant to the company a license as an insurance broker. On the return day the commissioner appeared and filed a demurrer to the complaint, and also an affidavit reciting in detail the reason for the refusal to issue the license for which the company had applied. After a hearing, the court issued a mandatory injunction which commanded the commissioner to forthwith issue to the company a license as an insurance broker, said license to remain in full force and effect until the final determination of the action. In addition thereto it also issued an injunction restraining the commissioner from in any manner interfering with the conduct by the company of its business and enjoining the commissioner from instituting any prosecution against the company for conducting the same. An appeal was taken from these orders to the Supreme Court, and such appeal is still pending.

Subsequently the insurance company filed charges in the superior court against petitioners and certain deputies of the commissioner, alleging disobedience of both injunctions, and prayed that they be punished for contempt for willfully disobeying the same. On the hearing the charges against the deputies other than petitioner Bernon F. Mitchell were dismissed, and the charges based upon disobedience of the mandatory injunction were likewise dismissed, thus confining the contempt charges to the issue as to whether or not petitioners were guilty of willful disobedience of the injunction against interference. At the conclusion of the hearing, petitioner E. Forrest Mitchell was found guilty of contempt of court, and a fine of $25.00 was imposed, and a sentence of twenty-four hours in the county jail in the event of failure to pay such fine. Petitioner Bernon F. Mitchell was also found guilty of contempt, and a fine against him in the sum of $250.00 was imposed, or a sentence of five days in the county jail in the event of his failure to pay such fine.

In support of their petition for review of the order, it is petitioners' contention that the injunction against interference is incidental to the mandatory injunction and the same became inoperative upon the taking of the appeal, the effect of which operated automatically to stay the effect of both injunctions. They further contend that, even assuming it not to be incidental and ancillary, and not therefore stayed by the appeal, there is no evidence at all in the record to support the finding that petitioners interfered with the conduct of the company in its brokerage business contrary to and in violation of the terms of the injunction. There is no escape from this latter contention. Here the injunction as above indicated provided, in substance and effect, that the commissioner should not interfere with the conduct of the company in the transaction of its business, and that he should not institute or prosecute any action to prevent the conducting of such business. Petitioners did neither. The evidence upon which the judgment was based simply shows that friends of E. J. Carroll visited the office of the Commissioner and inquired concerning the right of the company to do business. They were informed that the company had been refused a license by the commissioner, and, if they did business with said company, it would be upon their own responsibility. They were further informed that the right of the company to do business was before the courts, a matter with which they were perfectly familiar. The imparted information was the truth, and the statements were justified and warranted, and they in no manner constituted a disobedience of the terms of the order. This conclusion renders unnecessary a determination as to whether or not the injunction was stayed by the appeal.

The order adjudging petitioners guilty of contempt is vacated and annulled.

We concur: KNIGHT, J.; CASHIN, J.

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132 Cal.App. 638

## GIMINEZ v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8346.

District Court of Appeal, First District, Division 1, California.

June 17, 1933.

**Master and servant** 🔑385(1).

In case of latent disease of lungs and other internal organs from constantly inhaling chemical dust, and fumes, injury for compensation purposes dates from time when accumulated effects culminate in disability traceable to latent disease as primary cause (St. 1917, p. 841, § 11(b) (1), as amended by St. 1931, p. 2372).

Proceeding under the Workmen's Compensation Act by Leoncio Giminez, claimant, opposed by the National Carbon Company, employer, and the State Compensation Insurance Fund, insurance carrier. To review an order of the Industrial Accident Commission denying compensation, claimant brings certiorari.

Annulled and remanded.

Joseph E. Isaacs and William Sea, Jr., both of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

KNIGHT, Justice.

During the course of his employment as laborer in the manufacturing plant of the National Carbon Company extending over a period of two years or more, petitioner contracted a disease of the lungs and other internal organs from constantly inhaling and absorbing carbon dust, salamoniac acid fumes, graphite, and manganese; and eventually he was incapacitated thereby from performing any kind of work. He applied to the Industrial Accident Commission for compensation, but his claim was rejected upon the ground that it was not filed within six months from "the date of the injury," and consequently was barred by the statute of limitations. Sec. 11 (b) (1), Workmen's Compensation Act (as amended by St. 1931, p. 2372). He then applied to this court for and obtained a writ of certiorari for the purpose of having the decision of said commission reviewed and annulled.

About the time of the issuance of the writ there was brought before this court also three other cases involving the same type of disease, originating under similar circumstances, and presenting the same legal problem as to when the statute starts to run; and on account of the then unsettled state of the law upon the subject in this state, the controversy finally reached and was decided by the Supreme Court. Marsh v. Industrial Accident Commission (Cal. Sup.) 18 P.(2d) 933. As pointed out by the decision therein, the peculiar disease with which some employees working in manufacturing plants of this kind become gradually afflicted is of a latent and progressive type, and its insidious symptoms make it impossible for medical science to detect its presence until the accumulated effects of the exposure to the dust and fume-laden atmosphere develop into definite form, which may take several months or several years; and during its progress the temporary illness from which the employee may occasionally suffer is usually attributed to natural causes foreign to the employment. In view of these unusual and peculiar circumstances attending the development of the disease it was held that in cases of latent and progressive diseases such as pneumonoconiosis "the date of the injury" is not necessarily the last day the employee is exposed to the effects of the dust-laden atmosphere, and that consequently the prescriptive period for filing application for compensation does not always begin to run from that date; but that rather "the date of the injury" shall be deemed to be "the time when the accumulated effects culminate in a disability traceable to the latent disease as the primary cause, and by the exercise of reasonable care and diligence it is discoverable and apparent that a compensable injury was sustained in performance of the duties of the employment." From the beginning respondents herein conceded that if in that proceeding such were declared to be the rule by which cases of this kind must be governed, petitioner's claim for compensation was not barred by the statute of limitations, because the evidence showed without dispute that although he was compelled to lay off work on account of sickness at intervals more than six months prior to the filing of his application, he was treated for ailments which his attending physicians believed originated from causes arising outside of his employment, and that the disease itself did not assume definite form and consequently its existence was not known to either petitioner or his physicians until within the six months' period immediately preceding the filing of his application. Under the rule established by the Marsh Case, supra, therefore, and for the reasons set forth in the decision therein, petitioner's claim for compensation was not barred by the statute. The decision of the commission is accordingly annulled and said application is remanded for further proceedings.

We concur: TYLER, P. J.; CASHIN, J.

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132 Cal.App. 660

## PALM et ux. v. ASHTON et al.

Civ. 4887.

District Court of Appeal, Third District, California.
June 19, 1933.

**1. Mortgages** ⚿578.

On appeal from mortgage foreclosure judgment upon judgment roll alone, all intendments will be made in support of judgment, and, if record anywhere reveals that record owner is party, it is sufficient.

**2. Pleading** ⚿403(2).

Deficiency of foreclosure complaint in failing to allege who was fee owner of mortgaged property at commencement of foreclosure *held* cured by defendants' admission that they claimed interest in mortgaged property and finding that interest claimed was that of record owner, and authorized court to make binding decree of foreclosure.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by John B. Palm and wife against Harold Ashton, Flora L. Ashton, and another, as trustee of the estate of Harold Ashton, a bankrupt, and others. From the judgment, Harold Ashton and Flora L. Ashton appeal.

Affirmed.

Marks & Klenke, of Los Angeles, for appellants.

Merriam, Rinehart & Merriam and Harvey M. Parker, all of Pasadena, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action to foreclose a mortgage upon certain real property executed by Ralph Lake Lloyd, who, among others, including appellants herein, were named defendants in the complaint filed by respondents.

The summons and complaint was served upon all of the named defendants, with the exception of Ralph Lake Lloyd, the maker of the note and mortgage here in issue, upon whom service was not effected, and at the trial the action was dismissed as to him, and all of the remaining defendants defaulted, except appellants herein, who appeared by answer.

The complaint and supplemental complaint alleges that plaintiffs loaned to defendant Ralph Lake Lloyd the sum of $3,500, and as evidence thereof he executed a note and mortgage covering certain described real property situated in the county of Los Angeles. The complaint then alleged default in the payments as called for in the note, and asked that the mortgage be foreclosed.

It is further set forth that the other defendants claimed some right, title, lien, or interest in or upon the real property described in the mortgage, but that such claim was inferior, subsequent, and subordinate to the lien of plaintiffs' mortgage. Then followed an allegation of the expenditure of certain moneys to protect the property and prayed that defendants be required to set forth their claims, and for the usual decree of foreclosure. Appellants answered the complaint, and upon information and belief denied all of the allegations of the complaint and supplemental complaint, except as to their marital status, and admitted by failing to deny, the paragraph alleging that they claimed some right or interest in the property subordinate to the lien created by the mortgage.

At the trial appellants orally moved for judgment on the pleading on the ground that the complaint did not state a cause of action, which motion was denied, and, appellants offering no evidence, judgment, without a deficiency, was rendered for plaintiffs, from which judgment appellants prosecute this appeal.

Appellants here urge the following grounds:

(a) That the record is incomplete and insufficient to confer jurisdiction upon a trial court to render a decree of foreclosure in that the record shows that the owner of the estate or the mortgagor was not before the court.

(b) That the complaint fails to state facts sufficient to constitute a cause of action or to confer jurisdiction upon the trial court to render a decree of foreclosure thereon.

(c) That the findings of fact are insufficient to support a decree of foreclosure rendered thereon or to confer jurisdiction upon the trial court to render such a decree.

It is true that the complaint fails to allege who was the owner of the fee to the mortgaged property at the time of the commencement of this action, or that Lloyd, the mortgagor, conveyed or otherwise disposed of his interest in the real property covered by the mortgage. There is, however, an allegation in the complaint that defendants claim some right, title, or interest in the property, which, however, is inferior and subordinate to the lien of the mortgage, which allegation was, upon failure to deny, admitted by appellants, and to that extent, if no further, the court would have jurisdiction to proceed. If appellants had no interest in the property, they were not affected by the decree in this action, and would not therefore be affected by any judgment rendered therein, but, if they held some subordinate interest to the mortgage in the property, they were properly before the court.

Appellants rely principally upon the case of Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540, wherein the court says: "A mortgagor, when he has not disposed of his interest, is a necessary party to a suit for a foreclosure and sale under our law, even though no personal claim be asserted against him. The fact that a mortgage is executed upon the premises does not, of itself, authorize proceedings for their sale without making him a party. He has a right to be heard before his estate can be subjected to sale to satisfy any alleged lien, without reference to any personal claim against himself. If he has parted with the estate, his grantee stands in his shoes, and possesses the same right to contest the lien and to object to the sale. The object of the sale is to subject such estate as the mortgagor held at the time to the satisfaction of the lien which he created, and if that estate has been disposed of, a decree directing its sale without the presence of its owner would be a mere arbitrary act, condemning, without hearing, one man's property to pay another man's debt."

Here we find one before the court who admittedly holds an interest subordinate to the mortgage in question.

In Hutchison v. Barr, 183 Cal. 182, 190 P. 799, 800, a case somewhat similar to the instant case, the complaint alleged ownership in defendant mortgagor, the execution of the mortgage, its breach, that certain other defendants, including defendant Barr, claimed some interest in the premises, the nature of which was to plaintiff unknown, but inferior to the lien of the mortgage.

Defendant Barr answered and admitted she claimed an interest in the mortgaged premises, to wit, as owner thereof, and that she was at the commencement of the action, and was at the time of the trial, the owner in fee of the property described in the complaint. Plaintiff obtained judgment, and a decree of foreclosure without any allowance for a deficiency was entered, from which judgment and decree defendant Barr appealed and urged before the Supreme Court, practically the same points that are here presented. The court there said:

"The answer of the defendant Florence A. Barr admitted she was the owner of the fee of the mortgaged property at the time of the commencement of the action, and therefore cured the defect in the complaint, if any, resulting from the failure to plead that fact. [Citing cases.]

"That the defendant Florence A. Barr was the owner of the fee of the mortgaged premises at the time of the commencement of the action was, as we have seen by the averment of her answer, an admitted fact in the case, and, consequently, neither proof nor finding was necessary upon that phase of the case. [Citing cases.]

"The defendant Florence A. Barr, as a successor in interest of the mortgagor, could have been made defendant in the first instance without joining the mortgagor. [Citing cases.] The purpose of the action to foreclose was 'to subject to sale the title of the mortgagor—that is, such title as he had at the date of his mortgage—and to cut off all the rights of parties subsequently becoming interested therein.' [Citing cases.] The mortgagor, the corporation defendant, was a proper party to the action, and would have been a necessary party thereto, if the plaintiff had insisted upon a personal deficiency judgment as was originally prayed for. Code Civ. Proc. § 726.

"However, inasmuch as the right to a deficiency judgment was ultimately abandoned by plaintiff, and it appearing upon the coming in of the answer of defendant Florence A. Barr that the mortgagor had divested itself of the title to the mortgaged property, and that defendant Florence A. Barr was the owner in fee of the property at the time of the commencement of the action, the mortgagor was no longer a necessary party."

In the case at bar the trial court found that appellant Flora L. Ashton and E. A. Lynch, as trustees of Harold Ashton, a bankrupt, claim an interest in the premises covered by said mortgage, as record owners thereof.

[1] Upon an appeal from a judgment upon the judgment roll alone, all intendments will be made in support of the judgment, and if the record anywhere, whether in the complaint, answer, or findings, reveals the fact that the record owner is a party, it is sufficient. McLennan v. Wilcox, 126 Cal. 51, 58 P. 305.

[2] In view of the admission by appellants of some interest in the property covered by the mortgage and the finding that the interest was that of record owner of the property, we are of the opinion the deficiency in the complaint has been cured, and, appellants being before the court as owners, a binding order and decree could be made.

The judgment and decree are therefore affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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132 Cal.App. 635

**Hazel SHUR, Ralph Shur, and Roy Shur, Minors, by their Guardian ad Litem Mary Shur, and Mary Shur, Plaintiffs and Respondents, v. Helen DUFAULT. Defendant and Appellant.**

**Civ. 1448.**

District Court of Appeal, Fourth District, California.

June 16, 1933.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Harry C. Ellis and Goodwin J. Knight, both of Los Angeles, for appellant.

Harry O. Wharton, of Anaheim, for respondents.

MARKS, Justice.

This is a motion to dismiss this appeal. The record discloses that judgment was rendered and entered in favor of respondents in the court below on December 8, 1932, and notice of its entry was served on the same day. Appellant's motion for new trial was denied on February 17, 1933, and notice of the order was waived in open court by counsel for appellant on the same day and entered in the minutes of the court. Notice of appeal and notice to the clerk to prepare a transcript was filed March 7, 1933. No security to the clerk for preparing the transcript was given and no transcript has been filed. No proceedings for the settlement of a bill of exceptions have been instituted and none are pending. Any proceedings to procure a transcript were terminated by order of the court below on June 9, 1933. Appellant has filed nothing in this court.

Appeal dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.

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132 Cal.App. 704

**BEHRENS et al. v. SUPERIOR COURT IN AND FOR YUBA COUNTY.**

**Civ. 4960.**

District Court of Appeal, Third District, California.

June 22, 1933.

**1. Judgment ⚷497(1).**

**Justices of the peace ⚷129(1).**

Complaint for $27 for automobile storage charges *held* to show justice's court and superior court had jurisdiction of subject-matter of action, rendering judgment on complaint not subject to collateral attack on certiorari, notwithstanding complaint did not state a cause of action.

**2. Judgment ⚷18(2).**

Complaint showing court had no jurisdiction of subject-matter renders court's judgment void, but not complaint which does not state cause of action merely because of defects in allegations.

Petition for writ of certiorari by A. H. Behrens and others, prayed to be directed to the Superior Court in and for Yuba County, to review a certain judgment entered in the court.

Writ denied, and judgment affirmed.

Fred M. Harter, of Marysville, for petitioners.

W. C. Rucker, of Marysville, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon a petition for a writ of certiorari to be directed to the above-named Superior Court, for the purpose of reviewing a certain judgment entered in said court wherein one J. E. Pauly was plaintiff and A. H. Behrens, G & H Commercial Service, Inc., and Fred M. Harter and Bruce Goodman were defendants.

It appears from the petition and return that on or about the 12th day of May, 1932, an action was begun in the justice's court of Camptonville township, county of Yuba, by J. E. Pauly against the petitioners herein. Judgment went for the plaintiff, Pauly, against the petitioners in the action just referred to, and, upon appeal to the superior court of the county of Yuba, the judgment of the justice's court was affirmed.

Upon this hearing it is contended that neither the justice's court nor the superior court had jurisdiction of the action by reason of the alleged failure of the complaint to state a cause of action against the petitioners herein. The complaint in the justice's court in the action referred to herein is as follows, to wit:

"In the Justice's Court of Camptonville Township, County of Yuba, State of California.

J. E. Pauly, Plaintiff, vs. A. H. Behrens, G & H Commercial Service, Inc., Fred M. Harter & Bruce Goodman, Defendants.

Complaint.

"The plaintiff in the above-entitled action complains of the defendants above named, and, for cause of action, alleges:

"I. That said plaintiff now is, and that at all times herein mentioned, and previously, the owner of a garage situated on the south side of Main Street, in the town of Camptonville, County of Yuba, State of California, and said garage has been available for automobile storage at any and all times.

"II. That on the 18th day of June, 1931, one of the defendants, A. H. Behrens, Constable of Camptonville Township, upon written request of the G & H Commercial Service, Inc., came to the plaintiff and gave orders to him to keep an old Studebaker Touring car belonging to E. H. Hays, and being a part of a legal action of the G & H Commercial Service against the owner, stored and in safe keeping until released by above-named constable.

"III. That upon completion of arrangements between plaintiff and constable, the plaintiff changed the locks on the door and kept the car in storage for nine months, as ordered by constable and until released by constable on April 8, 1932.

"IV. That during the time the car was being thus stored, it was occupying room that was needed by said plaintiff for other purposes.

"V. That the regular and competitive price prevalent in the town of Camptonville for dead storage on automobiles by the month is five dollars ($5.00). And, that due to the fact that one of the defendants, Bruce Goodman, pleaded with plaintiff, due to the failure to satisfy claim in original suit with E. H. Hays, to reduce the storage charge, wherein said plaintiff made a reduction of from five dollars per month, to three ($3.00) per month.

"Wherefore, plaintiff prays judgment against the defendants for the sum of twenty-seven Dollars ($27.00) storage charge, interest, costs of suit, and for such other relief as may be meet, just and proper.

"J. E. Pauly, Plaintiff."

The record further shows that the petitioners in the action referred to, upon appearing, moved for a change of venue, and likewise demurred to the sufficiency of the complaint. The motion for change of venue was denied, and the demurrer to the complaint was overruled. The appeal from the justice's court presented for consideration the same questions which are set forth in the petition for the writ of review.

[1, 2] The reading of the complaint filed in the justice's court shows that the justice's court had jurisdiction of the parties to the action, and also had jurisdiction of the subject-matter of the action. The question involved was the amount of money that should be paid for the storage of a certain automobile, the demand being limited to the sum of $27, which, of course, was considerably below the $300 limit of the jurisdiction of the court in which the action was pending.

While it may be admitted that the complaint did not state a cause of action, it did set forth the subject-matter of the action, to wit, the amount of money due for storage of an automobile, and also the demand made by the plaintiff, to wit, that the plaintiff should have judgment against the defendants for the sum of $27. The defendants in the action were thus advised of the cause of action and the demand of the plaintiff. The law makes a distinction between a complaint which does not state a cause of action by reason of defects in the allegations therein contained, where the court has jurisdiction of the subject-matter of the action, and cases where the court has no jurisdiction of the subject-matter. If it appears from the complaint that the court had no jurisdiction of the subject-matter, the judgment of course is void, but, if the court has jurisdiction of the subject-matter, its rulings upon demurrer as to the sufficiency of the complaint constitutes only errors in procedure in the trial of the action and not any actions wherein lack of jurisdiction is involved.

In the recent case of Associated Oil Company v. Mullin, 110 Cal. App. 385, 294 P. 421, 423, the law in relation to the questions which we are considering is so fully and conclusively set forth that we quote therefrom the following as decisive in this case: "It is essential to jurisdiction that there be some proper application invoking the judicial power of the court in respect to the matters sought to be litigated (Young v. Rosenbaum, 39 Cal. 646; Tinn v. United States District Attorney, 148 Cal. 773, 113 Am. St. Rep. 354, 84 P. 152); but if a complaint shows a subject-matter and a demand for relief within the jurisdiction of the court, the mere fact that it fails to state a cause of action does not render the judgment void and subject to collateral attack (Gillespie v. Fender, 180 Cal. 202, 180 P. 332); or, as the rule is stated in Christerson v. French, 180 Cal. 523, 182 P. 27, a judgment is not void if the court has jurisdiction of the parties and subject-matter, irrespective of whether the complaint states a cause of action or not, so long as it apprises the defendant of the nature of plaintiff's demand. This rule applies both to contested cases (Le Mesnager v. Variel, 144 Cal. 463, 103 Am. St. Rep. 91, 77 P. 988), and to default judgments in other respects valid (Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 P. 880; Christerson v. French, supra). It has also been held that a judgment rendered against a person who has voluntarily appeared in the action as a defendant is not void so as to be collaterally assailable, although his name was not inserted in the complaint and no order granting leave to appear and answer is contained in the record. Tyrrell v. Baldwin, 67 Cal. 1, 6 P. 867."

To the same effect is the case of Roemer v. Nunes, 73 Cal. App. 368, 238 P. 820, where it was held that a judgment is not void because the complaint fails to state a cause of action so long as the court has jurisdiction of the subject-matter, and also of the parties. See, also, the case of De Matei v. Superior Court, 74 Cal. App. 147, 239 P. 853.

Irrespective of what courts have decided in other states upon the questions here involved, the cases which we have cited are conclusive here.

The writ is denied, and the judgment affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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132 Cal.App. 750

## TONG v. SUN REALTY CO.

Civ. 8076.

District Court of Appeal, Second District, Division 2, California.

June 23, 1933.

Rehearing Denied July 20, 1933.

Hearing Denied by Supreme Court Aug. 21, 1933.

1. **Negligence** ⚷136(27).

Knowledge of location of elevator counterweight and its operation *held* not imputable as matter of law to carpenter doing general work in elevator shaft when struck by counterweight.

2. **Negligence** ⚷67.

Carpenter struck by elevator counterweight while doing general work in elevator shaft *held* chargeable only with knowledge of conditions observable by ordinary inspection.

3. **Negligence** ⚷136(23).

In action by carpenter struck by elevator counterweight while doing general carpenter work in elevator shaft, owner's negligence *held* for jury.

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by Roy Tong against the Sun Realty Company and others. From an adverse judgment, named defendant appeals.

Affirmed.

See, also, 120 Cal. App. 477, 7 P.(2d) 1101; 14 P.(2d) 127; 17 P.(2d) 759.

George L. Greer, of Los Angeles, for appellant.

Lasher B. Gallagher, of Los Angeles, for respondent.

PARKER, Justice pro tem.

Appellant, defendant below, has appealed from an adverse judgment entered upon the verdict of a jury in an action for damages for personal injuries. The sole ground of appeal involves the sufficiency of the evidence to sustain the verdict and judgment. In this the contention of appellant is twofold. It is claimed, first, that the evidence fails to disclose any actionable negligence on the part of appellant; second, that the evidence shows without substantial contradiction that respondent was guilty of negligence, without which the accident would not have occurred.

Appellant's brief is an argument upon the evidence, very likely the same argument that failed in the court below. Not a suggestion of complaint goes to any ruling of the trial court, nor is error claimed in the instructions to the jury.

[1-3] There is little conflict in the evidence, save on the one point of warning given plaintiff, and plaintiff's testimony that no notice or warning of any kind was given him was evidently taken as the fact by the jury. Appellant is the owner of a building in the city of Los Angeles in which are maintained and operated three passenger elevators. These elevators are of a type capable of a speed of six hundred feet per minute. We deem it unnecessary to detail the mechanics of the elevators. Each operates in a shaft or well. As a part of the machinery of the elevator is a compensating weight, or counterweight, which moves up and down within the shaft opposite to the direction in which the elevator is moving. For example, when the elevator is at the top floor, the counterweight is at the bottom, and, when the elevator is at the bottom, the counterweight is above. This counterweight slides up and down within a track or slide, with some projection forward. Plaintiff was a carpenter engaged in making side openings in the elevators. As stated, there were three elevators, and for general purposes they may be designated by number, namely, 1, 2, and 3. In order that plaintiff might accomplish his work, it was necessary that he enter the shaft of each elevator. He had completed his work in the shafts of elevators 2 and 3 and was working in shaft No. 1 when the accident occurred. It is impor-

tant to note here that the construction in shafts 2 and 3 differed from that of shaft 1. The counterweight in shafts 2 and 3 was constructed and operated in and on the back of the shaft, and in a place where no harm or injury could result to one standing or working on the side or front of the shaft. In elevator shaft No. 1, however, the construction, as we have said, was different. In this shaft the counterweight operated on the side of the shaft, but little distant from the front. Respondent in completing his work on elevators 2 and 3 was ready to commence on No. 1. The cage or elevator was raised from the floor level and respondent permitted to enter. In the performance of his work he stood upon a cross beam of steel running from the front to the back and along the side of the cage. All of those in charge of the elevators knew of his entry and of his position in the shaft. The time of day was approximately 4 p. m. There was no artificial light in the shaft, and the general lighting condition therein was such as to present a condition of dusk or semi darkness. The elevator operator was cautioned as to the presence of a man in the shaft. Respondent was shown to have no familiarity with the construction of elevators or elevator shafts. Neither had he knowledge of the location of the counterweight and its operation. It might be here noted that such knowledge cannot, as a matter of law, be imputed or charged to a carpenter doing general work in and about an elevator shaft. He can be charged only with a knowledge of the conditions observable by the use of ordinary inspection, and the question becomes necessarily one for the jury. While respondent was in the shaft, the operator of elevator No. 1 caused his cage to rise to the top floor at a high speed and without warning, and with great force the counterweight came down and struck respondent on the side of the body. From the blow and the subsequent handling of the elevator in trying to effect his release respondent sustained the injuries here complained of. Some attempt is made by appellant to divide the injuries with reference to those sustained from the blow of the counterweight and those sustained in the subsequent operation of the elevator. All are attributable to the same negligence and we decline further analysis.

With this background there seems little merit to the appeal. We have carefully read the transcript, and find ample to uphold the judgment. There is nothing exceptional about the case which would make the question entirely one of law for the court rather than a question of fact for the jury. The jury was fully and correctly instructed, inasmuch as no complaint is made in this connection. For a general presentation of the law applicable, reference may be had to Fidelity & Casualty Co. v. Iron Works, 42 Cal. App. 766, 184 P. 402, and Buckingham v. San Joaquin Cotton Oil Co. (Cal. App.) 16 P.(2d) 807.

Judgment affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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132 Cal.App. 713

## CLINE v. CLINE.

Civ. 898.

District Court of Appeal, Fourth District, California.

June 22, 1933.

**1. Divorce 🔑178.**

Where controversy, in divorce action, involved property which plaintiff alleged to be community property, her acceptance of favorable portion of judgment would have prevented successful appeal from unfavorable portion unless defendant agreed acceptance should not affect right to appeal.

**2. Divorce 🔑182.**

That defendant, in divorce action, offered to plaintiff privilege of accepting $2,000 awarded to her without thereby depriving her of right to prosecute appeal from unfavorable portion of property judgment did not render $2,000 available for carrying on plaintiff's appeal, so as to preclude court from allowing attorney's fees and costs for prosecuting appeal.

**3. Divorce 🔑182.**

Discretion of trial court in rendering order allowing attorney's fees and costs for prosecuting appeal in divorce action relates to financial condition of parties, need of plaintiff, ability of defendant, good faith in taking appeal, and reasonableness thereof.

**4. Divorce 🔑182.**

Where ability of defendant is ample, ordinarily court will not compel plaintiff to resort to capital portion of her separate property to prosecute appeal in divorce action.

**5. Divorce 🔑182.**

In divorce action, trial court *held* not shown to have abused discretion in allowing plaintiff attorney's fees, costs, and maintenance pending appeal involving controversy as to property.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Daisy F. Cline against Hosea C. Cline. From an order allowing attorney's fees, costs, and maintenance pending appeal, defendant appeals.

Affirmed.

Utley & Nuffer, of El Centro, for appellant.

M. C. Atchison, of Calexico, for respondent.

ANDREWS, Justice pro tem.

This appeal is from an order allowing plaintiff attorney's fees, costs on appeal, and support pending appeal. Judgment was entered December 6, 1930, granting a divorce to the husband and giving to the plaintiff certain furniture by agreement, and awarding to her the sum of $2,000 found upon the trial to be her separate property. Defendant immediately upon the entry of judgment tendered to plaintiff the $2,000 and the tender being refused, deposited the same in court subject to plaintiff's order. He also tendered the furniture awarded to her by the judgment. Plaintiff appealed from the judgment and from the whole thereof and, thereafter, obtained the order for costs on appeal, from which the present appeal is taken.

Two general contentions are made by defendant: (a) That it was the right and duty of plaintiff to accept the $2,000; (b) that having received the $2,000 she would have available means for prosecuting her appeal without the necessity of obtaining the order here under review.

The plaintiff's position is that to accept the $2,000 would prevent her from appealing from the judgment and also that if she did accept the $2,000 the order would nevertheless be a necessary and proper order.

[1, 2] 1. Whether the plaintiff could safely accept the $2,000 depends upon whether the issues which were presented by the pleadings and tried in the case, and the judgment which was entered upon such issues were so far severable and distinct that appeal could be taken from that portion of the judgment which was unfavorable to plaintiff without involving the provision respecting payment of the $2,000, and whether the appeal was so taken. The controversy involved a large amount of property which plaintiff in her complaint alleged to be community property. She made no claim to any separate property. A reversal of the judgment would involve a retrial of the entire property rights of the parties, with no assurance that there would be awarded to plaintiff on a second trial this sum of $2,000 or any sum whatever. The plaintiff did not undertake to appeal from that part of the judgment which was unfavorable only, but from the judgment as a whole. It is evident that to accept this favorable portion of the judgment would have prevented a successful appeal except for the consent of defendant to such acceptance and waiver by him that such acceptance should not be claimed by him as preventing or affecting the right to appeal as hereinafter stated.

On the hearing of this motion, defendant made an affidavit in which he tendered the $2,000 and offered to plaintiff the privilege of accepting the same without thereby in any way depriving her of any right to prosecute her appeal and have the same passed upon by the upper court as to all other claims of plaintiff, and in language sufficient to accomplish that end, waived any claim which he might have to raise the question of the acceptance of the $2,000 being a bar to the prosecution of the appeal. This kind of an affidavit and waiver was an offer to plaintiff which she could accept or not as there was no contract obligation and no legal duty requiring her to do so. Even the construction and effect of the waiver itself might become involved in the appeal. If she rejected the same in good faith and on advice of her attorney, because of his opinion as to the effect of her acceptance, notwithstanding the affidavit and waiver, it cannot be held that as a matter of law she was bound to accept it to the end that its acceptance might be used to defeat this order. It must, therefore, be held that the $2,000 was not available for carrying on plaintiff's appeal and might properly have been disregarded by the trial court in making the order appealed from.

[3-5] 2. Assuming that she was bound to or had accepted the $2,000, it would not follow that the order here in question might not still have been a valid order. The discretion of the trial court in an order of this character relates to the financial condition of the parties, the need of the plaintiff and the ability of the defendant, and in this particular application would involve also the question of good faith in the taking of the appeal and the reasonableness of the grounds for appeal. Where the ability of the defendant is ample, even when he contends that the property involved is separate property, both because it may finally be held to be community property, and because of his potential earning capacity which in any event is community property, ordinarily the court would not compel the plaintiff to resort to the capital portion of her separate property and it is evident that the income from the $2,000 would not be sufficient to provide funds for this appeal and for her support. While it is true that in making this order the judge who made the order was not the same judge who tried the divorce case and, therefore, he might have been limited to the affidavits which were used on the hearing, supplemented by statements of counsel at the hearing, which would not appear in the record, there was set forth in the affidavit of the plaintiff matters which, if relied upon, as they

of course were, afford justification for this order and for the implied finding that the appeal was prosecuted in good faith and upon reasonable grounds. Such finding might be based upon the statement in the affidavit that plaintiff was advised by her attorney, who was the attorney who tried the case, that in his opinion the judgment was wrong and illegal and could be reversed on appeal. The record does not disclose any abuse of discretion on the part of the trial court in making the order from which appeal is taken.

Order affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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132 Cal.App. 716

## WOOD v. PETERSON FARMS CO. et al.

Civ. 1204.

District Court of Appeal, Fourth District, California.

June 22, 1933.

**1. Appeal and error ⇨614.**

Appeal is before court on judgment roll alone where reporter's transcript remains unauthenticated.

**2. Mortgages ⇨278.**

Purchaser of mortgaged property who signed escrow instructions which provided for taking property subject to mortgage, given by corporation for purchase money, *held* estopped to question proper execution of mortgage.

Appeal from Superior Court, Kings County; Frank Lamberson, Judge.

Action by Louisa G. Wood against the Peterson Farms Company and Cora Van Aernam Peters. Judgment for plaintiff, and defendant last named appeals.

Affirmed.

See, also, 22 P.(2d) 565.

Charles M. Johnson, of Los Angeles, for appellant.

Harry W. Chase, of Glendale, for respondent.

BARNARD, Presiding Justice.

This is an action to foreclose a mortgage covering 220 acres of land situated in Kings county and given to secure two notes, each for the principal sum of $4,800. On June 4, 1927, the plaintiff agreed in writing to sell the land in question to J. Y. Peterson and his wife for $12,570; the agreement providing that, when $2,970 of the purchase price was paid, the vendee might demand a deed and give back a mortgage securing the balance of $9,600, to be evidenced by two notes payable at certain named times. The sum of $2,970 was paid by J. Y. Peterson by June, 1928, and during that month he demanded a deed. The plaintiff executed a deed conveying the premises to J. Y. Peterson and his wife, and delivered the same to an abstract company which was handling an escrow in connection with the transaction. A few days later the plaintiff received back this deed, and, at the request of J. Y. Peterson and the abstract company, furnished another deed conveying the property to the Peterson Farms Company, a corporation, with instructions to deliver the same upon obtaining for her a first mortgage upon the property securing two notes for $4,800 each, payable on terms stated. This mortgage was recorded in Kings county by the abstract company on June 29, 1928. The mortgage and notes were signed "The Peterson Farms Company by J. Y. Peterson, Vice President," the mortgage was acknowledged by J. Y. Peterson as vice president of the corporation, and the corporation seal was attached thereto.

[1] About April 30, 1929, the Peterson Farms Company deeded the property in question to N. G. Perkins and A. Yoder. By a deed dated October 22, 1929, this property was conveyed by Perkins and Yoder and their wives to Cora Van Aernam Peters, one of the defendants herein. On May 19, 1930, this action was filed seeking to foreclose the mortgage referred to. The corporation defendant defaulted, and the defendant Cora Van Aernam Peters filed an answer denying that the Peterson Farms Company had executed the mortgage in question, together with a cross-complaint seeking to quiet her own title to the property. Findings of fact and judgment and decree of foreclosure in favor of the plaintiff were entered and filed on December 29, 1930, and from this judgment the defendant Cora Van Aernam Peters is prosecuting this appeal.

The reporter's transcript in this case was never authenticated [see Wood v. Peterson Farms Co. (Cal. App.) 21 P.(2d) 468], and the appeal is therefore before us on the judgment roll alone (Estate of Gamble, 166 Cal. 253, 135 P. 970). The only arguments presented by the appellant are based upon a consideration of the evidence. The court found that the notes and mortgage were executed by the Peterson Farms Company, the corporation defendant, on or about June 20, 1928, that the mortgage was duly acknowledged, and that it was recorded on June 29, 1928. Among other things, the court found that certain payments called for by the notes had not been paid; that the entire amount of principal and interest called for by the notes was due,

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⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes owing, and unpaid; that any interest or claim of this appellant was subsequent to and subject to the lien of the mortgage; and that all of the allegations in the answer of this appellant, which were inconsistent with or contradictory to any of the facts found by the court, were each and all untrue. The findings support the judgment, and the same must be affirmed.

[2] While not necessary to this decision, we feel disposed to add that we have examined the unauthenticated transcript on file herein and are fully satisfied that, if the same were to be considered, this appeal is without merit. The appellant's entire contentions are based upon the proposition that J. Y. Peterson, who executed this mortgage on behalf of the defendant corporation, was not authorized by the corporation to execute the same, and that the mortgage is therefore void and of no effect as against the appellant. Reliance is placed upon the testimony of the secretary of the corporation to the effect that the records thereof contain no resolution authorizing J. Y. Peterson, as vice president, to execute the mortgage. However, the testimony of the secretary further shows that it had come to his attention that the corporation owned the land in question and that on April 30, 1929, a resolution was adopted and signed by all of the members of the board of directors of the corporation providing that the corporation should sell and convey to N. G. Perkins and A. Yoder the land in question, describing the same, and further providing that "J. Y. Peterson, Vice President of this corporation, be, and he is, hereby authorized and directed to execute and deliver to said Grantee on behalf of said corporation a deed of conveyance of said property particularly describing the same, subject to existing encumbrances." Having accepted title to the land, recognized the indebtedness, sold the land, authorized the sale by resolution, and having defaulted in the present action, the corporation itself is estopped to deny the validity of the mortgage. Blood v. La Serena Land & Water Company, 134 Cal. 361, 66 P. 317. This mortgage was given to secure a portion of the purchase price of the land and was duly recorded, and the appellant took title to the land through a vendee from the mortgagor with both constructive and actual notice. The transcript shows that, when the appellant purchased the property in question, she signed escrow instructions which provided that she was to take the property subject to this mortgage and to the two notes secured thereby. This was a part of her contract, and the amount represented by this mortgage was a part of the consideration she was to pay for the land. She not only had actual notice, but is estopped to question the proper execution of the mortgage. Alvord v. Spring Valley Gold Co., 106 Cal. 547, 40 P. 27. Every consideration of equity is in favor of the judgment, and we are unable to see how in this equitable action this technical objection to the execution of the mortgage could possibly result in taking this land from the respondent, with only a small part of the purchase price paid, and giving the same to the appellant for a correspondingly less amount than that she agreed to pay for the same.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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## HENSHAW v. BELYEA.*

Civ. 7834.

District Court of Appeal, Second District, Division 2, California.

June 20, 1933.

Hearing Granted by Supreme Court Aug. 17, 1933.

**1. Automobiles** ⚷225.

Evidence did not show imminent peril to human life justifying plaintiff's leaving safe place to block third party's truck and trailer loaded with employer's steam shovel so as to excuse plaintiff's negligence when struck by board placed under truck.

Evidence showed that truck and trailer loaded with steam shovel failed to make grade, and started down hill backwards; that plaintiff standing nearby grabbed a four by four from truck and threw it under drive wheel, because he felt it was his duty to his employer; that children were playing on sidewalk within 100 feet of rear of trailer and on opposite side of street from that over which truck and trailer were traveling; and that a boy had been riding on a bicycle back of trailer.

**2. Automobiles** ⚷244(6).

Evidence that plaintiff standing in safe place ran to block truck and trailer starting backwards down hill after failing to make grade and was injured by board which he threw beneath wheel, showed that truck owner was not negligent.

**3. Automobiles** ⚷225.

Where human life was not in imminent peril, plaintiff, who left safe place to block truck and trailer starting backwards down hill and was injured by board which he threw beneath wheel, was contributorily negligent.

**4. Trial** ⚷143.

To raise a "conflict" justifying submission of issues to jury, evidence must be such as to present a fair and reasonable ground for difference of opinion.

[Ed. Note.—For other definitions of "Conflict," see Words & Phrases.]

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 31 P.2d 348.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by William U. Henshaw against B. W. Belyea, doing business under the fictitious firm name and style of the Belyea Truck Company. From a judgment for plaintiff, defendant appeals.

Reversed.

Harry D. Parker and White McGee, Jr., both of Los Angeles, for appellant.

Leslie S. Bowden and Gaines Hon, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Action for personal injuries. The jury returned a verdict for $15,349.70, and from the judgment entered thereon defendant appeals.

Appellant was the owner and operator of a truck and trailer, used at the time of the accident in question in hauling a large excavating shovel belonging to the firm of Grunwald & Tudor, who employed respondent to operate the shovel. The shovel was to be delivered at 114th street and Budlong avenue, in Los Angeles, where it was to be unloaded. The truck was operated by an employee of appellant named Norman Kresge, and the aggregate weight of truck, trailer, and shovel was about 81,000 pounds. It "was a heavy duty truck with six wheels; one wheel ahead of the other on the rear and the front wheels up toward the front of the trailer." The drive wheels were the front two of the four rear wheels. The trailer had either six or eight wheels and was connected with the truck by a rigid V-type tongue. There was a mechanical foot brake on the drive wheels and also a hydraulic hand brake.

One Hundred Fourteenth street runs east and west and Budlong comes into it from the north and leaves it to the south from 50 to 90 feet farther west making a break in Budlong to that extent. The truck approached the north intersection of Budlong from the east, on a down grade which ended at about the east boundary of the north extension. From that point there was a level space of approximately 50 feet on 114th street for the width of such thoroughfare, to about the west curb of said extension, and from there a grade of about 10 per cent. extended to the west on 114th quite a distance beyond the south extension of Budlong. There was a pavement on 114th street from 40 to 50 feet wide, with an unpaved strip on each side. Budlong avenue, on both extensions, is apparently a narrow dirt road about 20 feet wide. It was the plan to unload the shovel on the west side of the south extension of Budlong. Plaintiff was standing on the south side of 114th, not far from the south extension of Budlong, talking with a Mr. Coon, who was the contractor on the job on which the shovel was to be used, as the driver of the truck came down the grade from the east and started up the grade to the west from the north extension of Budlong. The vehicle reached the south extension, when it stopped and began to go back down the grade. Seeing this, plaintiff ran into the street and seized a piece of "4x4" about 4 feet long from the bed of the truck and threw it under the left drive wheel in an attempt to stop it. It was the protruding end of such block, evidently set in motion as the drive wheel of the truck passed over it, that caused the injury of which plaintiff complains.

The allegation of plaintiff's complaint is in substance that defendant so carelessly and negligently operated the truck and trailer "as to cause the truck and trailer to collide with plaintiff, striking plaintiff on the right leg with such force and violence" as to injure him. There is no evidence that plaintiff was struck by the truck or trailer, or anything other than the protruding end of the block which he himself had placed under the wheel, in the doing of which he voluntarily left the place where he was standing in safety. The theory of plaintiff is to the effect that defendant was negligent in not providing sufficient braking capacity for so heavy a load; that by reason of such negligence the truck was out of control of the driver on the grade; and that to save human life threatened by truck and trailer as it ran down the grade backwards and out of control, plaintiff threw the block under the wheel in an attempt to stop it.

Appellant contends that the evidence is insufficient to show that any person was in imminent peril, or to show any negligence upon his part.

The evidence which respondent urges establishes a case of imminent peril to third persons and prevents him from being held guilty of contributory negligence as a matter of law is substantially as follows: Plaintiff testified that the only persons present except himself and the truck driver were "Mr. Glancy and Mr. Coon and some children back down on the sidewalk behind the trailer.

"Q. How far behind the trailer? A. I don't know exactly.

"Q. Well, approximately? A. Within 100 feet of the back end of the trailer.

"Q. Were there any other automobiles on the street at that time? A. There had been. I didn't see any at that particular moment. There were some parked there, but none moving that I saw.

"Q. Parked on which side of the street, Mr. Henshaw? A. There were some parked on the south side of 114th street and some parked farther back east on the north side of 114th street."

William S. Glancy, plaintiff's helper in operating the shovel, asked if he saw any people on the street, testified: "Only the children that was around. One of them on a bicycle had been following along behind the truck for a little ways. I don't know just how far they was back, probably 50 or 60 or 75 feet, something like that.

"Q. You say one of them was on a bicycle? A. Yes sir.

"Q. How close to the back of the trailer was he? A. I don't know just how close, but you know how kids are, they tag in back of a thing, and he was about 50 or 60 feet back, I should judge.

"Q. And where were the other children? A. They were back on the curb and playing along there.

"Q. Which curb are you referring to now? A. The south curb of 114 street, * * * some of them in the edge of the street."

Asked as to whether he was instructed to place the block under the wheel, plaintiff replied: "No sir. I felt it was my duty to my employer."

The evidence fails to show the usual gathering of interested spectators, including children, always present when an accident happens in a street that has any travel over it or in a well-settled neighborhood.

A leading case on the question involved is that of Eckert v. Long Island R. Co., 43 N. Y. 502, 3 Am. Rep. 721. The evidence in that case showed that a child, three or four years of age, was sitting or standing upon the track of defendant's railroad as a train approached. The engine was running backwards, with the cowcatcher next to the cars being pulled, and had nothing in front to remove obstacles from the track. Plaintiff's witnesses heard no warning bell or whistle from the engine. Decedent, seeing the danger to the child, ran to it and threw it clear of the track. He, however, was struck by some part of the locomotive or tender as he continued across the track, receiving fatal injuries. It was the contention of defendant that decedent's negligence contributed to his injury and that no recovery could be had. The court said (page 506 of 43 N. Y.): "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded either rash or reckless." In other words, the peril to human life, as we read the cases in which judgments have been sustained by application of the principle involved here, has been real and imminent, and such seems to be the law. "Some one must be actually in peril before the rescuer is authorized to act. At the broadest, the situation must be such as to clearly convince the rescuer that human life or limb is in peril. * * * It requires more than mere suspicion that accident might follow to justify the invocation of the doctrine of 'imminent peril.'" Eversole v. Wabash R. Co., 249 Mo. 523, 155 S. W. 419, 425. In the case just cited a train was in the pathway of the runaway cars in an attempt to stop which plaintiff was injured. The crew on the train had left in response to a signal, unknown to plaintiff, but he was justified from the appearance of things in believing that he was attempting to save threatened human life. So in the case of a runaway team in "a measurably busy street," of a city, "there was ample opportunity for harm to come to some one, although the danger was not at the moment imminent to a definite person." Hollaran v. City of New York, 168 App. Div. 469, 153 N. Y. S. 447, 449.

[1] The picture presented by the favorable evidence here is entirely different. The truck stopped almost immediately after plaintiff's cry of pain arose, and we fail to find anything in the evidence from which a jury could conclude that there was imminent peril to children playing on the sidewalk within 100 feet of the rear of the trailer, and on the opposite side of the street from that over which the truck and trailer were traveling, or to a boy who had been riding a bicycle back of the truck some indefinite time and place, or to any other human being. Plaintiff himself makes no pretense that his voluntary action was impelled by any imminent peril to human life or limb, nor can such conclusion be drawn from his evidence. He frankly says in explanation that he did it because "I felt it was my duty to my employer," which supports only the conclusion that he felt his employer's shovel was in some danger.

[2, 3] In discussing the first contention of appellant we have assumed that there is evidence to support the conclusion of negligence on the part of defendant which the jury must have reached. In our opinion, however, the evidence on that question does not show such negligence. The evidence does show without question that the injury was occasioned, not by the truck colliding with plaintiff, as alleged in the complaint, but because plaintiff was negligent either in his means of placing the "4x4" under the drive wheel or in standing on the downhill side of the protruding end of such block while reaching for another one, when he knew, according to his own evidence, that the wheel was sliding the block toward his foot. It may be that if under the circumstances negligence is actually shown by the evidence on the part of defendant, and the doctrine of imminent peril were applicable, plaintiff could not be held

to the degree of care in placing the block that would be required in the absence of a seeming emergency. The evidence failing to show that the case is one in which such doctrine of imminent peril is applicable, however, such negligence cannot be excused; and even if under the evidence the jury was justified in imputing negligence to defendant, the contributory negligence of plaintiff in acting as he did, as well as in voluntarily leaving a place of safety and exposing himself to danger, would prevent a recovery.

We fail to see, however, any evidence justifying the conclusion that defendant was negligent in the operation of the truck and trailer. The evidence, in part, which plaintiff urges conflicted with the undisputed testimony of the driver of the truck and a bystanding and disinterested witness, viz., the contractor, Mr. Coon, is drawn from the testimony as to the tremendous weight of the truck, trailer, and its load, the fact that there were no brakes on any of the wheels of the trailer, and mechanical and hydraulic hand brakes on but the two drive wheels of the truck, and the fact that it was being operated on a 10 per cent. grade. No expert testimony was introduced to show that such brakes were insufficient. Plaintiff testified that "the truck and trailer gradually slowed down and stopped and started back down the hill, and I saw it was going down the hill, starting back, moving and gaining momentum, and I attempted to block the wheel of the truck with a block that I took off the bed of the truck"; that the drive wheel next to him "was sliding as the truck went down the hill." He further testified that as he placed the block under the wheel "the truck, trailer and all continued to move back down the hill. I reached on the bed of the truck for another block. Just at that instant the block that was already under the truck caught the toe of my shoe and foot, and the block rolled up on my foot and I felt a severe pain, felt the crack of the ankle. It knocked me down and knocked me clear of the truck. The end of the block went over the leg in such a way as to throw me out and away from the truck. Then I was—then I hollered. Q. Now was the truck rolling back at the time you placed the block there or was it sliding? A. The drive wheel was sliding; the other wheels were rolling." Plaintiff's witness and helper, Glancy, testified the same as to the truck starting up the grade and stopping. "It started rolling back. * * * It seemed to me I saw one of the rear wheels slide. * * * I put a block under the rear trailer wheel and it ran over that block.

"Q. Did you observe what Mr. Henshaw was doing? A. I didn't observe what he was doing at that time.

"Q. You say you put a block under the rear trailer wheel? A. I put a block under the rear wheel of the trailer and the rear wheels—both wheels ran over my block, and I grabbed another block and put it under that same wheel, and just then I heard Mr. Henshaw holler.

"Q. What else did you do, if anything? A. Well, his block and my block the second time I put mine under stopped the truck and trailer.

"Q. When you finally got that block under, the truck and trailer came to a full stop? A. Yes."

It is very apparent, in view of the fact that this witness knew nothing about what either the plaintiff or the driver of the truck were doing at the time, that his statement that plaintiff's block and the witness' second block halted the truck was the baldest kind of a conclusion. Respondent in his brief concedes that "it is true, according to the testimony, that the truck stopped almost in its tracks when the accident happened," but apparently concludes that the blocks actually caused the stoppage.

Apparently the first block placed under the wheels by Glancy did not have much effect, as both rear wheels of the trailer rolled over it. It is equally apparent from the testimony of plaintiff that his block stopped sliding down the hill, otherwise it would have pushed his foot down the grade without injuring him; that it turned as the wheel ran over it, first catching his shoe and foot and rolling "up my foot," and that the end of the block went on over his leg, throwing plaintiff out and away from the truck, at which time he "hollered." Plaintiff's evidence does not describe very clearly what happened, but it is plain that the truck wheel must have rolled over the "4x4," if the block was not thrown clear of the wheel in its progress; so it is apparent that Glancy's conclusion that the block, of which he knew nothing, together with his second block, stopped the truck is unwarranted. It is also apparent that if plaintiff's block and Glancy's first had no effect, the latter's second, with the momentum of the truck increasing, as it must have, with every second of time—assuming the truck was out of control—could not have been more effective. Something stopped the truck almost immediately after plaintiff "hollered," and the reason must be found elsewhere than in the very puny efforts of plaintiff and Glancy. The situation as already shown by the evidence favorable to plaintiff does not present a picture of a truck and trailer out of control on a down grade.

The fact standing out above everything from the evidence is that the truck was at all times under control, even considering plaintiff's evidence alone. When we turn to defendant's evidence we find that the driver testified that when he found that he could not make the grade to the point he desired to reach he stopped, shifted into reverse and started down on compression; that "a fellow put a block under the truck"; that the driver told him "to stay away; it is all right," but that as he knew plaintiff had put the block under the wheel he "started to apply the brakes to stop the thing immediately," and that as he started to apply the brakes "the block kicked—hit his leg"; that he then stopped the truck, got out and picked plaintiff up. Mr. Coon, the contractor on the job, testified to hearing the driver warn plaintiff in substance that "he had the truck under control and could handle it." With regard to plaintiff's injury he said that the wheel "rolled directly over the block and flattened the block out on the ground, pinning Mr. Henshaw's foot under the block. * * * It rolled entirely over the block, leaving him free. He wasn't pinned down by the block." It appears that Coon and a young man living near took plaintiff to the hospital. After they had left, the driver backed his load to the north extension of Budlong and unloaded the shovel—a far different climax from that which one might expect from the picture plaintiff seeks to paint from the evidence, but which can only be conjured up by indulging in flights of imagination and conjecture not warranted by the record.

[4] Respondent urges that the questions of negligence and imminent peril presented in the case were matters for the jury, and that the evidence set out creates a conflict that makes the decision of that body unassailable on appeal. We do not agree that there is any conflict, as we have said. In order to raise a conflict the evidence must be such as to present a fair and reasonable ground for a difference of opinion (White v. Greenwood, 52 Cal. App. 737, 740, 199 P. 1095), and we fail to perceive such a condition in the portion of the record referred to.

Judgment reversed.

We concur: WORKS, P. J.; STEPHENS, J.

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132 Cal.App. 724

## FINK v. WEISMAN et al.

Civ. 8665.

District Court of Appeal, First District, Division 2, California.

June 23, 1933.

Hearing Denied by Supreme Court Aug. 21, 1933.

**1. Appeal and error 🔑882(12).**

Error in instruction that broker owed duty to tell principal all he knew about purchase of realty, if he knew it was being purchased for principal and another jointly, *held* not invited by his requested instruction that he was not bound to disclose price or circumstances surrounding purchase, unless advised that property was being purchased for principal or for latter and another as partners.

**2. Appeal and error 🔑525(3).**

Record, listing appellant's requested instructions, sufficiently showed that erroneous instruction, not listed, was not requested by appellant.

**3. Appeal and error 🔑835(2).**

Point, first urged on petition for rehearing, that appellant interjected certain question into case by answer, may be ignored as raised too late.

**4. Appeal and error 🔑882(12).**

Defendant's interjection of question of his fiduciary relationship to plaintiff into action by answer did not preclude him from complaining on appeal of instruction that he owed duty to divulge all he knew about transaction to plaintiff.

**5. Appeal and error 🔑1066.**

Instruction that defendant broker owed duty to divulge all he knew about purchase of realty to plaintiff *held* prejudicial error as against claim that it properly applied to charge of conspiracy, in absence of showing as to whether jury found conspiracy or mere breach of duty.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

On rehearing as to one appellant.

Judgment against such appellant reversed and cause remanded for a new trial as to him, with directions.

For original opinion, see 18 P.(2d) 961.

O'Melveny, Tuller & Myers and Louis W. Myers, all of Los Angeles, for appellants.

Henry E. Carter and Wheeler & Wackerbarth, all of Los Angeles, for respondent.

DOOLING, Justice pro tem.

[1] We granted respondent's petition for rehearing as to appellant Toplitzky to give further consideration to respondent's claim that the instruction which we held prejudicially erroneous to Toplitzky was substantially similar to certain instructions requested by Toplitzky and hence the error was invited error of which Toplitzky could not complain. We are satisfied that there is nothing in this point. The instruction, the giving of which we held was prejudicial error, was as follows: "If the defendant Toplitzky, at the time when he acted as broker in these deals, knew that the property was being purchased for Mr. Fink and Mr. Weisman jointly, then he owed the duty to divulge to Mr. Fink all he knew with respect to the transaction, including the purchase price."

The proposed instruction, most strongly relied upon by respondent as substantially similar, read: "The defendant Toplitzky was under no duty or obligation to disclose to the plaintiff the purchase price of said properties, nor to disclose to plaintiff, Fink, any of the circumstances surrounding said purchase, unless at or prior to the purchase thereof the defendant Toplitzky was advised that said properties were being purchased for or in behalf of plaintiff, Fink, or for and in behalf of plaintiff, Fink, and the defendant Weisman, as copartner."

An examination of the instruction given and the instruction proposed will show that they are not substantially similar. The instruction given relates to the case where the jury finds that Toplitzky knew of Fink's interest. The proposed instruction relates to exactly the opposite case, where the jury finds that Toplitzky did not know of Fink's interest. A perfectly correct statement of law is involved in the proposed instruction. Unless Toplitzky knew of Fink's interest he could owe no duty of disclosure to Fink. But that is not the same thing at all as saying, as the court did in the instruction given, that if Toplitzky did know of Fink's interest he owed Fink a duty of disclosure. We have held that Toplitzky would only owe Fink a duty of disclosure: (1) If he knew of Fink's interest; (2) if he was acting for Fink in the transaction; and (3) if he had reason to believe that Weisman, if Weisman had knowledge of the facts, was concealing them from Fink. Toplitzky might have proposed instructions negativing each of these conditions separately and advising the jury that in the absence of such condition he owed no duty of disclosure to Fink. That would not justify the court in giving an instruction that given one of such conditions only, without the other two, Toplitsky would owe Fink a duty of disclosure.

A simple example will make this clear. Suppose A is on trial for the murder of B and proposes an instruction that unless B died within a year and a day after receiving the fatal wound A should not be found guilty of murder. That would not justify the court in instructing the jury that if B did die within a year and a day they should find A guilty of murder. The two cases seem to be exactly parallel.

[2] Respondent's further claim that it does not appear from the record that the instruction held erroneous was not given at Toplitzky's request seems frivolous and is only noticed because it was again urged in his petition for rehearing. The record lists the instructions requested by Toplitzky and this instruction does not appear among those so listed. We are satisfied that this is a sufficient showing on this point.

[3, 4] For the first time respondent urged on petition for rehearing that Toplitzky interjected the question whether he had a fiduciary relationship to Fink into the case by his answer. We might ignore this point as raised too late. (2 Cal. Jur., pp. 790–792.) However, the complaint counted on Toplitzky's concealment and as we pointed out in our original opinion Toplitzky would owe no duty of disclosure in the absence of a fiduciary relationship.

[5] Lastly respondent claims in his petition for rehearing that the instruction held erroneous was properly applicable to the fifth count of the complaint which charged a conspiracy. It is a complete answer to this that we cannot know whether the jury found a conspiracy under the fifth count or merely a breach of duty as alleged in the first four counts of the complaint.

We are satisfied with the disposition of Toplitzky's appeal in our opinion filed herein on January 28, 1933, and readopt that opinion in all respects.

The judgment against appellant Toplitzky is reversed and the cause remanded for a new trial as to Toplitzky, with directions to the trial court to allow the amended complaint to be further amended, if plaintiff so desires, to correct the defects therein attacked on this appeal.

We concur: NOURSE, P. J.; STURTEVANT, J.

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132 Cal.App. 753

## PEOPLE v. BENDER et al.

Cr. 2196.

District Court of Appeal, Second District, Division 2, California.

June 23, 1933.

Hearing Denied by Supreme Court July 21, 1933.

**1. Criminal law 🔑1133.**

Court, having granted rehearing generally, could reconsider count 1 of indictment, notwithstanding petition sought rehearing only on counts 2 and 3.

**2. Criminal law 🔑406(7).**

Deputy assessor's admission to investigators before indictment showing scheme to appropriate tax moneys *held* admissible on all counts in embezzlement prosecution (Pol. Code, §§ 3820–3831).

Where public official on investigation admits his wrongdoing and admits that he has, pursuant to plan and scheme, frequently taken out money and mishandled checks belonging to public funds, such statements throw light on intent and knowledge of accused and illustrate character of act under scrutiny.

**3. Embezzlement 🔑44(1).**

In prosecution against deputy assessor for embezzling tax moneys, evidence *held* insufficient to sustain conviction on one count but was sufficient on other counts (Pol. Code, §§ 3820–3831).

**4. Embezzlement 🔑8.**

That property may have been doubly assessed did not prevent tax payments from being public funds as regards deputy assessor's guilt of embezzlement thereof (Pol. Code, §§ 3820–3831).

**5. Criminal law 🔑560.**

To warrant conviction, law requires only proof convincing mind and directing and satisfying conscience of those bound to act conscientiously thereon.

> Law does not require demonstration or that degree of proof which excluding all possibility of error produces absolute certainty, for such degree of proof is rarely possible.

**6. Embezzlement 🔑11(2).**

Although taxpayer's check remained in county funds, deputy assessor using such check to cover up another shortage in his tax receipts was properly convicted of embezzlement (Pol. Code, §§ 3820–3831).

**7. Criminal law 🔑317.**

Omission of defendant to testify cannot be used against him, but silence raises no presumption of denial of facts testified to by prosecution's witnesses.

**8. Criminal law 🔑308.**

Presumption of innocence remains throughout trial, but does not alone destroy effect of satisfactory evidence.

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Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

On rehearing.

Judgment reversed in part and affirmed in part.

Prior opinion, 17 P.(2d) 751.

Henry G. Bodkin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and John Barnes, Deputy Dist. Atty., both of Los Angeles, for the People.

PARKER, Justice pro tem.

Defendants were indicted by the grand jury of Los Angeles county and charged with three distinct offenses of embezzling money. McCandless, appellant here, demanded and was granted a separate trial. He was found guilty on all three counts, and presents this appeal from the judgment and order denying his motion for a new trial. It is the contention of appellant that the evidence is not sufficient to support the verdict of the jury on any of the counts, and also that the trial court erred to his prejudice in the admission of certain evidence.

[1] It might be here noted that the case is now before us on rehearing after determination heretofore by this court. In our former opinion, we reversed the judgment as to the first count and affirmed the judgment as to counts 2 and 3. Appellant thereafter filed his petition for a rehearing on counts 2 and 3. The petition was granted in general terms; that is to say, the order was made that a rehearing be granted, without reference to the counts. We do not feel that we would be precluded from again considering count 1, but, inasmuch as we have reached the same conclusion thereon, we will not further discuss this perhaps interesting point of procedure. However, though still of the opinion that there is not sufficient evidence to support the conviction as to count 1, we shall discuss the case in its entirety to the end that a complete disposal thereof may be herein made.

It appears without dispute, and indeed is conceded, that appellant had been a deputy assessor of the county of Los Angeles from 1918 until some time after the occasions charged in the indictment, and that during all of said times defendant Bender had also been a deputy and chief clerk in the assessor's office of said county. We deem it unnecessary to set forth herein the entire scheme of assessment, levy, and collection of taxes as provided in the Political Code. It will suffice to say that that Code does provide for and make a classification of all property for tax purposes. The most general classification, and the only one which will concern us here, is that of real and personal property. All property is assessable as of March 1st of each year. Real estate assessed is listed by the assessor with the valuation thereon placed by that official, and in due course the assessment roll, containing description of said property, goes to the board of equalization of the county, where the values are adjusted, and the next step is through the auditor and then on to the tax collector. Personal property is carried upon a separate roll, excepting in cases where the owner of such personal property is also the owner of real estate, which real estate, in the opinion of the assessor, is of sufficient value to insure the payment of the personal property tax, in which latter case the personal property is carried on the real estate roll; the taxes due thereon being a lien against the real estate of the same owner. Whenever, in the opinion of the assessor, there is not sufficient real property to secure the payment of the tax upon the personal property of the taxpayer, the assessor shall and does collect the tax due on the personal property forthwith after March 1st of each year. The provisions of the Political Code governing are from section 3820 to section 3831, inclusive. It is around these collections of personal property taxes that the present case centers.

[2] At a time before the indictment was returned and after the dates of the offenses charged in the three counts, there was being conducted an investigation into alleged discrepancies regarding the handling of personal property taxes in the office of the assessor. Amongst others engaged in this investigation was the district attorney, including the office staff of that official and his office investigators. During the inquiry appellant was called and questioned. Here we stop to note that the connection of McCandless with the inquiry was such that any and all statements made by him were free from any influence, direct or indirect, that might taint the same to a point of inadmissibility as far as the point might be urged that such statements were not free and voluntary. In the presence of the district attorney and others conducting the investigation, and with full knowledge of the purpose of the inquiry, appellant made statements and admissions showing the following concerning the methods used in the handling of taxes, particular reference being to the personal property taxes: That appellant had charge of the statements in the case of unsecured personal property; that during the years 1930 and 1931 appellant did not have any tax receipt book issued to him; that defendant Bender would collect money due for taxes and hand the same to McCandless, or the check, as the case might be, and that this had been done many times, so frequently that he could not remember; that the working arrangement which appellant had with Bender was with reference to money that was not turned into the assessor, and that in most of these instances he gave Bender half, not being able to recall how many times this happened; that his arrangement with Bender in regard to collection of taxes and splitting the money was that the latter gave him the checks and he (appellant) deposited them and gave Bender half of the money; that those were general checks which Bender took in over his desk, and appellant could not remember the instances, and was himself not familiar with the people; that as a general rule appellant cashed the checks at his bank. Appellant further stated that the arrangement followed an occasion when Bender pulled a statement out of the files and kept it in his desk until the season was over; that Bender would keep such statements, and, when he figured the transaction was closed he would send McCandless down and get payment from the taxpayer; that he (appellant) saw how easy it was and "fell for it" himself during the last few years; that he (appellant) knew Bender had been taking the checks for years, and that appellant fell into the scheme along about 1929, although he did not remember exactly the time; that there was no definite arrangement about how the money should be divided; that during the last year he (appellant) pulled statements from the file himself, and also a couple before that time; and that sometimes he paid Bender by check payable to "cash." After making this statement appellant was not held in custody, at which he expressed surprise, apparently feeling that he would be immediately arrested and held.

One of the reasons why a rehearing was granted herein was the claim of appellant that, regardless of the admissibility of this statement, the trial court had admitted it only with reference to count 3. We have followed through the transcript very closely, and find that there is no merit in this claim. It is true that the statement or admission contained other things with reference to some specific transactions, and it was with reference to these alone that the statement was excluded as to all counts excepting count 3. We are of the opinion that the statement was admissible against appellant on all counts. While no reference was made to the instances covered by the indictment, and while it was conceded that at the time the statement was taken or made the district attorney had no knowledge of the specific instances here involved, yet the statement contained admissions going to show a general scheme or plan looking to and having for its purpose the lotting of the public funds. The statement contained no confession of any particular act done or crime committed other than a general malfeasance. On this statement no charge could be predicated or proved. In its essence and to its utmost it was an admission, as the distinction is made in People v. Fowler, 178 Cal. 657, 664, 666, 174 P. 892. The statement does not come within the principle announced in People v. Canfield, 173 Cal. 309, 159 P. 1046, but rather within the well-accepted rule of People v. Sanders, 114 Cal. 216, 46 P. 153, 157. In the latter case it is said: "The commonest instance of the admission of evidence of another crime is where it becomes pertinent to prove the scienter or guilty knowledge under the particular charge." And, without attempting a treatise upon the subject, it appeals at once to the common sense that, where a public official upon investigation admits his wrongdoing, and admits that he has, pursuant to plan and scheme, frequently taken out money and mishandled checks belonging to the public funds, such statements throw light upon the intent and knowledge of the accused and illustrate the character of the act under scrutiny.

[3] Coming then to the particular acts going to support the separate counts: Preliminarily we note that all three counts are based upon the mishandling and unlawful appro-

priation of the funds of a single taxpayer. This taxpayer is named Spalding. In the year 1931, about May thereof, Spalding paid into the assessor's office as and for taxes on unsecured personal property the sum of $90.50. An interesting history surrounds this payment. It appears that the agent of Spalding had been directed by Bender to send in this sum and to make the check payable to McCandless. On the day this check was expected in the office, Bender showed noticeable interest and concern. At almost half hour periods he would inquire of the mail clerk if the letter had come, and otherwise manifest an unusual concern. When the letter did arrive, the deputy in charge, instead of advising Bender or appellant, at once took it and the check into the assessor, who upon notice thereof sent for Bender and McCandless. Bender told a story about some mistake, and stated that the check was intended to pay some taxes on real estate, and was sent to him personally, for the reason that the tax had become delinquent in the tax collector's office, and that in some way he could take it to that officer and have it acknowledged as having been received earlier, thus avoiding delinquency penalties. The assessor, however, directed a return of the letter and check. All of this took place in the presence of McCandless, who said nothing but glared at the deputy, who had apparently upset the plan. It is not possible to infer anything but that McCandless knew that Bender was using his name in the transaction. The taxpayer, upon receiving the returned check, sent in another one for the same amount, payable to appellant. This check was indorsed by one Priver, using appellant's name, and was regularly cleared. Upon these facts and other details the charge in count 1 was established to the satisfaction of the jury. The taxpayer, however, had never seen McCandless, and there is not a scintilla of evidence reasonably connecting him with Priver. There is nothing to show, to any degree of satisfaction, that appellant was other than one whose name was used by Bender, without his knowledge, in consummating this steal. We therefore have held, and do again hold, that the evidence is insufficient to sustain the conviction on count 1.

Coming then to count 2: During the year 1930, and on the first Monday in March thereof, Spalding was the owner of considerable personal property, consisting in the main of certain large boats. There was some uncertainty as to whether this property could be secured by certain real estate owned by the same taxpayer, as likewise there was much debate concerning the value of the boats. The transaction in the main was handled through Bender. The boats were first assessed at a large figure, and subsequently this amount was reduced almost to a minimum. Without giving the figure, we might state that the reduction showed that either the boats were originally assessed beyond all proportion to their actual value or that the reduction was to a ridiculously low figure. Regardless of this, the amount of tax claimed on the final valuation of the boat Westward was $82.75. This amount was paid by check made payable to Bender, for which the taxpayer received no receipt. This check was transferred by Bender to appellant and by the latter deposited in his personal bank account, and thereafter the instrument went through clearance and was paid. Another feature of this assessment was that the same boat was carried over into the real estate roll, the tax secured by the real estate, and the entire tax on the latter roll paid. Thus the boat was twice assessed during the same year and the taxes thereon twice paid.

**[4, 5]** Appellant strenuously attacks the sufficiency of the evidence to sustain this count. He argues that from the peculiar conditions surrounding the valuation it is more probable that the small check was in reality a bribe, rather than a tax payment. The ready answer is that the amount was paid as a tax pursuant to a tax statement. Whether the property was doubly assessed made no difference as far as this payment being public funds is concerned. It is a common occurrence for the taxpayer in every county to pay double taxes, and so often has this occurred that the revenue laws make direct provision for the taxpayer's remedy in such event. Never, however, has it been suggested that, pending adjustment, the money paid is not part of public funds belonging to the county. The chief argument of appellant is that, even if all this be conceded, yet the evidence fails to disclose any knowledge on his part. For aught that appears, it is urged, McCandless may have taken this check in regular course as a holder in good faith and for value. There is no positive evidence of any connection between the taxpayer and McCandless, nor is there positive evidence that the latter knew the sum represented in the check was money paid to the county for taxes. When we say positive evidence, we mean necessarily evidence disclosing physical contact between Bender and McCandless. No one heard Bender tell appellant that the money was tax money. Yet there is evidence sufficient to satisfy, beyond any reasonable doubt, that the money was tax money, paid in regular course to the county by one owing such a sum for taxes, and that the same never reached the county treasury. There is the proven fact that this money did go to the personal account of appellant and was by him appropriated. There is then the admission of McCandless that he had appropriated sums of money in just this way and that Bender would turn over checks to him the proceeds from which they would divide, and that the funds thus manipulated were moneys received from tax sources and belonging to the county of Los Angeles. We think this evidence sufficient to convince any reasonable person beyond all doubt of the guilt of appellant. The law does not require demonstration or that degree of proof which excluding all possibility of error produces absolute certainty, for such degree of proof is rarely possible. Only that degree of proof is necessary which convinces the mind and directs and satisfies the conscience of those who are bound to act conscientiously upon it.

Much is said by appellant concerning the irregularity of the payment to Bender. In this connection it is urged that the tax, being twice paid, was illegal and unusual. All of these arguments are met and answered in the case of People v. Robertson, 6 Cal. App. 518, 92 P. 498, wherein will be found most appropriate language disposing of similar claims.

[6] We come now to the third count. The dramatis personæ are the same, and each in his identical rôle. The taxpayer is the same, although represented by a different agent. The time of this transaction was earlier than the other two, in that it transpired in the year 1928. The taxpayer had received a tax notice from the assessor's office. At that time McCandless had a book of receipts and had been making tax collections. The mode of operation general in the office was to issue receipt books to the collectors. When money was received, a receipt would be given the taxpayer and a duplicate receipt would be left in the book. These receipts were numbered, as was each book. When the collector accounted for the book, he had all of the duplicate receipts and settled for the amount of total. The taxpayer in this instance paid in the sum of $702 by check. This check went through the hands of McCandless, and wound up in his possession. He had a receipt book showing collection of taxes in the sum of $8,787.73. When he came to make settlement on this book, he used the check for $702, though in that book of receipts was no property mentioned as assessed to the taxpayer, Spalding, who had paid the $702. In other words, this check was used to pay out on the receipts for moneys received from other sources. It might be conceded that the office sanctioned the turning in of all checks at as early a date as possible in order to avoid any charge of unreasonable delay in presentation. And it may be conceded further that a practice to this end had arisen. Appellant concedes that he handled this check and that he turned in the amount represented thereby in settlement of taxes. The testimony before the jury was that this money was received in payment of the taxes of Spalding. No record was found of any assessment against Spalding for the year 1928. Therefore, claims appellant, it is reasonable to assume, and it must be so assumed, that Spalding simply used his check to pay the taxes of some one else, as does often happen. However, the check was made payable to the assessor, E. W. Hopkins, and in response to a tax notice received by Spalding's tax agent. Also there is evidence that during that year Spalding did own property subject to taxation in the county of Los Angeles; and further was there evidence that the checks of another concern had been similarly used by appellant. We think the showing withstands all argument. The fact that the check of $702 did actually remain in the county funds does not alter the situation, inasmuch as its use to cover up another shortage constituted and completed the offense charged. People v. Forman, 67 Cal. App. 697, 228 P. 378.

[7, 8] It may be noted that appellant did not take the stand nor did he offer any explanation of the facts indicating so clearly his guilt. We do strenuously affirm the rule that the failure of a defendant to testify in his own behalf shall in nowise be used against him; yet we must concede that the failure of a defendant to testify does not have the effect of strengthening his case, nor does it tend to weaken the case of the people. When facts are testified to by witnesses for the prosecution concerning which a defendant has personal knowledge, it is his inalienable right to remain mute and offer no explanation. But the one inevitable result is to leave the testimony uncontradicted; and we know of no rule of law that presumes a denial of the facts through silence. Naturally, there remains throughout the trial the presumption of innocence, and the facts are to be viewed in the light of that presumption; but that presumption does not of itself destroy the effect of evidence which is in itself satisfactory.

The record is free from error. The only defense is exceedingly technical and without merit. The guilt of appellant as to counts 2 and 3 was clearly shown. Embezzlement of public moneys is one of the most serious offenses known to our law, and one guilty thereof, and whose guilt so clearly appears as in the instant case, supported by his own admissions, should not find refuge in superficial technicality in nowise affecting the proof of the charge.

As to count 1 the judgment and order are reversed. As to counts 2 and 3 the judgments and orders are affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

132 Cal.App. 681

## SMITH et al. v. PACIFIC GAS & ELECTRIC CO.

Civ. 4879.

District Court of Appeal, Third District, California.

June 20, 1933.

Rehearing Denied July 20, 1933.

Hearing Denied by Supreme Court Aug. 17, 1933.

1. **Eminent domain** ⚷273.

Property owners *held* not entitled to injunctive relief against power company, but limited to remedy for damages for trespass on his land, where action was brought after poles were erected, power line strung, and use made thereof in public capacity.

2. **Eminent domain** ⚷265(4).

Property owners who appealed in eminent domain action *held* entitled to their costs on appeal.

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Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by Harriet L. Smith and another against the Pacific Gas & Electric Company, and cross-complaint by defendant. Judgment for defendant, and plaintiffs appeal.

Affirmed.

W. E. Davies, of Marysville, for appellants.

Thomas J. Straub and Clinton F. Stanley, both of San Francisco, and W. R. Dunn, of Sacramento, for respondent.

PER CURIAM.

This action was begun on or about the 1st day of October, 1930, to recover of and from the defendant damages, and also for injunctive relief by reason of the following alleged facts:

That the defendant, on or about the 8th day of September, 1930, wrongfully and unlawfully, and without right or title or permission or consent of the plaintiffs, entered upon certain lands and premises belonging to the plaintiffs, dug ten holes and erected ten poles thereon, and strung, built, and erected wires and power lines thereon for the purpose of transmitting power.

The defendant, denying the allegations of the complaint as to the amount of damages inflicted upon the lands and premises belonging to the plaintiffs, filed a cross-complaint in the nature of an action in eminent domain to condemn a right of way across the lands belonging to the plaintiffs, for the purpose of maintaining its power lines and poles for the transmission of electric energy, setting forth, among other things, that the defendant is a public service corporation, and maintaining said line for and as a public use.

The court found in accordance with the allegations of the cross-complaint filed by the defendant that the defendant had a right to condemn a right of way over the lands and premises belonging to the plaintiffs for the purpose of maintaining its poles and electric power lines; that the same was intended for, and was being devoted to a public use, and awarded damages to the plaintiffs in the sum of $100 and costs in the action.

A review of the testimony shows that there was some conflict as to the amount of damages that should be awarded. However, the findings of the court in this particular appear to be supported by a preponderance of the testimony.

[1] Appellants' argument apparently is based on section 14 of article 1 of the Constitution, which provides that property shall not be taken for public use without just compensation having been first made to, or paid into court for the benefit of, the owner, etc. The record shows, however, that this action was not begun until after the poles had been erected, the power line strung, and use being made thereof in a public capacity. Under such circumstances, the law is well established that the remedy of the owner is one for damages, and that injunctive relief will not be awarded. In support of this we need only cite 10 California Jurisprudence, p. 540, § 136, and the case of Conaway v. Yolo Water & Power Co., 204 Cal. 125, 266 P. 944, 58 A. L. R. 674, where the authorities on this subject are fully set forth.

[2] Being an action in the nature of eminent domain, the appellants are entitled to their costs on appeal.

The judgment is affirmed.

218 Cal. 377

## AMERICAN SURETY CO. OF NEW YORK v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 14061.

Supreme Court of California.

June 22, 1933.

Rehearing Denied July 20, 1933.

**1. Appeal and error ©=387(4).**

That undertaking on appeal was filed prior to filing of notice of appeal, but subsequent to entry of judgment in municipal court, *held* not to leave superior court without jurisdiction of appeal (Code Civ. Proc. §§ 985, 986.)

**2. Appeal and error ©=387(4).**

Existence of judgment and right of appeal furnish sufficient consideration for undertaking on appeal, even though undertaking precedes filing of notice of appeal (Code Civ. Proc. §§ 985, 986).

**3. Appeal and error ©=387(4).**

Presence of undertaking in proper form at time of filing of notice of appeal would furnish proper consideration for undertaking (Code Civ. Proc. §§ 985, 986).

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In Bank.

Application by the American Surety Company of New York for a writ of mandate prayed to be directed to the Appellate Department of the Superior Court of Los Angeles County, and the Hon. Victor R. McLucas and others, as Judges of the Appellate Department thereof, to compel them to reinstate a certain cause on the docket.

Peremptory writ of mandate issued.

Mathes & Sheppard, Robert A. Cushman, and Gene G. Curry, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles (Burke, Hickson & Burke and Daniel G. Marshall, all of Los Angeles, of counsel), for respondents.

PRESTON, Justice.

Action in mandate directed against the appellate department of the superior court of the county of Los Angeles to compel it to reinstate on its docket the appeal of defendant in a case begun in the municipal court of said county styled "Myron W. Goble, plaintiff and respondent, vs. American Surety Company of New York, a corporation, defendant and appellant," said superior court having entered an order purporting to dismiss the appeal for want of jurisdiction thereof.

The petition correctly states the question of law involved as follows: "Is the superior court without jurisdiction of an appeal from the municipal court merely because the undertaking on appeal is filed prior to the filing of a notice of appeal, where the undertaking was filed subsequent to the entry of judgment in the municipal court and thereafter, and within the time allowed by law a notice of appeal was filed?"

Plaintiff, in the trial court, sued defendant for breach of contract, and obtained a money judgment in the sum of $2,000. This judgment was entered on July 5, 1932. Defendant, pursuant to due notice, brought on for hearing his motion for new trial, which motion was denied on August 29, 1932. On September 10, 1932, the formal notice of appeal from the judgment was filed. All these steps were admittedly taken in due time. However, the undertaking on appeal required by sections 985 and 986 of the Code of Civil Procedure was actually on file on August 2, 1932, was still on file on September 10th thereafter, and has continuously remained a record in said court. Respondent court, upon this showing, refused jurisdiction of the appeal because of failure to lodge the said undertaking with the court subsequent to and within five days after the filing of the notice of appeal.

The undertaking, however, correctly recites the date of rendition of judgment, the amount thereof, the parties to the action; also that an appeal has been taken; that a stay of execution is desired, and it covenants that the surety is bound in double the amount of the judgment, if the appeal is dismissed or the judgment affirmed, to pay said judgment, together with damages and costs, and authorizes a summary judgment after thirty days from such termination of the action.

The statute in question, section 986 of the Code of Civil Procedure, contains the following language: "The undertaking on appeal must be filed within five days after the filing of the notice on appeal, and the notice of the filing of the undertaking must be given to the respondent. The adverse party may except to the sufficiency of the sureties within five days after the notice of the filing of the undertaking. * * *" This section and sections 983 to 987, inclusive, pertain to appeals from the municipal courts. They are modeled after sections 974 to 979, inclusive, of the Code of Civil Procedure, relating to appeals from the justices courts.

[1] Respondent contends that this law not only fixes the point of time beyond which an undertaking may not be filed, but also fixes the period when the right to file such instrument first accrues. We agree only with the first part of this contention. After the right of appeal accrues, we see no efficacy in limiting the mere order in which the notice of appeal and undertaking may be filed. The reasons which may have prompted a different holding under other statutes are not pres-

ent here. The notice of appeal need not be served, but the notice of filing the undertaking must be served on respondent, and his duty to inspect it and his right to except thereto do not arise until such notice is received. This fact renders it immaterial whether the one filing precedes the other so long as both papers are filed after the right of appeal has accrued and within the period prescribed by law. The five-day period after the notice of appeal is filed is simply an enlargement of the period for the filing of the undertaking, but it does not forbid the filing of such undertaking at an earlier period after judgment.

We do not regard the cases of Buckholder v. Byers, 10 Cal. 481; Dooling v. Moore, 19 Cal. 81, and Carpentier v. Williamson, 24 Cal. 609, as binding upon us, for they arose under the Practice Act, enacted in 1851, which required a service of the notice of appeal, but did not require a notice of the filing of the undertaking; hence for the protection of the respondent it was proper to declare a definite time within which he might expect the undertaking to be filed and thus bring into being the right to except to the sufficiency thereof. Practically the same observation may be made as to the cases of Hewes v. Carville Mfg. Co., 62 Cal. 516, and Little v. Jacks, 68 Cal. 343, 8 P. 856, 9 P. 264, 11 P. 128, arising under section 940 et seq. of the Code of Civil Procedure, enacted in 1872 and as amended in 1874. Here, as already observed, we have a statute which does not require a service of the notice of appeal, but does require service of notice of the filing of the undertaking and the time for the respondent to except to the sufficiency thereof does not begin to run until such notice is received. No possible injury could come to respondent by holding the order of filing to be immaterial so long as the right of appeal has accrued.

From the above holding it follows that we necessarily disapprove of the holding in the case of Goodman v. Superior Court, 19 Cal. App. 457, 126 P. 185. However, we regard the case of Rigby v. Superior Court, 162 Cal. 334, 122 P. 958, as clearly paving the way for the holding we here make. There the court reviewed sections 974 to 979 of the Code of Civil Procedure relating to appeals from justices to superior courts, and pointed out that prior to 1909 the appellant was required to serve and file his notice of appeal within thirty days after rendition of the judgment, and that the appeal was ineffectual for any purpose, unless an undertaking was filed pursuant to section 978; further, that as the law did not specifically provide when the undertaking should be filed, it was thus inferred from the provisions as a whole that the undertaking must be filed within the period fixed for the taking of the appeal, but the order of filing of the notice of appeal and the undertaking was immaterial so long as both occurred within the thirty-day limit. The court then considered the amendment of 1909 (St. 1909, p. 1065), creating a new section, 978a, which was similar in its language to the statute we have before us. The court thereupon reasoned that the new section was designed to enlarge the time for the filing of notice of the undertaking, and that, in an extreme case, the undertaking could be filed as late as five days after the thirty-day period had elapsed. This holding is not adverse to the one here announced, but, on the contrary, we regard the conclusion we have reached as the logical outcome of the principles there declared. If it was immaterial which filing preceded the other during the thirty-day period, it was still immaterial after the time for filing the undertaking had been enlarged over the additional five-day period. In other words, the statute there fixed the period beyond which the undertaking could not be filed, but it did not declare when such period began or the order in which the notice of appeal and undertaking must be filed.

[2, 3] The existence of a judgment and the right of appeal therefrom furnish sufficient consideration for the undertaking, even though the undertaking precedes the filing of the notice of appeal. Clarke v. Mohr, 125 Cal. 540, 58 P. 176. And, were this not so, the presence of the undertaking in proper form at the time of the filing of the notice of appeal would furnish a proper consideration for the undertaking.

The conclusion we have reached is in harmony with the rule announced for the construction of similar provisions in the following cases: French v. Powell, 135 Cal. 636, 68 P. 92; Hub Hdw. Co. v. Ætna Acc. & L. Co., 178 Cal. 264, 173 P. 81; Williamson v. Egan, 209 Cal. 343, 287 P. 503.

Let a peremptory writ of mandate issue as prayed for, directing respondent court to reinstate the appeal in said action.

We concur: WASTE, C. J.; CURTIS, J., IRA F. THOMPSON, J.; SEAWELL, J.; LANGDON, J.

218 Cal. 446

## REMINGTON v. STATE BAR OF CALIFORNIA.

L. A. 14001.

Supreme Court of California.
June 29, 1933.

**Attorney and client** ⚷58.

Evidence of attorney's "ambulance chasing" and association with persons engaged in fraudulent enterprises *held* insufficient to justify disbarment but warranted public reprimand.

In Bank.

Disciplinary proceedings by the State Bar against Gerard Remington, who petitions for review of a recommendation that he be disbarred.

Petitioner publicly reprimanded.

Gerard Remington, in pro per.

Chas. A. Son, of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PRESTON, Justice.

Review of disciplinary proceedings had against petitioner by the state bar. No legal question is presented. Our sole task is to pass upon the weight of the evidence to establish the guilt or innocence of petitioner in order to determine what penalty, if any, should be imposed upon him.

The notice to show cause contained thirty-six respective charges of misconduct against petitioner growing out of his connection with various peculiar transactions and enterprises, conducted largely by his associates and others, including charges relating to the aiding and abetting of one Stevens, and United Adjustment Association, both unlicensed, to practice law in connection with the claims of certain minors for personal injuries received as the result of an automobile accident.

These various charges were heard at length before local administrative committee No. 5 for the county of Los Angeles. Voluminous evidence was received. At the conclusion of the hearing, the committee found to be true only those charges relating to the so-called "ambulance chasing" matter; that is, the committee found that petitioner did aid and abet said unlicensed persons to practice law and as a result of their activities accepted professional employment on behalf of the said several claimants and later remunerated said unlicensed persons for obtaining said employment. Summing up the result of its investigation, the committee found "from a great mass of testimony introduced, that the accused allowed himself to be interested in a large number of questionable business enterprises, and that undoubtedly many persons * * * alleged to have been defrauded out of money, did actually lose considerable sums of money in these various enterprises, largely through the representations of other persons associated in the enterprises in which the accused associated himself," but the committee further stated that it was unable to find that the representations causing such losses were made directly by the accused or that the accused conspired with any of his business associates to make fraudulent representations and cause losses to the various investors or that the accused acted in his capacity as an attorney, save with respect to said single and isolated case of "ambulance chasing." Further, with respect to that case, the committee found that accused had not prior thereto nor has he since engaged in similar practices and although he directly violated the rules of professional conduct in that particular matter, he acted fairly with respect to the claims of the parties involved. Upon these findings the committee recommended that the accused be privately reprimanded for his conduct in connection with said "ambulance chasing" charges.

Thereafter further proceedings were had and the cause was submitted to the board of governors of the state bar. That body approved and adopted the first thirty-six findings of the local committee, but, in connection with the prosecution of the claims of said minors for damages for personal injuries, it further found that, in collusion with said unlicensed persons, and by obtaining the appointment of said Stevens as guardian ad litem, entering into a settlement agreement with the insurer and thereafter dismissing the first court action and commencing a new action in the municipal court wherein judgment was entered for the same amount as the agreed settlement, and satisfied, all sums remaining after payment of expenses and fees being distributed to said minors, petitioner and Stevens acted knowingly with the intent and with the effect of taking into their own hands the fixing of fees and allowances to be paid as against said minors, thus depriving the court of its supervisory control of said matter. Further the board of governors found that "fraudulent transactions of the respondent's associates extended over a period of years; that respondent received profits from some of these transactions; that when the transactions were attacked by arrests and otherwise, he defended his associates and arranged settlements for them; that he must have acquired knowledge of the character of the operations they were carrying on, and that he nevertheless continued his business relations with them." In conclusion it was recommended that petitioner be disbarred.

We have examined this record with greatest care and thoroughness. But we are unable to say that the evidence adduced is of sufficient strength to support an order of disbarment. Indeed, it is unfortunate, if there be any sound basis for the numerous accusations made against petitioner, that the extent of his participation in the enterprises of his associates was not more fully ascertained and that the fraudulent and wrongful acts on his part so broadly hinted were not brought into the full light of day.

Under the record as it now stands, we find ourselves in accord with the findings and conclusions of the local committee. It is, therefore, hereby ordered that the petitioner, Gerard Remington, be given a public reprimand, and this opinion shall constitute such a reprimand.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.; IRA F. THOMPSON, J.

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218 Cal. 481

## NOEL et al. v. CAPOBIANCO et ux.

S. F. 14824.

Supreme Court of California.
July 6, 1933.

**Easements** ⚷54.

Owners of some of lots subject to right of way easement *held* entitled to reconstruct and regrade terrace to conform to street grade where other lots would be benefited.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Daisy Noel and others against Alfredo Capobianco and wife. Judgment for plaintiffs, and defendants appeal.

Affirmed.

H. M. Anthony and Harold A. Harwood, both of San Francisco, for appellants.

Milton Marks, of San Francisco, for respondents.

PER CURIAM.

The respondents have made a motion to dismiss this appeal or affirm the judgment on the ground that the appeal is not substantial and, in fact, presents no debatable question of law. The parties, excepting the city and county of San Francisco, own lots adjoining a private right of way known as Culebra terrace, opening into Chestnut street. The grade of Chestnut street was recently raised and, of course, unless the Culebra terrace is also raised, the use thereof for pedestrians and vehicles is rendered difficult, and the free and open enjoyment thereof is prevented. The plaintiffs, representing nine out of the thirteen lots served by the terrace, brought this action against the defendants, Alfredo Capobianco and his wife (the owners of one lot), to have it declared that they had the right to reconstruct and regrade the terrace, at their own cost and expense. The appeal is from the judgment in favor of plaintiffs and is brought to us on the judgment roll. The court found that ever since September 14, 1911, "all of the parcels of real property fronting upon Culebra terrace have been subject to an easement of right of way over the said real property, for purposes of ingress and egress and for use as a private right of way," specifically describing the property so used. It also found that the use of the right of way was rendered difficult by reason of the change already mentioned, and, unless reconstructed, plaintiffs "will have no convenient nor free, open and unobstructed access to and from their real property" and that the grade could be raised according to plans prepared by the city and county of San Francisco, which reconstruction "will not interfere with but will aid and better the use and enjoyment of the real property owned by the defendants." The judgment was that plaintiffs had the right to do the work of reconstruction at their own cost and in accordance with the plans of the city and county of San Francisco.

The appellants contend that their property is taken for public use without compensation; that the judgment transcends the power of the court in declaratory relief actions; and that plaintiffs have no right to additionally burden their property by entering upon it for the purpose of making the alterations.

All of these contentions are answered by the findings and the judgment. In effect, the court declared that defendants' property was not taken or damaged, nor was any additional burden cast upon their property, and declared the rights of plaintiffs with respect thereto.

There is no merit in the appeal.

Judgment affirmed.

218 Cal. 382

## HOCKETT v. PACIFIC STATES AUXILIARY CORPORATION et al.

L. A. 12677.

Supreme Court of California.
June 26, 1933.

**1. Bills and notes** ⊂⇒492.

Rebuttable presumption exists that maker made valid delivery of negotiable note in payee's possession (Civ. Code, § 3097).

**2. Principal and agent** ⊂⇒123(3).

Evidence *held* to justify finding that grandmother authorized grandson to deliver her negotiable note to payee, or that lack of ordinary care to prevent negotiation estopped her from denying delivery (Civ. Code, § 3097).

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Alice E. Hockett against the Pacific States Auxiliary Corporation, and the Pacific States Savings & Loan Company, which filed a cross-complaint. From a judgment for cross-complainant, plaintiff appeals.

Affirmed.

For prior opinion, see 15 P.(2d) 547.

C. F. Culver, of Los Angeles, for appellant.

Earl L. Banta, of Los Angeles, for respondents.

PRESTON, Justice.

Plaintiff, by this action, sues in equity to cancel a promissory note, and deed of trust to secure same, on the ground that each of said documents was forcibly taken from her by her grandson and negotiated to the defendant Pacific States Savings & Loan Company, without authority from or a consideration to her. Said defendant, the payee and beneficiary under said trust deed, cross-complained, alleging the validity of each of said instruments and praying for a decree to establish it. The cause was tried and the court made findings and gave judgment denying relief to plaintiff and sustaining in toto the cross-action of defendant. Plaintiff has appealed. The sole question for determination is the sufficiency of the evidence to sustain the conclusion of the court.

[1] At the outset, it may be said that the promissory note is negotiable in form, plaintiff's signature appears thereon, and respondent has possession thereof. From these facts there arises a presumption that a valid and intentional delivery by the maker was made and this presumption obtains until the contrary is proved. Section 3097, Civ. Code. This, of itself, would ordinarily be sufficient to support the court's findings. However, here the court made, among others, the following findings: "The court finds that Willis E. Hockett is the grandson of plaintiff and that plaintiff signed and executed said note and Trust Deed and placed them in the hands of said Willis E. Hockett for the purpose of enabling said Willis E. Hockett to use the same for the purpose of raising the principal sum of * * * $1096. The court finds that plaintiff delivered said note and Trust Deed to said Willis E. Hockett, and further finds that if said Willis E. Hockett later took said note and Trust Deed from plaintiff, she allowed said note and Trust Deed to go into the possession of said Willis E. Hockett and to be used by him without using ordinary care in that she neglected and omitted to notify either the said payee of said note or the said Trustee under said Trust Deed that said note and Trust Deed were in the possession of said Willis E. Hockett without her consent. The court finds that said note and Trust Deed and each of them when they went into the hands of said Willis E. Hockett were regular on their faces. The court finds that by reason of the fact that said note and Trust Deed are regular on their faces and were in the possession of said Willis E. Hockett, the grandson of plaintiff, that the defendants relied upon the apparent due execution, genuineness and delivery of said instruments by plaintiff and induced thereby, advanced the sum of * * * $1096.00 * * * in consideration of the receipt of said note and Trust Deed and received the same for value in the ordinary course of business. * * *"

From the evidence it appears that plaintiff had two pieces of real property, one incumbered and the other clear. At the instigation of the grandson the note and deed of trust were prepared and signed by her and the promissory note was also signed by the grandson as comaker. The documents were delivered to the grandson to be by him taken to a certain notary for certification and to then be taken for negotiation. But plaintiff contends that she thought that the purpose of the documents was to secure a refunding of the existing mortgage, or change of payee therein, with respect to her incumbered property; that she did not know that it was to incumber her clear property.

The notary, who was a banker and friend, returned with the grandson to plaintiff's residence and there explained to her the nature of the documents and surrendered them to her. At this point, plaintiff testified, respecting the instruments, as follows: "Well, the boy took it away from me. He just snatched it out of my hands. I did not acknowledge that trust deed before anybody—excepting Mr. Mayland and I never delivered it to the Pacific States Loan Company. I never got anything from them, or anybody else, in connection with that trust deed, or the note—in money or any consideration—or anything else. * * * After Mr. Mayland brought it back to me I stood and held it in my hand, and he (Willis E. Hockett) had come up and grabbed it out of my hands. Mr. Mayland was not there at the time. He just stepped out. I was too dumbfounded to do anything. I didn't understand what was happening to me. I went up to the bank and told Mr. Mayland about it. * * *"

This occurrence was on May 15, 1928. The grandson was not a witness at the trial, but the plaintiff otherwise showed that a notary's certificate in regular form was placed upon the deed of trust by another and thereafter the grandson began negotiations with respondent loan company in the matter. On the same day a joint escrow was established with the Title Insurance & Trust Company of Los Angeles. The deed of trust was actually filed for record on the 22d day of March, 1928, but the consideration did not pass from respondent until on or about September 1, 1928, a period of some three and one-half months after the occurrence hereinabove related. During this period, by a proceeding in the superior court, a decree of said court was obtained terminating the joint tenancy of plaintiff and her deceased husband in said property. The property was registered under the Torrens Title Act (St. 1897, p. 138), and in the court proceeding just referred to there was also procured a duplicate Torrens title certificate, upon the allegation that the original certificate had been destroyed by fire, which allegation was untrue, because plaintiff held the original certificate herself and produced it in evidence in this cause. The consideration by respondent loan company was disbursed, usually upon orders to which the grandson attached the appellant's name by him. Two checks were made direct to appellant and indorsed in her name, but she denies the genuineness of her purported signatures.

[2] There is much evidence which tends to show that the plaintiff was grossly imposed upon by her grandson. But there is also ample evidence upon which the court could conclude that plaintiff was negligent in many particulars in not taking the proper steps to prevent negotiation of the documents. It is true that the evidence shows that she called upon the first notary, Mr. Mayland, who in turn visited the office of the registrar of titles and asked to be notified if any papers came in affecting the title to said property, but this was far from what should have been done under the circumstances. Said notary at least knew the name of the payee of the note or trustee in the deed of trust. Plaintiff could have found out this information. Plaintiff likewise had access to means of finding her grandson and doubtless, according to her own testimony, saw him upon several occasions before the full consideration passed from respondent and she could have obtained information as to his whereabouts from his father and mother, whose residence was known to her. From a consideration of the whole record, we are unable to say that the court was not justified in finding that plaintiff authorized delivery by the grandson or that her neglect and lack of ordinary care in the premises estopped her from denying such delivery.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.

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218 Cal. 337

## COAST TRUCK LINE v. ASBURY TRUCK CO.

L. A. 12560.

Supreme Court of California.

June 19, 1933.

**1. Automobiles** ⚷104.

Truck company authorized to transport vegetables for hire by Railroad Commission, which subsequently rescinded authority and granted company certificate of public convenience and necessity for transportation of oil well supplies, heavy machinery, pipe, steel, and tanks, *held* not possessed of certificate authorizing company to transport vegetables (St. 1917, p. 330, as amended).

**2. Automobiles** ⚷107(2).

Superior court has jurisdiction of action by truck line to enjoin truck company from transporting vegetables for compensation without certificate of public convenience and necessity (St. 1915, p. 161, § 67; St. 1917, p. 330, as amended; Const. art. 6, § 5).

**3. Courts** ⚷26.

As court of general jurisdiction, superior court may interpret and give effect to any legislative, executive, or judicial document or order.

**4. Public service commissions** ⚷19(2).

On collateral attack of Railroad Commission's order, defect complained of must appear on face of judgment roll (St. 1915, p. 160, § 65).

**5. Automobiles** ⚷107(2).

In action by truck line to enjoin truck company from transporting vegetables for compensation without certificate of public convenience and necessity, Railroad Commission's order vacating prior orders authorizing company to operate, and reciting that it

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

was made after hearing, *held* final (St. 1915, p. 160, § 65; St. 1917, p. 330, as amended).

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In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action for injunction by the Coast Truck Line, a corporation, against the Asbury Truck Company. From an order granting a temporary injunction restraining the operation by defendant of a truck line without first obtaining a certificate of public convenience and necessity, defendant appeals.

Affirmed.

Libby & Sherwin and Warren E. Libby, all of Los Angeles, for appellant.

Henry J. Bischoff, of San Diego, for respondent.

WASTE, Chief Justice.

Defendant appeals from an order granting a temporary injunction. The action was brought by plaintiff, a duly certificated common carrier, to enjoin the defendant trucking company from transporting vegetables for compensation over the public highways of the state between Los Angeles and Oceanside and other points, without first obtaining a certificate of public convenience and necessity from the Railroad Commission, as required by the Auto Stage and Truck Transportation Act. (St. 1917, p. 330, as amended).

[1] In response to an order to show cause why such injunction should not issue, defendant offered in evidence two orders or decisions of the Railroad Commission, dated, respectively, March 31, 1927, and June 9, 1927, which orders or decisions, when read together, are sufficiently comprehensive to authorize the defendant to transport vegetables for hire between the points above named. In opposition to this showing there was introduced in evidence two subsequent orders or decisions of the Railroad Commission. The first of these, dated August 16, 1927, rescinds and vacates the earlier decisions relied on by the defendant, while the second, dated December 1, 1927, grants to the defendant a certificate of public convenience and necessity "for the transportation of oil well supplies, heavy machinery, pipe, steel and tanks." Upon this showing the trial court properly concluded that the defendant was not possessed of a certificate authorizing it to transport vegetables. A temporary injunction was thereupon issued.

[2] Section 67 of the Public Utilities Act (Stats. 1915, pp. 115, 161), provides that "no court of this state (except the supreme court to the extent herein provided) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties." Relying on this section, defendant urged in the court below and contends upon this appeal that the superior court was without jurisdiction to proceed in this cause. With this contention we cannot agree.

[3] The action of the superior court in the instant cause does not run counter to any provision of the foregoing section. It has not attempted to "review, reverse, correct or annul" any order or decision of the commission, nor has it undertaken to "enjoin, restrain or interfere" with the commission in the performance of its official duties. It has merely given effect to the most recent and final order of the commission by enjoining defendant from operating in violation thereof. The validity of the several orders of the commission was not involved nor under review in the court below. The interpretation of the several orders at most was the only question before the court. As a court of general jurisdiction, the superior court may properly interpret and give effect to any document or order even though it be the result of action by the legislative, executive, or judicial branch of the government. Henderson v. Oroville-Wyandotte Irr. Dist., 207 Cal. 215, 219, 277 P. 487. Moreover, under section 5 of article 6 of the Constitution, the superior court has "original jurisdiction in all cases in equity." The present action for an injunction falls squarely within this grant of power. In Yolo Water, etc., Co. v. Superior Court, 43 Cal. App. 332, 341, 185 P. 195, 199, it is declared: "Powers conferred by the Constitution upon the railroad commission to supervise and regulate public utilities and to bring suits to enforce its orders and compel public utilities to obey the law is not inconsistent with the power conferred upon superior courts to entertain injunction suits instituted by others than the commission against public utilities. To so hold will not create any conflict between the courts and the commission, because in all such suits the courts will be bound and guided and controlled in all respects in entertaining and deciding or dismissing them as much by section 23 of the Constitution and the Public Utility Act as by any other provision of the law."

[4, 5] There is no merit in petitioner's attack on the order of the Railroad Commission rescinding and vacating its two prior orders granting defendant authority to operate. On a collateral attack of this character, the defect complained of must appear on the face of the judgment roll. The vacating order, here assailed, states on its face that it was made after hearing had. Defendant's contention that it had no notice thereof is therefore without merit. In addition, it is well to point out that section 65 of the Public Utilities Act, supra, makes the orders and decisions of the commission final in all collateral actions and proceedings. Truck

Owners, etc., Inc., v. Superior Court, 194 Cal. 146, 150, 228 P. 19.

The order appealed from is affirmed.

We concur: SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; SHENK, J.

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218 Cal. 345

## WEIDNER v. ZIEGLAR et al.

## SAME v. UNION TRUST CO. OF SAN DIEGO.

L. A. 12896.

Supreme Court of California.
June 20, 1933.

**1. Mortgages 🔑375.**

Assignee of purchasers' beneficial interests under trust declaration *held* liable with remaining original beneficiary for deficiency on principal indebtedness after sale of beneficial interests.

> Declaration of trust imposed personal liability on beneficiaries for deficiency in principal indebtedness remaining after application of proceeds from sale of beneficial interest, and the assignee's acceptance of assignment of beneficial interest stated that assignee accepted assignment and approved, warranted, confirmed, and agreed to declaration of trust and all terms and conditions thereof.

**2. Assignments 🔑109.**

Intention of parties, construed either by their acts, subject-matter of contract, or their words, controls in determining whether assignee assumed obligations imposed by contract on assignor.

**3. Mortgages 🔑375.**

Where assignee of purchaser's beneficial interest under trust declaration was liable for payment of taxes, arrangement whereby assignee attempted to advance delinquent taxes to vendor receiving from him assignment pro tanto of amount paid *held* without consideration.

**4. Mortgages 🔑375.**

Assignee of purchaser's beneficial interest under trust declaration assuming liability for deficiency on indebtedness and payment of taxes could not recover from proceeds of sale of beneficial interest amount advanced for taxes.

In Bank.

Appeals from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Separate actions by L. G. Weidner against Frank B. Zieglar and another, in which the defendants filed cross-complaint, and by L. G. Weidner against the Union Trust Company of San Diego. From the judgment, plaintiff and cross-complainants appeal.

Affirmed in part and reversed in part.

Prior opinion, 14 P.(2d) 353.

Hamilton, Lindley & Higgins, of San Diego, for respondents and appellants Frank B. Zieglar and Harry F. Carling.

Harrison G. Sloane, of San Diego, for appellant and respondent L. G. Weidner.

Albert J. Lee, Charles H. Forward, and Harold R. Conklin, all of San Diego, for respondent Union Trust Co., of San Diego.

IRA F. THOMPSON, Justice.

Prior to August 2, 1926, the defendants Frank B. Zieglar and Harry F. Carling were the owners of a tract of land in San Diego county, which property John B. Zeller, M. Reiss, Ed. F. Gilbert, John W. Waybright, and A. E. Davies desired to purchase for the purpose of subdividing into smaller parcels and selling. With this purpose in view the land was deeded to the Union Trust Company of San Diego and a declaration of trust executed by all the parties. In brief, it provided for an adjustment of certain differences of interest between the former owners, Zieglar and Carling, who were designated in the instrument as payees, and for a class of beneficiaries, designated as class A, to the extent of $125,000, which beneficial interests it was provided might be sold to purchasers, but until so sold should belong to the class B beneficiaries, who were the purchasers already named. It was also declared, after making provision for payment of the purchase price, improvements, expenses, and a designated profit to the class A beneficiaries, that the class B beneficiaries should share equally with class A beneficiaries in the anticipated profits. In other words, and solely to make the arrangement clear, the class B beneficiaries were to guide the destinies of the subdivision; the purchase price, improvements, etc., were to be paid, at stated intervals, out of the sales of the property, and, if necessary, sales of class A interests were to be made to assist the purchasers to carry out their part of the undertaking, which was to pay the sum of $315,000 to defendants Zieglar and Carling; to improve the property; to protect and defend it from loss and damage; to pay all taxes or liens assessed against it; and to make sales of the subdivided property. The obligations of the beneficiaries were declared to be joint and several. Their beneficial interests were declared to be hypothecated for the purpose of securing performance of the terms of the declaration of trust. We may find it necessary hereafter to refer to some of the specific provisions, but for the present the general outline is sufficient.

The plaintiff in the two actions named in the caption hereof was not an original beneficiary, but acquired by assignment three-fifths of the class B beneficial interests during March, 1928, and another one-fifth August 29, 1928. During May, 1928, certain taxes on the property had become delinquent, and plaintiff, instead of advancing them directly in his capacity as a beneficiary, attempted to advance them as a payee through the defendant Zieglar, receiving from Zieglar an assignment pro tanto in the sum of the amount put up, to wit, $18,239.47. The first above-entitled action was commenced by Weidner to have it declared that the meaning of the assignment from Zieglar was that he assumed the position of a payee possessed of the rights of Zieglar until the advance was repaid to him and to enjoin a threatened sale of the beneficial interests by the trustee for defaults under the declaration of trust. Carling and Zieglar separately answered, denying that the plaintiff had advanced the money as a payee, and also jointly filed a cross-complaint in which they alleged that Weidner had accepted an assignment of a class B beneficial interest and had assumed the obligations of such beneficiary; that he had failed to make payments of principal and interest and taxes as required; that for the default thus occasioned they had caused a sale of the beneficial interests; and that, after the proceeds therefrom had been deducted, there remained due from plaintiff the sum of $117,940.26, and prayed for judgment accordingly.

In the second action the plaintiff sought to recover the sum advanced for taxes, upon the theory that at the sale of the beneficial interests by the trustee the sum of $150,000 was realized, out of which he claimed it was his right to be reimbursed.

The injunctive relief sought by plaintiff was, as is apparent from the facts already recited, denied. The two actions were consolidated. The court denied relief to the plaintiff in both actions and decided against the defendants and cross-complainants on their cross-complaint. From the judgment so entered the plaintiff has appealed as well as the cross-complainants.

[1] It becomes apparent from what we have already said that the controlling question in this case is whether the plaintiff and appellant undertook and assumed the obligations of a class B beneficiary under the trust. We have heretofore stated the ultimate conclusion to the effect that the original class B beneficiaries personally agreed to discharge and pay the purchase price, taxes, and improvements. There can be no doubt concerning that fact, but, if there were, it would be set at rest by the decision of the District Court of Appeal in the case of Davies v. Union Trust Co. of San Diego, 125 Cal. App. 593, 13 P.(2d) 961, 962, a case involving the identical trust here under consideration, wherein it was pointed out that, although a "studious effort was made to avoid a clear covenant on the part of appellant and his associates to pay the indebtedness which is acknowledged to exist," yet there were express covenants to "protect the trust property from loss, damage, liability, and expense" and to pay for improvements and to pay installments of the principal indebtedness, together with taxes or assessments against the property, which provisions, it was determined, were sufficient to support a deficiency judgment against one of the original class B beneficiaries. The declaration of trust provides as follows: "The terms and conditions hereof shall inure to and bind Trustee, all of said Beneficiaries and Payees, and all other heirs, legatees, devisees, executors, administrators, successors and assigns." It was executed by the trustee and ratified by the payees, the defendants and appellants Carling and Zieglar and the beneficiaries, in language, a part of which, in view of the subsequent acceptance of assignment by Weidner, is significant, as follows: "We hereby jointly and severally assent, agree to, guarantee, warrant, approve, ratify and confirm said Declaration in all particulars." The plaintiff and appellant upon receiving the assignments already mentioned signed acceptances, each in the following words: "Assignee's Acceptance. The undersigned assignee in the foregoing assignment, does hereby accept said Assignment and does hereby approve, warrant, confirm and agree to the Declaration of Trust referred to in said Assignment and all the terms and conditions thereof, hereby acknowledging that the same has been read by the undersigned." Two factors are to be noted in this acceptance. Weidner accepted the assignment and thereby became a class B beneficiary, subject to all the terms and conditions imposed upon his assignor. But this was not deemed sufficient to accomplish and express the intent of the parties. Something further was required. Hence he agreed to, ratified, confirmed, approved, and warranted all the terms and conditions of the declaration. Let us suppose that Weidner had been originally a beneficiary, but for some reason his signature to the original ratification had not been appended, i. e., he had not executed it. And, indulging supposition further, let us contemplate the effect of his signature, upon discovery of the omission, in the exact words of the latter half of the acceptance. Can it be doubted that he had bound himself as effectually as though he had signed it in the first instance? We entertain no doubt upon the question, by which process of reasoning we also conclude that there was no doubt concerning the purpose and intent of the second half of the acceptance. By the first half Weidner was to become entitled to all the

rights and privileges of a beneficiary, and by the second half he assumed all of the burdens and responsibilities. This is made the more manifest by the provision already quoted, that the terms of the trust shall bind the assigns of the beneficiaries.

[2] Considerable time and attention is devoted by counsel to the authorities dealing with the assumption of liability under a contract by an assignee thereof. There is nothing mysterious about the rule of law announced therein, nor is there any conflict in the cases when read in the light of that which governs, to wit, the intent of the parties, construed either by their acts, the subject-matter of the contract, or their words. It is conceded by counsel for defendants that the mere assignment of rights under an executory contract does not cast upon the assignee any of the personal liabilities imposed by the contract upon the assignor, for which proposition of law the books are full of authorities. But they point out that, in harmony with section 1589, Civ. Code, which reads: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting," there are a number of cases which declare an assumption by the assignee, such, for example, as Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 25 P. 52, 10 L. R. A. 369, 21 Am. St. Rep. 63; Jones v. Allert, 161 Cal. 234, 118 P. 794, and Robinson v. Rispin, 33 Cal. App. 536, 165 P. 979. And our attention is especially directed to Brady v. Fowler, 45 Cal. App. 592, 188 P. 320, 321, which case involved an option with a covenant by the optionee to pay taxes during the term thereof. It was assigned, and the court in an opinion written by Mr. Justice Richards said: "The written instrument which the court declared to constitute an option is set out in full in the plaintiffs' complaint, and by its terms the obligations thereof are expressly made binding upon the successors and assigns of the parties thereto. No express assumption of those obligations by an assignee thereof was therefore necessary. Moreover, as we have said, this appellant having enjoyed the rights arising from his making of the monthly payments therein provided, he cannot escape the burdens coincidently imposed during such period of enjoyment." In the case of Barberich v. Pooshichian, 59 Cal. App. 507, 211 P. 236, 238, it was declared that, as between the vendors and defendants who were the assignees of vendees, and who had undertaken and agreed "to keep, observe, and comply with each and all of the terms and conditions in said contract contained" on the part of the original vendee, there was a privity of contract which rendered the defendants liable under the contract. And in Title Insurance, etc., Co. v. Amalgamated Oil Co., 63 Cal. App. 29, 218 P. 71, 75, the assignee of an oil lease who took "'together with all rights and privileges, burdens and benefits in said lease set forth'" was declared to be "liable for the performance of all the obligations agreed to by the original lessee." Counsel for plaintiff and appellant lay considerable stress upon the case of Armstrong Co. v. Shell Co., 98 Cal. App. 769, 277 P. 887, but an examination of the case discloses there was no obligation resting upon defendant's assignor to pay the royalties sought to be recovered in the action. We might multiply considerably the authorities to the same effect as the first three discussed, but no useful purpose would be served. Our conclusion is that the plaintiff and appellant assumed the obligations of his assignors and is liable with the other sole remaining beneficiary for the indebtedness.

[3, 4] This conclusion practically disposes of the claims of plaintiff and appellant that he was entitled to recover the sum advanced by him for the payment of taxes. Being under the obligation to pay the taxes, it is obvious that the finding of the trial court to the effect that no consideration was given or received for the execution of the purported and limited assignment by defendant and appellant Zieglar is correct. See Sullivan v. Sullivan, 99 Cal. 187, 33 P. 862; Marinovich v. Kilburn, 153 Cal. 638, 96 P. 303, and Shipley v. Rosemead Co., 100 Cal. App. 706, 280 P. 1017. It is also apparent that plaintiff's and appellant's claim that he was entitled to be reimbursed out of the sum realized from the sale of the beneficial interests pledged as security for the obligations which he had assumed is without merit.

It follows from what has been said that plaintiff was not entitled to recover, but that cross-complainants should have had judgment. The judgment in so far as it denies relief to plaintiff is affirmed, but that portion thereof which denies recovery to cross-complainants Frank B. Zieglar and Harry F. Carling is reversed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.

218 Cal. 340

## COAKLEY v. SWIM.

S. F. 14574.

Supreme Court of California.
June 20, 1933.

**1. Homestead 🔑217.**

Decree quieting plaintiff's title to homestead and enjoining defendant from asserting any claim thereto *held* not too broad as estopping defendant from proceeding to appraise value of homestead under statutes (Civ. Code, §§ 1245–1257).

**2. Exemptions 🔑62.**

No lien can be impressed upon exempt property.

**3. Homestead 🔑110.**

Homesteader is free to sell homestead and reinvest proceeds in other property which may likewise become exempt if he so elects.

**4. Homestead 🔑116.**

Attachment and abstract of judgment obtained against debtor and her husband could not impress debtor's homestead with lien, where value of homestead was not appraised and it was not shown lands thereafter lost homestead character, that they had enhanced in value in excess of $5,000, and that excess was subject to judgment (Civ. Code, §§ 1245–1257).

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In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Elizabeth Coakley against Meurice Swim, in which defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Affirmed.

Meurice Swim, in pro. per. and Russell P. Tyler, both of San Francisco, for appellant.

William M. Malone, of San Francisco, for respondent.

SEAWELL, Justice.

This appeal is taken by the defendant from a judgment quieting plaintiff's title to her homestead and removing therefrom a cloud which was cast thereon by defendant asserting an interest therein, arising out of an action entitled Swim v. James K. and Elizabeth Coakley, husband and wife, commenced by defendant, Swim, upon an assigned claim on account of hospital care and attention rendered to James K. Coakley, husband of Elizabeth Coakley, plaintiff herein. Said action terminated in a judgment in favor of plaintiff and against said Coakleys for the sum of $163, together with costs taxed at $8.55 and interest in the sum of $8.45. Respondent herein, Elizabeth Coakley, on May 31, 1927, long prior to the commencement of said action and before said indebtedness was incurred, made and filed a declaration of homestead on the real property affected by this action for the joint benefit of herself, her husband, and two minor daughters. It is not disputed that said homestead was selected as provided by law, or that it has not been abandoned or in any wise lost or become subject to the lien of third parties, unless the proceedings taken by plaintiff therein (appellant in this action) have impressed said homestead with the lien of appellant herein, as asserted by him. The facts upon which the contending parties rest their respective claims follow.

On April 13, 1928, the defendant, Swim, commenced an action against said Coakley to obtain a judgment on account of said assigned claim for hospital services. Five months after the filing of said action, to wit, September 12, 1928, while said homestead was, and for more than a year prior to the commencement of said action had been, a valid and subsisting homestead, the defendant herein caused a writ of attachment to issue, which was levied by the sheriff upon said homestead. Thereafter he recovered judgment for said sum of $163.95, together with costs. He thereupon caused to be filed and recorded with said city and county recorder an abstract of said judgment, and by virtue of this abstract of judgment and said attachment he claims that said homestead has become impressed with a lien.

By a cross-complaint defendant specially asserts a lien upon said homestead by virtue of the levy made of a writ of attachment, without taking any other or further proceedings.

The appeal is before us on a bill of exceptions. The only point that appellant attempts to make in his brief for a reversal or modification of the judgment quieting plaintiff's title is that the order of injunction is too broad. His contention is thus stated:

[1] "The judgment provides that respondent's title be quieted and further that appellant be enjoined and debarred from asserting any claim adverse to respondent's *title as hereby ascertained and determined.*" (Italics ours.) It is objected that, if appellant should proceed to appraise the value of said homestead under the provisions of sections 1245 to 1257, Civil Code, both inclusive, he would be violating the command of the judgment. There is no merit in this suggestion. The judgment could not be framed in any other language if it is to be made effective for any purpose. Every judgment is rendered with reference to the issues involved in each particular case. The decree enjoins the defendant from asserting any claim "adverse

to respondent's title *as hereby ascertained and determined*." Nothing could be clearer. The injunction is expressly limited to the issues therein involved, and not to any new issues or to a changed condition as to increased value in excess of the sum fixed by statute in a proper proceeding. The judgment is limited to the precise situation and state of facts existent at the time it was entered.

[2-4] Defendant's claim to a lien, as shown by his pleadings, is placed solely upon the effectiveness of the attachment and the abstract of judgment obtained in the manner related, ex proprio vigore, to impress a lien upon a valid and subsisting homestead. The judgment does not purport to estop the appellant from prosecuting any right given him by the provisions of sections 1245, et seq., Civil Code. Defendant took no steps whatever to have appraisers appointed to appraise the value of the homestead. Until its value was shown to exceed the sum of $5,000, it was immune from execution and forced sale, except in those cases named in section 1241, Civil Code, of which the instant claim is not one. No lien can be impressed upon exempt property. A homesteader is free to sell the homestead and reinvest the proceeds in other property, which may likewise become exempt if he so elects.

If a homestead could be impressed with a lien, in the manner in which defendant by his asserted claim seeks to incumber the free use and title of plaintiff's property, then a creditor's claim would cloud the title of every homestead and the favored object of the law, to wit, the protection of the homesteader, would wholly fail.

Neither by his answer, cross-complaint, or in any other proceeding did he raise the issue as to the value of the homestead. The only objection whatever made to the validity of the homestead by the pleadings or at all is that the homestead was "abandoned by process of law subsequent to the declaration." What is meant by that objection, or upon what theory it was made, is not pointed out by the defendant. Defendant at no time appeared as a creditor in conformity with sections 1245–1257, Civil Code, and, if he had actually done so, it would have availed him nothing, inasmuch as he did not show or attempt to show that he applied to the superior court in the county in which the homestead is situated for the appointment of persons to appraise the value of said homestead within the time provided by law. Section 1245, supra, expressly provides that if such "application shall not be made within *sixty* days after the levy of such execution the lien of the execution shall cease at the expiration of said period, and no execution * * * shall thereafter be levied upon the homestead." Absolutely no step has been taken by the judgment creditor upon a verified petition or otherwise, or within the time or in the manner provided by section 1246, Civil Code, et seq., to comply with the provisions of law prescribing the manner in which the value of a homestead may be appraised by the court. Appellant has not shown that the lands of plaintiff thereafter lost their homestead character, or that they had enhanced in value to an amount in excess of the sum of $5,000, and that the excess was subject to the payment of a valid judgment.

Klemmens v. First National Bank, 22 N. D. 304, 133 N. W. 1044, relied upon by appellant, has no relevancy to the instant case. In that case the term "forever enjoined" was held to be too broad, on the ground that it might affect the right of a judgment creditor even in case the homestead had lost its character as such. The term "forever enjoined," used in the cited case, but not in the instant case, has the sanction of ancient usage, and we do not necessarily see anything menacing in its use. As a matter of course, such language is limited to the existing and controlling facts of the case before the court. That is to say, the injunction would continue "forever" if the facts and situation under which it was issued should continue unchanged "forever." But we have no such situation confronting us, as the word "forever" does not appear in the judgment in the instant case.

The appeal is without merit. The judgment is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.

132 Cal.App. 625

## WALKER v. BACON.

Civ. 1237.

District Court of Appeal, Fourth District, California.

June 16, 1933.

**1. Automobiles** ⚷181(1).

"Willful misconduct" warranting recovery by guest against automobile owner is intentionally doing something which driver should not do, or failing to do something which he could do in operation of motor vehicle under circumstances from which accident and injury to guest would be probable (St. 1931, p. 1693).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

**2. Automobiles** ⚷244(20).

Willful misconduct of automobile driver may be inferred, in action for injuries to guest from circumstances surrounding accident (St. 1931, p. 1693).

**3. Automobiles** ⚷245(24).

In guest's action for injuries sustained when automobile ran into guard of cement culvert, automobile driver's willful misconduct *held* for jury.

**4. Automobiles** ⚷246(3).

In guest's action for injuries sustained in automobile accident, instructions defining willful misconduct, *held* erroneous as permitting recovery for gross negligence only (St. 1931, p. 1693).

> Instructions stated, in substance, that for willful misconduct there must be an actual and conscious knowledge or its equivalent of peril to be apprehended and a like failure to act, and that such knowledge may be inferred from circumstances showing a reckless disregard for safety of others and a willingness to inflict injury complained of.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Anne Walker against Albert Bacon. From a judgment for plaintiff, defendant appeals.

Reversed.

Ray W. Hays and Wakefield & Hansen, all of Fresno, for appellant.

Frank Curran and Laurence B. Myers, both of Fresno, for respondent.

ANDREWS, Justice pro tem.

The essential facts developed on trial are: That both parties were employees of Fresno county, defendant a traffic officer, plaintiff a visiting nurse. Both had reason to go out of town on business connected with their work. Defendant invited plaintiff to ride with him and he would go first to the place he was to visit and then take her to the place she must go. The road at the place of the accident was paved with bitumen to the width of sixteen feet, with dirt shoulders two or three feet wide on each side, making the width about twenty-two feet in all. It is described as of old-fashioned construction, crowning in the center, and not very smooth. A cement culvert crossed under the road, on the end of which was some sort of cement guard, three feet high, into which the car ran, the track marks showing a sudden sharp deflection from its course into the cement culvert. Both parties were injured, and neither was able to tell what happened or what caused the car to leave the road. No other car was passing. Defendant was driving around sixty miles per hour, and plaintiff protested that it was too fast. The steering gear was worn and unsafe, of which defendant had been notified.

The decision to be arrived at depends upon the construction to be given the words "willful misconduct." Construed according to ordinary or popular definition, they would mean any act not conforming to right behavior, done purposely. This definition would describe most acts of negligence. For instance, reckless driving is wrong in law and as deportment, is done knowingly, but is only negligence. The history of the legislation culminating in limiting liability to acts of willful misconduct in guest cases gives evidence of a purpose to eliminate entirely the element of negligence as a basis of liability. The cases cited all agree that the Legislature intended by these words something other and different than negligence, whether ordinary or gross. The legislative sense of fair play seems to have been shocked by the perverted use of the law of negligence in guest cases to recover indirectly against insurance companies by suits against indifferent and irresponsible hosts; in some cases being a conspiracy between guest and host against the insurance carrier. The intent of the law as it stands must be derived from a construction so far technical that it does not embrace any meaning wherein negligence would be included, or the acts, if constituting negligence, must be subordinated to the idea of intent.

The cases quite generally use the word "intent" as pointing out the purpose of the law, the key with which to unlock its meaning. Willful misconduct refers to intentional acts; that is, acts designed to bring about the result involved in the suit. Some cases point out that the wrongful act complained of may be either positive or negative, one of commission or omission, but either or both must be intentional. In any definition of intent there is no room for any constructive knowledge because intent implies actual knowledge. Intent relates to a mental state or purpose, and there can be no direct testimony of the fact of its existence except on the part of the person who is charged with having the intent. The fact of its existence can be deduced from statements or conduct of the party in the light of surrounding circumstances or any motive or influence shown to exist.

The intent involved in the term "wrongful" is such intent as must be an element of most crimes, a deliberate purpose to accomplish the wrongful act complained of in the suit. Of course, such a conception of the purpose of the Legislature must recognize that practically no guest cases can be maintained at all, for rarely, if ever, would there be a case of intentional wrecking of a car by its owner or driver. Nevertheless, it is believed that this must be held to be what was intended by the enactment of the law, for there is no other logical stopping place. Any other construction which attempts to work out a basis of liability growing out of these words will end in permitting recovery on the basis of negligence, and is what leads to the confusion which exists. Therefore the rule should not be difficult to express. Willful misconduct would be an act done by the host with intent to cause the disaster involved in the suit with consequential damages to the guest, or the failure by the host to prevent the disaster, intending by such omission to permit the occurrence, with such injuries as would probably result therefrom to the guest.

The evidence in the instant case nowhere justifies a finding by the jury that defendant intended to cause the car to be wrecked with consequent injury. He may have been driving faster than was safe and did not cease to do so at plaintiff's request, and this may have been a contributing cause to her injuries, and he may have been warned that the steering gear was worn and dangerous, and he may have used bad judgment and have been negligent, but not a word of testimony or a circumstance connected with his conduct would lead to the inference that he deliberately caused or permitted the accident.

The other propositions advanced by appellant as errors are not considered or discussed; it being deemed best to rest the action taken by this court upon the view that the evidence does not support the judgment.

Judgment reversed.

MARKS, Justice (concurring).

I concur in the order reversing the judgment, but place my concurrence upon grounds other than those set forth in the foregoing opinion. In order to make my position clear, it is necessary to further review some of the facts of the case which are not particularly emphasized in the opinion of my associate.

The road over which appellant was driving just before the accident was not smooth. He described it as having a high center, and narrow, and with deep ditches on either side. He had been over the road many times. I quote from his testimony:

"Q. * * * Eliminating the question of duty and considering the question of the condition of that highway, would you drive in excess of 40 miles an hour, ordinarily over it? A. No.

"Q. And you would not because of the condition of the highway, isn't that a fact? A. Yes."

There is no evidence indicating that any duty required appellant to drive at a high rate of speed at the time of the accident.

Respondent testified that she became frightened at the rate of speed at which appellant was driving and saw that the speedometer was registering sixty miles an hour. She asked him not to drive so fast, but he increased his speed. She asked him again just before the accident not to drive so fast. Appellant testified that the speedometer registered about 10 per cent. slow.

Appellant's son testified:

That he had greased the car before the accident and that "the steering knuckle of the arm, from the steering column down, underneath the car, was very badly worn.

"Q. Is that steering knuckle— A. Yes, the piece that fits over it.

"Q. It was badly worn? A. Yes, sir.

"Q. Did you say anything to your father about that condition you observed? A. Yes, sir.

"Q. Did you tell him it was unsafe to drive his car? A. Yes.

"Q. Very well. How many times did you tell him, prior to March 15th? A. Twice that I remember of."

Numerous attempts have been made to define "willful misconduct" without any definitely satisfactory result. In Helme v. Great Western Milling Co., 43 Cal. App. 416, 185 P. 510, 512, it was said: "'Willful misconduct' means something different from and more than negligence, however gross." See, also, Howard v. Howard (Cal. App.) 22 P.(2d) 279, 281. It invites difficulties to conclude that "willful misconduct" is "something different" from negligence. If there is no negligence, there can be no willful misconduct, for, if there be no negligence, the driver of an automobile must be operating it in accordance with all the rules of the road and the dictates of prudence and caution. It is obvious that under such circumstances there could be no willful misconduct. It should be true that willful misconduct is "more than negligence, however gross."

[1, 2] Gross negligence has been defined as "'the want of slight diligence,' as 'an entire

failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others,' and as 'that want of care which would raise a presumption of the conscious indifference to consequences.'" Howard v. Howard, supra; Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327; 19 Cal. Jur. 554, and cases cited. When the Legislature in 1931 (St. 1931, p. 1693) omitted gross negligence from the grounds upon which a guest could recover damages against the owner, driver, or person responsible for the operation of the motor vehicle, it restricted the right of recovery to intoxication or willful misconduct. While negligence may be involved in willful misconduct, it is apparent that the Legislature intended to confine the right of recovery to a degree of carelessness and recklessness that is greater and beyond that which the law then knew and defined as gross negligence and which is "willful" on the part of the responsible person. While it is difficult to define that degree of carelessness which the Legislature must have had in mind, it is my opinion that it must be held that willful misconduct is willfully, that is, intentionally, doing something which a driver should not do, or failing to do something which he could do in the operation of a motor vehicle under circumstances from which an accident and injury to the passenger would be probable. Of course, willful misconduct may be inferred from the circumstances surrounding the accident.

[3] Taking into consideration the fact that appellant drove his automobile at a speed of at least sixty-six miles an hour over a high-crowned road that was not smooth when he knew the condition of the road did not justify a speed of more than forty miles an hour, and knowing further that his automobile had a very badly worn steering knuckle, it is my opinion that his conduct might have been willful misconduct, and that the jury was fully justified in drawing the conclusion that he was guilty of willful misconduct. This evidence, if believed, showed that he was intentionally doing something with a knowledge that serious injury would be a probable result to his passenger.

[4] The trial judge gave the following instructions to the jury in which the attempt was made to define "willful misconduct":

(a) "Plaintiff alleges that the defendant drove and operated his automobile at a high and dangerous rate of speed, and in such a careless and reckless manner, without regard to the safety of the plaintiff, that he caused the automobile to run into a concrete culvert on the edge of the highway, and that the carelessness, recklessness and wilful misconduct of the defendant was the sole, direct and proximate cause of said accident and the injuries which plaintiff received. The defendant denies these allegations and it is upon the issues raised by the complaint and the answer that the case is submitted to the jury."

(b) "The burden is on the plaintiff to prove by preponderance of the evidence that the defendant was guilty of wilful misconduct in the operation of his vehicle at the time and place in question, and, likewise, to prove by a preponderance of the evidence that the injuries received by plaintiff, if any, proximately resulted from the wilful misconduct of the defendant."

(c) "The word 'Wilfully' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage."

(d) "You are instructed that to constitute 'wilful misconduct' there must be actual knowledge, or that which in law is deemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury."

(e) "In order to prove the requisite knowledge, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of the road or the automobile, but that it is sufficient if it appears that the circumstances surrounding the act of commissions or omissions are such as evinces a reckless disregard for the safety of others and a willingness to inflict the injury complained of."

(f) "If you believe from the evidence in the case that the defendant at the time and place referred to in plaintiff's complaint was guilty of 'wilful misconduct' in the operation of his automobile and that said 'wilful misconduct' directly and proximately resulted in and caused said automobile in which plaintiff was a passenger to run into a concrete culvert on the edge of the highway and be wrecked and if the wrecking of said automobile and the injuries plaintiff received thereby, if any, were caused directly and proximately by the 'wilful misconduct' of the defendant in the operation of his automobile, then I instruct you that plaintiff is entitled to recover against the defendant, Albert Bacon."

(g) "If you find that the defendant, Albert Bacon, at the time and place referred to in plaintiff's complaint, drove and operated his automobile with the knowledge of the peril of the unsafe condition of the road and with conscious indifference to consequences, then you are instructed that said defendant, Albert Bacon, was guilty of 'wilful misconduct' in the operation of his automobile."

Instructions which I have designated "b" and "f" seem to have been given on motion of the court. The other instructions were proposed by respondent and given with slight modifications in "a," "d," "e," and "g." There were no other instructions given on "willful misconduct."

These instructions would be proper in defining gross negligence. When the court told the jury that in "willful misconduct" there must be an actual and conscious knowledge or its equivalent of the peril to be apprehended and a like failure to act and that this knowledge may be inferred from circumstances showing "a reckless disregard for the safety of others and a willingness to inflict the injury complained of" it did no more than say that willful misconduct may be "an entire failure to exercise care or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others" and "that want of care which would raise a presumption of the conscious indifference to consequences" which constitutes gross negligence as defined in Krause v. Rarity, supra. It falls far short of applying the rule that "willful misconduct is wilfully, that is intentionally, doing something which a driver should not do, or failing to do something which he could do in the operation of a motor vehicle under circumstances from which an accident and injury to the passenger would be probable."

The quoted instructions permitted a recovery by respondent for gross negligence only. The implied finding of the jury might indicate a conclusion by that body that appellant was only guilty of gross negligence that did not amount to willful misconduct. Under these circumstances the judgment should not stand. A new trial should be had so that it may be determined in the court below whether the injury to respondent resulted from the willful misconduct of appellant.

The other error complained of, and probably a serious error, need not be considered here, as it need not occur at the next trial.

I concur: JENNINGS, Acting P. J.

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133 Cal.App. 99

## O'KEEFE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 9186.

District Court of Appeal, Second District, Division 1, California.

June 30, 1933.

**Executors and administrators** 🔑216(2).

That former attorney for executor had sued executor to recover for services and that assignment of fees to executor had been made as security for payment of certain notes *held* not to prevent court having jurisdiction of estate from fixing value of attorney's fees.

Application by Anne O'Keefe for a writ of mandate to be directed to the Superior Court in and for Los Angeles County, to compel respondent to fix portion of attorney's fees payable from the estate of Michael Maher, deceased, to which applicant was entitled as attorney for executor of such estate.

Peremptory writ directed to issue.

Ralph C. Curren, of Los Angeles, for petitioner.

Avery M. Blount and William J. Clark, both of Los Angeles, for respondent.

PER CURIAM.

In course of administration of the estate of Michael Maher, deceased, the petitioner, Anne O'Keefe, was the attorney for the executor until March 10, 1932. At that time the administration was practically completed and was in a condition to be closed, except for the payment of an inheritance tax and the preparation of the final account and petition for distribution. At this point the attorney was discharged and another attorney substituted in her place. Later all taxes were paid, and executor's final account filed. Thereupon petitioner made application to the court to fix the portion of attorney fees payable from said estate to which she is entitled, determine the reasonable value of the extraordinary services rendered by her, and direct payment of said sums to petitioner.

When said matter came on for hearing, the court dismissed the petition without determining the merits of the same, said dismissal being made on the ground that the court is without jurisdiction to hear and determine said petition. The only reasons suggested in justification of such refusal to exercise such jurisdiction are that there was evidence that petitioner has filed in the municipal court an action against the executor James H. Maher, individually, to recover for legal services rendered to him, including the services rendered by her in course of administration of said estate, and the further fact of a purported written assignment by petitioner to James H. Maher of her said fee for services to the estate, such assignment purporting to have been made as security for the payment of certain notes.

Inasmuch as the court has jurisdiction of the subject-matter of said application for allowance of said attorney fees, and inasmuch as such jurisdiction is in no wise affected by the pendency of said action in the municipal court, or by the said purported assignment of said notes, it is the clear duty of respondent court to proceed with the determination of said application upon its merits.

For the foregoing reason it has been ordered that the peremptory writ issue.

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

132 Cal.App. 770

### PEOPLE v. YOUNG et al.

Cr. 252.

District Court of Appeal, Fourth District, California.

June 23, 1933.

**Prostitution** ⚿1.

Female *held* chargeable as principal with offense of pimping, though opening statement of statute defining such offense recites "Any male person" committing acts therein prohibited should be guilty of felony (St. 1911, p. 10; Pen. Code, §§ 31, 261, 971, 1111).

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Earl Watson Young and June Young were charged with the offense of pimping. From a judgment dismissing the charge as to June Young, the People appeal.

Reversed.

U. S. Webb, Atty. Gen., and Thos. Whelan, Dist. Atty., and Frank Pomeranz, Deputy Dist. Atty., both of San Diego, for the People.

H. P. Sweet, of San Diego, for respondent.

ANDREWS, Justice pro tem.

The defendants having been arraigned upon the information, the defendant June Young entered a demurrer to the second count of the information. Her demurrer was sustained by the trial court and judgment entered dismissing her. The appeal here presented is by the people from that judgment. The crime involved is defined in the law as follows (Stats. 1911, p. 10): "Any male person who, knowing a female person to be a prostitute, shall live or derive support or maintenance, in whole or in part, * * * shall be guilty of a felony, to wit: pimping. * * *"

The question presented by the appeal is whether a female can be charged with this offense because the opening statement of the law is "Any male person." Penal Code, § 31, reads as follows: "All persons concerned in the commission of a crime * * * and whether they directly commit the act * * * or, not being present, have advised * * * its commission * * * are principals in any crime so committed." Penal Code, § 971, reads: "* * * and all persons concerned in the commission of a felony, whether they directly commit the act * * * or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal."

By these sections it is manifest that one who, not being the principal actor but who assists in the commission of a crime, although absent from the scene, is regarded as a principal and may be charged as such in the presentment without using any terms indicating the fact that such person was an accomplice. Penal Code, § 68, reads: "Every executive officer * * * who * * * receives * * * any bribe * * * is punishable" etc.

Under this section, it is held in People v. B. M. Anderson et al., 75 Cal. App. 365, 242 P. 906, that one not an executive officer can be convicted of the offense here charged in conjunction with the principal who has been guilty of the offense. In this case, reference is made to the distinction of principal and accomplice, although both are being prosecuted for the same offense by reason of sections 31 and 971, above cited.

Penal Code, § 261, reads: "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator," etc. In People v. Bartol, 24 Cal. App. 659, 142 P. 510, it is held that information of this crime, brought the case under section 31 aforesaid, and the discussion in the opinion sets forth that while a woman could not be principal as that term is commonly understood, she could be convicted of the crime by proof of assisting in its commission. It should be noted that the clear inference in said section is that the crime set forth could only be committed by a male person, quite as clearly as if the language were explicit as in the crime involved in the case at bar.

The defendant cites the case of People v. Simpson, 79 Cal. App. 555, 250 P. 403, as one controlling in this case because it passes upon the question here involved. In that case the holding was made in the matter of corroboration of the testimony of a female accomplice.

Penal Code, § 1111, reads: "* * * An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." If the court in the case last cited had in mind the distinction recognized in the other decisions above cited, between principal and assistant, although charged in form with the same offense, it may have indicated that the word "identical" used in section 1111 was the basis for its holding and the summary disposition of the question. In that case, which involved the same crime here involved, in disposing of the question which is presented on the present appeal, the court used this language and no other: "It is here manifest that the witness Ruby Young could not be prosecuted for the crime of pimping."

It is evident that the question as here presented was not before that court. The trial court in this case may well have felt bound by that decision and relied upon it properly in sustaining the demurrer; but when the question is again presented to a court of review and there is no other expression upon this subject by other courts of review in this state, so that no rule has become settled, it seems appropriate that in this case further consideration should be given to the question.

The sections cited which make principals and accomplices subject to be prosecuted as principals and under the same wording or charge, so far as the form of the presentment is concerned, and the holdings that in case of an executive officer, one not an executive officer can be convicted, and in the case of rape a woman who assists can be convicted of that offense, seem to require a holding that a woman charged with the offense here involved, in connection with the charge against a male person of the offense, is properly charged and could be lawfully convicted on evidence that she assisted the principal.

The judgment of the lower court is reversed.

We concur: BARNARD, P. J.; MARKS, J.

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133 Cal.App. 96

## HARRINGTON v. FREDDI et al. (two cases).

Civ. 8589, 8590.

District Court of Appeal, Second District, Division 1, California.

June 29, 1933.

1. **Appeal and error** 🔑1003.
Verdict must stand if there is any substantial evidence supporting it, although preponderance of evidence may be against it.

2. **Automobiles** 🔑245(78).
Whether plaintiffs in automobile collision were contributorily negligent because of speed maintained *held* for jury.

3. **Trial** 🔑260(1).
Denial of requested instructions was not error where court fully instructed jury.

Appeals from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Separate actions by Ernest Harrington and by Ida Harrington against Luis Freddi and another, which were tried together. From judgments for plaintiffs, defendants appeal.

Affirmed.

Albert Nelson, of San Luis Obispo, and Thomas P. Weldon, of Santa Maria, for appellants.

Fred A. Shaeffer, of Santa Maria, for respondents.

YORK, Justice.

The plaintiffs Ernest and Ida Harrington are husband and wife, and upon stipulation their two actions against the defendants, which arose out of the same automobile accident, were tried at the same time before the same jury; said jury returning a separate verdict in favor of each plaintiff. From the judgments entered pursuant to said verdicts, the defendants appeal.

The accident occurred on the morning of April 23, 1931, on the state highway in the county of San Luis Obispo at a point south of the city of Arroyo Grande and north of the town of Nipomo, as the plaintiff Ernest Harrington, accompanied by his wife, Ida Harrington, was driving southerly on said highway in a Star car cut down and equipped for the conveyance of fish, and the defendant Prandini was driving northerly on said highway a truck loaded with cans of milk. The truck was going down a slight grade approaching a curve, and the Star car was approaching the same curve upgrade when the accident occurred and the plaintiffs were badly injured. The complaint in each case alleged that plaintiffs were injured as result of the careless and negligent operation of the truck by the defendant Prandini, as the agent of defendant Freddi, by whom he was employed. The answer in each case admitted the agency and the collision between the two motor vehicles, but denied the other material allegations of the complaint and alleged contributory negligence on the part of each plaintiff.

The appellants make twelve assignments of error: (1) The trial court erred in denying motion for nonsuit; (2 to 8, inclusive) the trial court erred in refusing to give certain instructions requested by defendants; (9) the evidence is insufficient to justify the verdict; (10) the verdict is against law; (11) plaintiffs were guilty of contributory negligence; (12) the court erred in denying motion for a new trial.

[1, 2] Appellants maintain that the motion for nonsuit should have been granted for the reason that plaintiffs' Star car was being operated in an unlawful manner and that, therefore, they were guilty of contributory negligence; one of their contentions being that

since the Star car was not equipped with a windshield wiper, plaintiffs were unable to see clearly through the windshield, and that if the Star car had been proceeding at a rate of speed that would have been reasonable at the time the driver thereof saw the truck, it could have been stopped in ample time to have avoided the collision. While it is true that the Star car was not equipped with a windshield wiper, the evidence clearly shows that Mrs. Harrington had wiped the windshield clean before passing Arroyo Grande and before the collision occurred, and further there is no evidence in the record which even tends to show that the plaintiffs were unable to see through the windshield at the time of the collision. Appellants further contend that since there was a curve in the road and the plaintiffs were unable to see two hundred feet ahead, they were violating the law in operating their car in excess of fifteen miles per hour. There is a conflict in the evidence as to whether the accident occurred on or approaching the curve in question, but at any rate, plaintiff Ernest Harrington testified that he was able to see ahead of his car for about 150 feet and defendant Prandini testified that he saw the Harrington car at least 160 yards before the accident. Furthermore, the jury was taken to the scene of the accident and were able to determine from observation on the ground just how far a person traveling on the highway could see around the curve in question. As was said in Badger v. City and County of San Francisco, 41 Cal. App. 571, 573, 182 P. 978: "In considering this proposition, [contributory negligence] it is necessary always to bear in mind that the jury has found to the contrary. In this case it not only returned a general verdict to that effect, but, in answer to a specific question, it declared that George H. Scott did not negligently drive upon the track. If there was any substantial evidence in support of this fact the verdict must stand, although the preponderance of the evidence may be against it." We believe this reasoning is applicable to the facts disclosed in the case before us, and that there was no error in denying the motion for nonsuit.

[3] We have carefully examined the instructions complained of—requested by defendant and refused by the trial court—and we are of the opinion that no prejudicial error was committed by the trial court in its refusal to give these instructions, in view of the fact that the court very fully instructed the jury as to the law and facts covered by the pleadings and proven in the case.

We find no merit in the last four points made by appellants.

The judgments appealed from are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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132 Cal.App. 647

## MENGES v. ROBINSON et al.

Civ. 1412.

District Court of Appeal, Fourth District, California.

June 17, 1933.

**1. Appeal and error** ⚷161.

Appellant accepting benefits of judgment appealed from cannot attack it, unless reversal thereof cannot affect his right to such benefits.

**2. Judgment** ⚷768(1).

Appellant's creation of lien on respondent's realty by recording abstract of judgment appealed from provides security for enforcement of judgment if it becomes final on appeal (Civ. Code, § 2872; Code Civ. Proc. §§ 671, 674, as amended by St. 1927, pp. 829, 830, and § 1180).

**3. Appeal and error** ⚷164.

Appellant's action in causing abstract of judgment appealed from to be recorded *held* not ground for dismissal of appeal as attempt to enforce judgment or acceptance of fruits thereof (Code Civ. Proc. § 674, as amended by St. 1927, p. 830).

**4. Appeal and error** ⚷766.

Failure of interrogations, preceded by title "Statement of Questions Involved," on first page of appellant's brief, to conform strictly to requirements of court rule, *held* not to require dismissal of appeal (Rules for Supreme Court and District Courts of Appeal, rule 8, § 2).

The interrogations implied that court erred in admitting certain testimony and denying motions for instructed verdict and judgment notwithstanding verdict and that jury erred in rendering verdict for unsatisfactory amount because it entirely disregarded certain instructions.

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Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Mark M. Menges against Richard L. Robinson, A. R. Mott, H. C. Bosch, and others. Judgment for plaintiff in an unsatisfactory amount, and he appeals. On the motion of defendants Mott and Bosch to dismiss the appeal.

Motion denied.

George H. Gobar, of Fullerton, for appellant.

Head, Wellington & Jacobs, of Santa Ana, for respondent Mott.

R. Y. Williams and Charles D. Swanner, both of Santa Ana, for respondent Bosch.

JENNINGS, Justice.

This is a motion by two defendants to dismiss plaintiff's appeal from the judgment. Two contentions are urged in support of the motion. The first of these contentions is that the plaintiff in whose favor the judgment was rendered has, subsequent to the institution of the appeal, taken affirmative action upon the judgment from which the appeal is prosecuted, thereby recognizing the validity of the judgment and consequently waiving his right to appeal. The second contention is that plaintiff's opening brief is fatally defective in that it fails to set forth on the first page thereof a statement of the question involved as required by section 2, rule VIII, of the Rules of the Supreme Court and District Courts of Appeal.

It appears from the record herein that the plaintiff instituted this action in the superior court of Orange county to recover from the defendants the sum of $5,000, together with interest and costs on a promissory note for the aforesaid amount alleged to have been executed by the defendants in favor of a third person who was alleged to have transferred the note to plaintiff prior to maturity for a valuable consideration. Defendants Bosch and Mott filed answers to plaintiff's complaint denying that plaintiff was a holder in due course of the note and further pleading as a separate defense to plaintiff's complaint that the defendants were induced to execute the note through fraudulent representations of the payee who later fraudulently conspired with plaintiff to transfer the note to him for nominal consideration. An additional defense alleged in the answers was failure of consideration.

The action was tried before a jury which returned a verdict in plaintiff's favor in the amount of $1,000. In conformity with the verdict thus returned, the judgment was duly entered. Plaintiff then moved the court for a new trial which was denied. Thereupon, plaintiff, being dissatisfied with the judgment, perfected an appeal to this court. After giving notice of appeal, plaintiff secured from the clerk of the court an abstract of the judgment and caused it to be recorded in the office of the county recorder of the county wherein the action was tried. Because of plaintiff's action in thus causing an abstract of the judgment to be recorded, it is contended that he accepted a benefit or advantage of the judgment and thereby waived his right to complain of it on appeal.

[1] There is no doubt that the rule is settled that an appellant may not accept the benefit of a judgment and at the same time assert his right to attack it. In re Estate of Shaver, 131 Cal. 219, 221, 63 P. 340; Storke v. Storke, 132 Cal. 349, 353, 64 P. 578; County of San Bernardino v. County of Riverside, 135 Cal. 618, 620, 67 P. 1047; First Nat. Bank v. Wakefield, 138 Cal. 561, 562, 72 P. 151; Turner v. Markham, 152 Cal. 246, 247, 92 P. 485; In re Estate of Ayers, 175 Cal. 187, 190, 165 P. 528; Graham v. Alchian, 51 Cal. App. 263, 197 P. 134. The reason supporting this established legal principle is that the action of an appellant who voluntarily accepts the advantage afforded by a judgment and yet seeks to reverse it is fatally inconsistent. To this rule there is a clear exception that, where a reversal of the judgment cannot affect the right of the appellant to the benefit which he has taken, as, for example, where there is no controversy as to his right for the amount for which the judgment was given, but he claims to be entitled to a larger amount, he is not precluded from an appeal even though he has voluntarily accepted the amount awarded to him by the judgment. County of San Bernardino v. Riverside, supra; Walnut Irrigation Dist. v. Burke, 158 Cal. 165, 110 P. 517; In re Estate of Hubbell, 216 Cal. 574, 577, 15 P.(2d) 503; Guho v. City of San Diego, 124 Cal. App. 680, 682, 13 P.(2d) 387. The exception is not here applicable. The record shows that respondents by their answers to the complaint and by the evidence submitted on their behalf during the trial of the action denied that they were liable in any amount to appellant on account of the note which constituted the basis for appellant's right of action.

The contention of respondents on the motion to dismiss the appeal herein that appellant has taken affirmative action in support of the judgment with which he announces his dissatisfaction by his appeal therefrom is not devoid of merit. There is a species of inconsistency in appellant's action in this regard. Nevertheless, bearing in mind the desirability that appeals shall be considered on their merits, we may with propriety consider the effect of appellant's action in causing an abstract of the judgment to be recorded for the purpose of arriving at the conclusion whether or not he thereby brought himself within the operation of the aforementioned rule so that it must be declared that he waived his right of appeal from the judgment.

It must be conceded at the outset that appellant by his action secured nothing of tangible value. Certainly he derived no direct financial benefit. The only result which followed from the recordation of the judgment abstract was the creation of a judgment lien on any real property in Orange county owned by respondents or either of them at the time of recordation or which they might thereafter acquire during the time the lien continued in existence. If neither of them at the time of recordation owned any such property in the aforesaid county and if during the time the lien should continue neither should acquire any real property therein, obviously no benefit or advantage of any character can be said to have been derived. It may be observed that it is nowhere made to appear that either of the respondents owned any real property in Orange county. It may therefore be declared that, so far as appears, appellant derived no direct benefit by the recordation of the abstract. The only advantage that he may secure consists of a speculative benefit depending on the acquisition by either of the respondents of real property in Orange county during the time the judgment lien continues in existence.

[2] Furthermore, even if it be assumed that respondents owned real property in Orange county at the time the abstract of the judgment was recorded, appellant, by taking the affirmative action of causing the abstract to be recorded, derived no benefit other than the impressment on such real property of a judgment lien. The effect produced by the creation of such a lien is that some security is thereby provided for enforcement of the judgment should it become final on appeal. This must be true, since it is a distinctive characteristic of a lien that it makes the property to which it attaches security for the performance of an act. Section 2872, Civ. Code; section 1180, Code Civ. Proc.

Prior to 1927 (St. 1927, p. 829), section 671 of the Code of Civil Procedure provided that a judgment lien which would attach to real property of the judgment debtor in the county where the judgment was entered was created by the docketing of the judgment. The Legislature of California in that year amended the aforesaid section. Since its amendment the section reads as follows: "*Entries in docket.* Immediately after filing the judgment-roll, the clerk must make the proper entries of the judgment under appropriate heads, in the docket kept by him." In the same year (St. 1927, p. 830), the Legislature also amended section 674 of the Code of Civil Procedure to provide for the creation of a judgment lien upon real property of a judgment debtor in any county in the state by the recordation in such county of a certified abstract of a judgment rendered by any court of record of California, or of the United States. The effect produced by these amendments was therefore to eliminate the automatic creation of a judgment lien on real property of a judgment debtor in the county where the judgment is entered by the mere docketing of the judgment and to require the affirmative action of recordation of an abstract of the judgment in order to create a judgment lien which will attach to real property of a judgment debtor in such county.

[3] We entertain the opinion therefore that, although appellant's action in causing an abstract of the judgment to be recorded after he had announced his dissatisfaction with the judgment by initiating an appeal from it was inconsistent, nevertheless he should not, by reason of such inconsistent action, suffer the penalty of having his appeal dismissed. We make this declaration with due regard to the following language which is contained in the decision in Stetson v. Sheehan, 52 Cal. App. 353, at page 358, 200 P. 387, 390: "And it would seem that the only penalty which a plaintiff appealing from a money judgment in his favor might be put to in the event of his seeking to enforce said judgment pending his appeal would be that of having his appeal dismissed upon the ground that he had waived the same by accepting or seizing upon the benefits of said judgment."

With respect to the above-quoted language it may be observed, first, that it is dictum; and, second, that it is not applicable to the situation which exists in the instant case. So far as the record shows, appellant has proceeded no further in the enforcement of the judgment in his favor than to cause an abstract of it to be recorded. We think that it may not fairly be said that thereby he is "seeking to enforce" a judgment with which he has announced his dissatisfaction, but rather that he has simply taken the precaution to provide some security for the satisfaction of the judgment should it be affirmed on appeal. Certainly it cannot be successfully maintained that he has accepted "the fruits of the judgment," as this phrase is employed in numerous decisions hereinabove cited.

[4] The second contention of respondent urged in support of the motion to dismiss the appeal is that there is not set forth on the first page of appellant's opening brief a proper statement of the question involved on the appeal as required by section 2 of rule VIII of the Rules for the Supreme Court and District Courts of Appeal. Examination of the brief shows that the first page contains three interrogations preceded by the title, "Statement of Questions Involved." The first of the three interrogations refers to the court's action in admitting certain testimony and carries the implication that the court erred in permitting the testimony to be given. The second interrogation refers to the court's action in denying motions for an instructed verdict and for judgment notwithstanding the verdict, and carries the implication that the court's action in so doing constituted reversible error. The third interrogation refers to the amount for which the verdict was rendered, and carries the implication that the jury erred because it entirely disregarded certain instructions assertedly given by the court. It is our opinion that the so-called "Statement of Questions Involved," set forth on the first page of appellant's opening brief, does not strictly conform to the requirements of the above-mentioned rule. Nevertheless, it must be conceded that appellant made some effort to comply with the rule, and under the cir-

cumstances we do not feel impelled to impose upon him the harsh penalty of dismissal.

For the reasons stated, the motion of respondents to dismiss the appeal herein is denied.

We concur: BARNARD, P. J.; MARKS, J.

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132 Cal.App. 672

## FRIEDMAN v. BARBE et al.

Civ. 7678.

District Court of Appeal, Second District, Division 1, California.

June 20, 1933.

**Automobiles 🔑244(20).**

In guest's action for injuries, evidence supported finding that motorist was negligent in attempting left turn at intersection without giving proper signal and in not waiting for traffic to clear (St. 1923, p. 558, § 130, as amended by St. 1925, p. 412, § 15a).

> Evidence disclosed that driver failed to wait until traffic at intersection cleared, but approached and attempted to make left turn at intersection, stopped on street car tracks, and indicated by his left arm his intention to make left turn, but did not indicate intention to stop, as required by St. 1923, p. 558, § 130, as amended by St. 1925, p. 412, § 15a.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Lena Friedman against E. H. Barbe and Samuel C. Ward. Judgment for plaintiff, and defendants appeal.

Affirmed.

Foster & Klinck and George N. Foster, both of Los Angeles, for appellants.

Lissner, Roth & Gunter and Louis M. Lissner, all of Los Angeles (I. H. Prinzmetal, of Los Angeles, of counsel), for respondent.

DESMOND, Justice pro tem.

The plaintiff recovered a judgment in a jury-waived trial against both defendants in the sum of $3,500, assessed as damages for injuries sustained in an automobile collision. Both defendants have appealed, but no brief has been filed by defendant Barbe. Where hereinafter the term appellant is used, it refers to the other defendant, Ward. About 7:40 p. m. of July 30, 1929, plaintiff was riding in the rear seat of an automobile owned and operated by her son-in-law, the appellant Ward, who at that time was driving north on Berendo street near Beverly boulevard in the city of Los Angeles. Beverly boulevard is a main-traveled thoroughfare with boulevard stop signs throughout its course. The appellant brought his car to a full stop as he reached the southerly line of Beverly boulevard and observed traffic moving east and west along that street. According to his testimony, he saw more than one automobile coming from the west and a street car and at least one other automobile approaching from the east. He decided to enter the intersection between this traffic moving east and west, and, when he had reached the car tracks, came to a full stop; the street car in the meantime having passed his car on its westward course. Appellant put his hand out for a left turn, and, as his car stood upon the tracks, Barbe driving toward the east, struck the rear of the Ward car with his own auto, moving it in an easterly direction, and in this collision the plaintiffs suffered the injuries for which damages were awarded.

Appellant claims that the record does not as a matter of law disclose any evidence of negligence on his part. Respondent contends that the evidence justified the court in finding appellant was negligent in two particulars: First, in not waiting at the southerly curb line until all traffic with which he might collide had moved both east and west; next, in coming to an abrupt stop on the car tracks in approximately the middle of a street where traffic was moving in both directions. It may be noted here that Berendo street does not cross Beverly boulevard in a direct line; the northerly portion of that street being some 60 or 70 feet west of the southerly portion measured between the center lines of the street. The diagram of the locale also indicates that, when appellant stopped his car in Beverly boulevard, it stood in a diagonal position with the forward part pointing to the northwest across the northerly or westbound car line; the rear portion being across the east-bound car line. Appellant testified that, when he stopped his car in that position, the street car had reached a point approximately 60 feet to the west. He also testified that at that instant the only other west-bound traffic was an automobile approximately 200 feet east of him traveling at a speed which he estimated at 30 miles per hour; further, that he remained stationary for about ten seconds. Under these circumstances, can it be said that there was no evidence to justify the finding that this appellant was negligent? We do not think so. The court may have concluded that conditions required the defendant not to stop his car, but, on the contrary, to make a short left-hand turn while traveling to the west on or near the west-bound tracks to a point at least opposite the northerly portion of Berendo street, if he intended going north, or to the west in the wake of the street car, if he intended going west.

Section 130 of the California Vehicle Act in force at the time of this accident, reads as follows (Stats. 1925, pp. 412, 413, § 15a):

"Sec. 130. *Signals on turning.* (a) The driver of any vehicle upon a public highway before starting, turning or stopping such vehicle shall first see that such movement can be made in safety, and if it can not be made in safety, shall wait until it can be made in safety; then, if the operation of any other vehicle may reasonably be affected by such movement, the driver shall give a signal plainly visible to the driver of such other vehicle of the intention to make such movement. Such signal may be given either by the use of the hand and arm in the manner hereinafter provided, or by means of a mechanical or electrical device which meets the requirements hereinafter set forth and which has been approved by the division of motor vehicles as hereinafter provided.

"Whenever the signal is given by means of the hand and arm, the driver shall indicate his intention to turn to the left by extending his hand and arm horizontally from and beyond the left side of the vehicle, his intention to turn to the right by extending his hand and arm upward and beyond the left side of the vehicle, and his intention to stop or to suddenly decrease speed by extending his hand and arm downward from and beyond the left side of the vehicle.

"The signal herein required to be given before turning to the right or left, whether given by means of the hand and arm or by means of an approved mechanical or electrical device, shall be given continuously during the last fifty feet traveled by the vehicle before turning."

In the instant case the appellant gave a signal with his left arm for a left turn and gave no signal for a stop. Possibly the other defendant, observing the signal for a turn and not for a stop, concluded that the Ward car would be off the southerly track in time for him to travel eastward without diminishing his speed, whereas, if he had seen a stop signal given by Ward, he might have thrown on his brakes and avoided a collision. If, instead of entering this boulevard at the time he did, appellant had waited for the traffic to clear, this accident would not have occurred. In view of what developed, we are not prepared to say that his failure to wait did not constitute additional evidence of negligence on his part.

Judgment affirmed.

We concur: HOUSER, Acting P. J., and YORK, J.

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132 Cal.App. 699

## COYNE et al. v. WHIFFEN et al.

Civ. 7795.

District Court of Appeal, Second District, Division 2, California.

June 22, 1933.

**1. Automobiles ⇨168(9).**

Speed in excess of that permitted by statute at obstructed intersection is negligence and not merely prima facie evidence of negligence (St. 1923, p. 553, § 113(a), as amended).

**2. Automobiles ⇨172(11).**

Rear motorist must exercise reasonable care with respect to forward automobile, and must heed forward motorist's proper signal of intention to turn.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by William R. Coyne and others against J. P. Whiffen and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Paul Nourse, of Los Angeles, for appellants.

Julius V. Patrosso, of Los Angeles, for respondents.

PARKER, Justice pro tem.

This is an appeal by the defendants from a judgment, rendered upon a verdict of a jury, in favor of plaintiffs and against the defendants in an action to recover damages for and on account of injuries sustained by respondent Myrtle Coyne in an automobile collision.

No point is raised as to the sufficiency of the evidence, appellants conceding that there was a conflict and that there was sufficient evidence before the jury to sustain the verdict. No complaint is made as to the rulings of the trial court on the admission or rejection of evidence, nor is there any claim of contributory negligence urged. The sole question presented involves the giving of two instructions offered by respondents and the refusal of the court to give an instruction requested by appellants.

[1] The first instruction given to which attack is directed is as follows: "You are instructed that by the provisions of the statutes of California in force at the time of the accident in question, it was unlawful for the driver of any motor vehicle to drive at a rate of speed in excess of fifteen miles in traversing an intersection of highways when the driver's view is obstructed. A driver's view is deemed to be obstructed within the meaning of the statute when at any time dur-

ing the last 100 feet of his approach to said intersection he does not have a clear and uninterrupted view of such intersection and of the traffic upon all the highways entering such intersection for a distance of 200 feet from such intersection. If you find from the evidence, therefore, that the view of the defendant, J. P. Whiffen, in approaching the intersection of La Brea avenue and Clinton street was obstructed within the meaning of the statute as above stated, and if you further find that in traversing the intersection said defendant, J. P. Whiffen, was then driving at a rate of speed in excess of fifteen miles, that said defendant was guilty of negligence, and if you further find that such negligence contributed directly and proximately to cause the collision between the automobile driven by said defendant and the automobile in which the plaintiff Myrtle Coyne was riding, and that as a direct result thereof the plaintiff, Myrtle Coyne, sustained injuries, then your verdict must be for the plaintiff and against the defendant." The instruction offered by appellants and refused by the court ties in with the argument on the one given, and we shall therefore consider the two together. The refused instruction reads: "Section 113 of the California Vehicle Act, in full force and effect at the time of the accident, in question, provided in part as follows: 'Restriction as to speed. (a) Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to injure the life, limb or property of any person.' Unless you find from a preponderance of the evidence that the defendants were violating the provisions of said section of the California Vehicle Act, you cannot find their speed to have been a negligent one."

The point of the argument is that section 113 (a) of the California Vehicle Act controls all speed limits of the statute; that there is no definite speed set forth in the statute that will of itself be a violation of the law unless coming within the terms of section 113 (a). In other words, the contention is that a speed in excess of that made lawful by the statute is no more than prima facie evidence of negligence, and not in itself to be declared negligence as a matter of law or negligence per se. Appellants frankly concede that the uniform holding of the Supreme Court and Appellate Court of this state is to the contrary. Notwithstanding this concession it is urged that the prior decisions failed to give full consideration to the question from the viewpoint of appellants herein. We cannot now abandon all precedent and follow a new trail. It is possible that appellants may convince the Supreme Court, and we are frank to state that the argument presented at once appeals to reason and everyday conditions of automobile traffic. We note this, however: The correction of alleged conditions might well be brought to the attention of the Legislature and provision made to cover the situations detailed as existing. In complete answer to the contention made we merely cite the following cases: Hayes v. Emerson, 110 Cal. App. 470, 294 P. 765; Havens v. Loebel, 103 Cal. App. 209, 284 P. 676; Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045. This same point was passed upon by this court in Thompson, Adm'x v. Dentman et al. (Cal. App.) 21 P.(2d) 1009.

[2] Appellants next complain of an instruction given as follows: "The statutes of the state of California provide that the driver of any vehicle upon a public highway before turning such vehicle shall first see that such movement can be made in safety, and if it cannot be made in safety, shall wait until it can be made in safety; that if the operation of any other vehicle can reasonably be affected by such movement, the driver shall give a signal plainly visible to the driver of such other vehicle of the intention to make such movement. Such signal may be given either by the use of the hand and arm or by means of a mechanical or electrical device which meets the requirements of the statute and which has been approved by the division of motor vehicles. Whenever the signal is given by means of the hand and arm the driver shall indicate his intention to turn to the left by extending his hand and arm horizontally from and beyond the left side of the vehicle. The signal to be given before turning as herein provided, shall be given continuously during the last fifty feet traveled by the vehicle before turning. Therefore, where two vehicles are traveling in the same direction on the same street, one in the rear of the other, it is the duty of the driver of the rear car to exercise reasonable care with respect to the forward car, and if the driver of the forward car indicates by the proper signal as defined by the statute, his intention of turning to the left, it is the duty of the driver of the rear car to yield him that right."

It is of the last portion of this instruction that appellants complain, and we see no merit in the complaint. The purpose of the signal is to warn the rear driver of the intention to turn, and when this signal is given at the proper distance it surely must be for same purpose recognized to be accomplished if the legal mode is followed. The instruction places upon the driver of the rear car the duty of reasonable care, and that is always the duty of a motorist, whether ahead or behind. It would seem highly illogical to require the driver of the forward car to give a signal and continue the same for a distance of fifty feet before the turn and then hold that the driver of a car in the rear was under no duty to heed that signal. As a matter of commonplace the signal is intended solely to warn the rear car. Without further discussion, attention may be called to the following cases: Hanson v. Cardoza, 106 Cal. App. 500, 290 P. 62; Barton v. Studebaker Corporation, 46 Cal. App. 707, 189 P. 1025.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

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133 Cal.App. 17

## HARVEY et al. v. GRIFFITHS et al.

Civ. 4886.

District Court of Appeal, Third District, California.
June 26, 1933.

**1. Limitation of actions ⚷179(2).**

Complaint alleging misrepresentations as to value and connection with sewer in exchange of properties *held* insufficient where not filed within 3 years from date of alleged fraud, and no facts were alleged from which it could be determined that plaintiffs failed to discover fraud until later date (Code Civ. Proc. § 338).

**2. Limitation of actions ⚷192(3).**

So-called "answer to demurrer to second amended complaint" filed without leave could not piece out complaint which failed to show that action of fraud was begun within three years after discovery thereof (Code Civ. Proc. § 338).

**3. Judgment ⚷518.**

Complaint alleging procurement of default deficiency judgment by fraudulently concealing contract *held* collateral attack on judgment in reliance on "intrinsic" as distinguished from "extrinsic" fraud and insufficient to set aside judgment.

[Ed. Note.—For other definitions of "Extrinsic or Collateral Fraud" and "Intrinsic Fraud," see Words & Phrases.]

**4. Judgment ⚷418, 443(1).**

Only ground on which judgment may be vacated is that court lacked jurisdiction or that judgment was procured by extrinsic as distinguished from intrinsic fraud.

**5. Judgment ⚷443(1).**

Judgment resting on forged documents or perjured testimony rests on "intrinsic" as distinguished from "extrinsic" fraud which alone will justify court in holding judgment void.

**6. Judgment ⚷568.**

Default judgment is estoppel as to all issues necessarily litigated therein provided court acquires jurisdiction of parties and subject-matter.

**7. Pleading ⚷225(1).**

Where plaintiffs had two opportunities to amend original complaint, sustaining demurrer without leave to amend again *held* not error where no request for permission to amend was made.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by John Parker Harvey and another against Monte N. Griffiths and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Roy H. Smith, of Los Angeles, and A. C. Brydonjack, of Long Beach, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles (Robert E. Paradise, of Los Angeles, of counsel), for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiffs have appealed from a judgment which was rendered against them pursuant to an order sustaining without leave to amend, a demurrer to the second amended complaint. The complaint contains three causes of action, each of which is based upon fraud alleged to have been exercised incident to the procuring of an exchange of properties. The first two counts charge fraud in securing the execution of the instruments of conveyance and the complaint prays for rescission of the documents together with damages. The third cause alleges fraud in the foreclosure of a trust deed which was executed to secure a part of the purchase price of the real property received by the plaintiffs in the exchange, and asks for a cancellation of the judgment which was accordingly entered, together with damages.

The respondents contend that the complaint fails to state a cause of action, and that it is not susceptible of amendment, because it appears the plaintiffs were guilty of laches for failure to commence their suit within five years from the time of the alleged perpetration of fraud, and that the third cause constitutes a collateral attack upon a foreclosure judgment based upon acts which merely amount to intrinsic fraud.

Upon the contrary, the appellants assert their action is not barred under the provisions of section 338 of the Code of Civil Procedure until three years have elapsed from the date of the discovery of the fraud which they have alleged occurred within that period of time. It is further claimed the court abused its discretion in sustaining the demurrer without leave to amend the pleading.

The complaint alleges that the transaction of exchange of properties which is the basis for this suit for rescission occurred February 17, 1925, and that the fraud was not discovered by the plaintiffs until September 1, 1927. The original complaint was filed July 24, 1930. The only specifications of fraud which are recited in the first two counts are that the defendants misrepresented the value of the property which they conveyed to plaintiffs; that they wrongfully represented the property was connected with the municipal sewer system; and that they agreed to repair the roof of the building which is situated on the premises. With respect to the discovery of the alleged fraud the complaint merely alleges "that on or about the 1st day of September, 1927, plaintiffs ascertained the falsity of said representations and because of the same, plaintiffs caused a grant deed of said lot 3 duly executed by them to be delivered to the defendants."

[1] Assuming, without so deciding, that the allegations of the complaint, except for the statute of limitations, state a good cause of action based upon fraudulent representations to warrant rescission, no facts are recited which will have the effect of tolling the statute so as to prevent the barring of the cause of action for more than three years after the alleged fraud was perpetrated. It is true, under the provisions of section 338 of the Code of Civil Procedure, that "an action for relief on the ground of fraud or mistake" must be commenced "within three years," but that "the cause of action in such case [is] not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

The complaint fails to state a complete cause of action for the reason that it appears the suit was not commenced within three years from the time of the alleged perpetration of fraud and no facts or circumstances are recited from which the court may determine that the plaintiffs failed to actually discover the misrepresentations until a later date. All that the pleading alleges in that regard is "that on or about the 1st day of September, 1927, plaintiffs ascertained the falsity of said representations." No excuse for this failure is alleged. This is clearly inadequate. In the case of Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P. (2d) 268, 269, which was a case in all essential respects exactly like the one at bar, the Supreme Court said: "It is not enough that the plaintiff merely avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them,—as that they were done in secret, or were kept concealed; and he must also show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged."

Many cases are therein cited which uphold the requirement to specifically recite facts in the complaint which will enable the court to determine as a matter of law whether the case is barred by the statute of limitations. Quoting with approval from the case of Galusha v. Fraser, 178 Cal. 653, 657, 174 P. 311, the Supreme Court said in the cause previously cited:

"Where the plaintiff sues for relief on the ground of fraud, and seeks exemption from the three-year period of limitation for the reason that he did not discover the fraud until after it was perpetrated, he must not only show (1) that he did not discover the fraud until within the three years next before the action was begun, and (2) that the fraud was committed under such circumstances that he would not be presumed to have had knowledge of it at the time, but (3) he must also set forth the times and circumstances under which the facts constituting the fraud came to his knowledge, so that the court may determine from the allegations of the complaint whether the discovery was within that period."

Far from averring facts in the complaint in this action tending to rebut the presumption that the plaintiffs had full knowledge of the actual value of the property and that it was not connected with the sewer system, they alleged that "plaintiffs entered into occupation of said Lot 3, Block 36, Tract 5609, on or about July 1, 1925." It seems unreasonable to assume that owners could occupy their city property for more than two years without discovering its value or the fact that it was not connected with the sewer.

[2] Subsequent to the filing of defendants' demurrer to the second amended complaint, the plaintiffs filed a document termed "Answer to Demurrer to Second Amended Complaint." This document contains arguments upholding the sufficiency of the allegations of the second amended complaint, together with a citation of numerous authorities. It is primarily in the form of an answer. It is now asserted this so-called answer to the demurrer contains additional allegations of facts and circumstances which supply the deficiencies of the complaint so as to render it adequate to meet the requirements necessary to toll the statute of limitations until the alleged discovery of the fraud. We find no such statements of fact. It may not be said to be an amendment to the amended complaint. No leave was asked or granted to

file such an amendment. Moreover, there is no such pleading known to the California procedure as an answer to a demurrer. That document had no legal bearing on the pleadings in this suit, and contains no statements which would affect the determination of this appeal.

[3, 4] The third cause of action is based upon alleged fraud of the defendants in instituting a suit in equity and recovering a judgment by default against the plaintiffs for a deficiency indebtedness after the foreclosure sale of the property under the provisions of their trust deed which was executed to secure the balance of the purchase price of the property. No facts are stated to indicate that the parties were not duly served with process in that action or that the court was without jurisdiction to render the judgment. This count of the complaint states facts only which constitute mere intrinsic fraud. This is a collateral attack upon the judgment. The procuring of a judgment by mere intrinsic fraud will not justify a court in setting it aside. The only grounds upon which the judgment of a court may be vacated and set aside is that the court lacked jurisdiction to render the judgment, or that it was procured by extrinsic fraud. Hanley v. Hanley, 114 Cal. 690, 46 P. 736, 737; Pico v. Cohn, 91 Cal. 129, 133, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Hendricks v. Hendricks, 216 Cal. 321, 14 P. (2d) 83; 1 Freeman on Judgments (5th Ed.) 661, § 331. It is not claimed in this action that the defendants were guilty of conduct in the suit in which the default judgment was rendered which prevented them from having their day in court or which deprived them of a fair and an impartial trial. All that is asserted is that "defendants brought action claiming deficiency of $2,025.85 * * * in the superior court of the State of California, in and for the County of Los Angeles, and fraudulently by wilfully concealing from the court the terms of said contract referred to in paragraph VII of the above first cause of action obtained a default judgment against plaintiffs and issued an execution thereon against the business which was then owned by the plaintiffs. * * *"

[5] This is inadequate to state a cause of action based on extrinsic fraud. It was held in the case of Hanley v. Hanley, supra, that "it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony." Such conduct is declared to be intrinsic fraud as distinguished from extrinsic fraud, which alone will justify a court in holding that a judgment is void.

[6] It is immaterial that the judgment which is assailed was procured by default. The defendants in that action had an opportunity to appear and protect their interest. They deliberately waived the right to their day in court by failing to appear and answer the complaint. A default judgment is an estoppel as to all issues necessarily litigated therein and determined thereby exactly like any other judgment provided the court acquired jurisdiction of the parties and subject-matter involved in the suit. Hutchings v. Ebeler & Trout, 46 Cal. 557; Strong v. Shatto, 201 Cal. 555, 258 P. 71; 3 Freeman on Judgments, (5th Ed.) 2690, § 1296.

[7] The court did not abuse its discretion by sustaining the demurrer without leave to amend the second amended complaint. The plaintiffs had two opportunities to amend their original complaint so as to set out the necessary facts to constitute a good cause of action, and they failed to do so. The fact that a demurrer is sustained without leave to amend the complaint does not constitute an abuse of discretion in the absence of a request for permission to amend the pleading. Consolidated R. & P. Co. v. Scarborough, supra; Haddad v. McDowell, 213 Cal. 690, 3 P.(2d) 550; 22 Cal. Jur. 119, § 77. No application to amend the second amended complaint was requested by the plaintiffs after the demurrer thereto was sustained.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

218 Cal. 386

## WESTERN LOAN & BUILDING CO. v. SCHEIB et al.

L. A. 12305.

Supreme Court of California.

June 26, 1933.

**1. Mortgages 🔑145, 151(3).**

Mortgage, recorded April 8, 1927, did not attach until note, signed by mortgagor December 27, 1926, and left in possession of mortgagor's agent, was delivered to mortgagee May 27, 1927, and was not prior to mechanic's lien attaching April 13, 1927.

**2. Mortgages 🔑69.**

Delivery of note by mortgagor to his agent was not delivery to or for benefit of mortgagee.

**3. Principal and agent 🔑23(1).**

In mortgage foreclosure action, evidence showed one applying for mortgage loan acted solely as mortgagor's agent, so that his possession of note until certain date was mortgagor's possession.

**4. Mortgages 🔑151(3).**

Mere recording of mortgage before note was delivered to mortgagee could not give mortgage priority over mechanic's liens attaching between recording of mortgage and delivery of note.

**5. Mortgages 🔑1.**

"Mortgage" is merely security for debt, and if there is no debt there is no mortgage.

[Ed. Note.—For other definitions of "Mortgage," see Words & Phrases.]

**6. Mortgages 🔑145.**

Mortgage recorded April 8, 1927, came into existence as lien on May 27, 1927, when debt came into existence on delivery of mortgage note to mortgagee.

PRESTON and CURTIS, JJ., dissenting.

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In Bank.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Western Loan & Building Company against Charles A. Scheib and others. From the judgment, plaintiff appeals.

Affirmed.

Bicksler, Smith, Parke & Catlin, of Los Angeles, for appellant.

Miller & Ellis, James E. Mahon, Earle M. Daniels, Gibson, Dunn & Crutcher, and Glen Behymer, all of Los Angeles, for respondents.

PER CURIAM.

Plaintiff appeals from a judgment of the trial court decreeing that the mechanics' liens of respondents have priority over the mortgage lien of plaintiff. It is admitted that each of the mechanics' liens held by the several respondents became a lien on the real property on April 13, 1927, and that respondents have duly and properly taken all steps required by law for the enforcement of their respective liens. The sole question presented for determination on this appeal is the priority between the mortgage lien held by appellant and the mechanics' liens held by respondents.

The facts giving rise to this appeal, as found by the trial court and concerning which, except as hereinafter indicated, there is no dispute, are as follows:

In November of 1926 defendant Charles A. Scheib, the owner of certain real property in the city of Los Angeles, made a written application to the appellant for a building loan of $55,000, to be secured by a mortgage. This application for a loan was not made by Scheib personally, but was made through one S. E. Beach; the latter acting as agent of Scheib for this purpose. Scheib agreed to pay Beach a commission for his services if the loan was secured. It should here be stated that all of the negotiations between Beach, as agent of Scheib, and the appellant, were carried on by mail; the main office of appellant being located in Salt Lake City, Utah.

On December 6, 1926, the appellant wrote to Beach, as the agent of Scheib, informing him that the executive finance committee had approved the application for the loan, and setting forth the terms and conditions on which the money would be advanced. On December 7, 1926, the appellant forwarded to Beach, as agent of Scheib, a form mortgage and promissory note which, it was stated, were to be signed by Scheib, the mortgage recorded and the documents, together with a title report and other information, returned to appellant at Salt Lake City. On December 27, 1926, Scheib signed the note, and signed and acknowledged the mortgage, and left them with S. E. Beach, his agent, to be recorded and forwarded to appellant. S. E. Beach, as agent of Scheib, through his son, W. E. Beach, and pursuant to appellant's request, delivered the mortgage (but not the note) to an escrow agent with instructions to record when a title insurance policy was furnished showing the mortgage to be a first lien. On April 8, 1927, the escrow agent had the mortgage duly and properly recorded. The county recorder mailed the recorded mortgage to appellant at Salt Lake City, he having received no instructions to the contrary, and the name of appellant appearing thereon, but the evidence sustains the view that this was probably not the intent of the parties, the intent being that the recorded mortgage should have been mailed back to the escrow agent or to Beach. All during this period Beach had the promissory note in his possession as the agent of Scheib. The note was not delivered with the mortgage on April 8, 1927. On April 13, 1927, it is admitted, the mechanics' liens of respondents attached. On May 27, 1927, appellant wrote to Beach, as the agent of Scheib, as follows:

"Under date of May 16th we wrote you relative to closing the above application. Since that time we have heard nothing from you concerning the same.

"If we do not hear from you within the next ten days we will take it for granted the application will not be completed and we will cancel it from our records."

On the same day, May 27, 1927, Beach mailed the note to appellant.

Subsequent to receiving the promissory note, and starting on May 31, 1927, appellant advanced various sums to Scheib in installments, totaling $42,500. The final installment of $12,500 was not advanced because Scheib failed to complete the building as agreed. Scheib defaulted in his payments to appellant, whereupon the latter instituted this action to foreclose its mortgage, joining as defendants all parties having any record interest in the property. All defendants defaulted except the respondents.

From the above facts the trial court concluded, as a matter of law, that although appellant's mortgage was recorded on April 8, 1927, and respondents' liens did not attach until April 13, 1927, the mechanics' liens were entitled to priority over the mortgage for the reason "that prior to the actual delivery of said note to plaintiff on May 27, 1927, no indebtedness existed in favor of plaintiff for which the mortgage recorded April 8, 1927, in favor of plaintiff as mortgagee, could act as security, and plaintiff's mortgage lien * * * attached on the 27th day of May, 1927, and not prior thereto."

[1] The sole question presented on this appeal is: When did appellant's mortgage lien attach as against respondents? Did it attach as of April 8, 1927, when the mortgage was recorded, or did it attach on May 27, 1927, when the promissory note was physically delivered? The proper answer to this question can only be determined upon ascertaining when the indebtedness between Scheib and appellant came into existence. The trial court found that this indebtedness came into existence on May 27, 1927, and not before. Under the facts, as above outlined, we are clearly of the opinion that this conclusion was correct. The problem is simply one of offer and acceptance of a contract. The appellant in December of 1926 made an offer to Scheib, through Scheib's agent Beach, to make the loan providing that Scheib executed and delivered to appellant a promissory note and mortgage, and performed certain other conditions. Until the offer was accepted by the performing of the required acts no binding obligation on the part of appellant to advance the money came into existence. In other words, no indebtedness was created until the offer was accepted. Scheib performed some of the required acts. He signed the note and mortgage, and through his agent caused the mortgage to be recorded and delivered to appellant. Title insurance was secured and other conditions performed. But the last act necessary to complete the acceptance—i. e., delivery of the promissory note evidencing the indebtedness—was not performed. Until the note was delivered the offer of appellant to make the loan had not been accepted, and no indebtedness was created until that time. Appellant itself placed this interpretation upon the transaction. This is made clear by the letter from appellant to Beach, as agent of Scheib, of May 27, 1927, above quoted, in which it is stated that appellant has heard nothing further concerning "closing the above application," and "if we do not hear from you within the next ten days we will take it for granted the application will not be completed and we will cancel it from our records." The only reasonable interpretation of that letter is that at the time it was written (May 27, 1927), the appellant itself did not consider that any binding contract to advance the money had been entered into; that appellant considered that its offer to make the loan had not been accepted; that unless it was accepted within ten days by sending the note the application for the loan would be canceled.

[2] Appellant seeks to avoid the application of the above reasoning to this case by the contention that Beach was acting as its agent for the purpose of accepting delivery of the note and mortgage, and that therefore the note was delivered to appellant on December 27, 1926, when Scheib signed it and left it in the possession of Beach. Of course, if Beach was in fact the agent of appellant for the purpose of accepting delivery of the note, it would be clear that the offer to make the loan was accepted on December 27, 1926. It is well settled that delivery of a contract by one of the contracting parties to a third person for the benefit of the other contracting party constitutes a good delivery. Carr v. Howell, 154 Cal. 372, 97 P. 885; Kelly v. Woolsey, 177 Cal. 325, 170 P. 837. But the rule enunciated in those cases has no application to the facts of this case. For that rule to apply there must be a delivery to the third party for the benefit of the other contracting party. Here the trial court expressly found that Beach at all times was acting solely and exclusively as the agent of Scheib, and at no time was he acting as the agent of appellant. If these findings are supported

by the evidence it necessarily follows that while the note was in the possession of Beach solely and exclusively as the agent of Scheib, the possession of Beach must be considered the possession of Scheib, and the note was not delivered until May 27, 1927.

[3] Appellant contends that the above findings are not supported by the evidence; that the evidence shows that Beach was the agent of appellant for the purpose of securing the execution and delivery of the note and mortgage; that the finding of the trial court that Scheib left the note and mortgage in the possession of Beach and that they were "left by him in the possession of S. E. Beach to be recorded and forwarded to plaintiff" is inconsistent with the finding that Beach was acting solely and exclusively as the agent of Scheib. After reading the record we are clearly of the opinion that the findings of the trial court that Beach at all times during this transaction was acting solely and exclusively as the agent of Scheib and at no time was acting as the agent of appellant are amply supported by the evidence.

V. R. Marsden, manager and vice president of the appellant, testified that: "This loan was negotiated by S. E. Beach. He acted in the capacity of a broker. He was not a broker for the plaintiff company. He has no connection with our company and never did have any connection with our company. He was never authorized to use our name on his office as our legal representative or as agent on behalf of our company at any time." He was then asked:

"And you know that Mr. Beach had no connection whatsoever with this company in regard to this loan? A. Well, I don't say that.

"Q. Other than as broker for someone else? A. Yes, sir."

Marsden further testified: "I know W. E. Beach. He is the son of S. E. Beach. He has no connection with our company. * * * S. E. Beach had nothing to do with these transactions. The only thing with any of these loans that Mr. Beach had anything to do with our company was merely as broker for the applicant."

In addition to this testimony of the manager and vice president of appellant there was introduced into evidence the application for a loan made by Scheib through Beach. This application was a regular form application furnished by appellant to prospective borrowers. This form, which was signed and acknowledged by Scheib, contains the following provision: "Charles A. Scheib, being first duly sworn, deposes and says: That I understand and agree that if this application is made by me, through any person, or by any means except by direct communication to the home office of the company at Salt Lake City, Utah, that the person I deal with is not the agent of the Western Loan & Building Company, but is My Agent."

Mr. Charles A. Scheib testified that "Mr. S. E. Beach was my agent. I asked him to act as my agent when I applied for the loan. * * * I signed the affidavit [above quoted] * * * being a statement that the agent making the application is the agent of the borrower and not the agent of the Western Loan & Building Company."

S. E. Beach testified that: "I am in no manner connected with the plaintiff Western Loan & Building Company and never have been in any way only as to sending in applications for loans. I never had any connection with the plaintiff whereby I represented them in any capacity. W. E. Beach is my son. To my knowledge he has never represented plaintiff in any capacity." Beach was then asked for whom he was acting when he caused the mortgage to be recorded and replied:

"Mr. Scheib. Q. You were acting for Mr. Scheib when you caused this mortgage in which he is mortgagor [to be recorded], for Mr. Scheib? A. Yes.

"Q. Is that correct? A. Yes, sir; he was the mortgagor and I acted for Mr. Scheib."

In the face of this testimony by the agent, S. E. Beach, by the principal, Scheib, and by the appellant's vice president and manager, all to the effect that Beach was acting solely and exclusively as the agent of Scheib, and at no time, for any purpose, was the agent of the Western Loan & Building Company, we must hold that the findings complained of not only are supported by substantial evidence, but are supported by the overwhelming weight of the evidence. Since this is so, it follows, as already stated, that while the note was in the possession of Beach, as agent for Scheib, it must necessarily be considered as still within the possession of Scheib. It follows, therefore, that no delivery of the note took place until May 27, 1927, long after the mechanics' liens of respondents had become a lien on the real property involved.

[4-6] Of course, since the trial court held, on substantial evidence, that no debt was incurred until May 27, 1927, the mere recording of the mortgage on April 8, 1927, could in no way give the mortgage priority over the liens of respondents. A mortgage is merely security for a debt, and if there is no debt there is no mortgage. 17 Cal. Jur. § 17, p. 710; § 161, p. 873. Since the debt did not come into existence until May 27, 1927, the mortgage as a lien came into existence at that time. The liens of respondents dating as they do from April 13, 1927, clearly are, therefore, entitled to priority over the mortgage.

The question of priority of liens must in practically every case be controlled by a strict application of the rather technical procedure regulating the priority of lien claimants.

The judgment appealed from is affirmed.

PRESTON, Justice (dissenting).

I am not in accord with the opinion as written in this cause. Under the undisputed evidence and under the findings of the court below, Scheib executed the note and mortgage and delivered them to Beach to be transmitted to plaintiff. There were no conditions or reservations made by Scheib at the time of such delivery. The facts are that on December 7, 1926, plaintiff wrote Beach, the broker in the transaction, and among other things sent him a copy of the note and mortgage with instructions as follows: "Kindly have papers properly executed, recorded and abstracted * * * after which return to this office. * * *" The court finds that on December 27, 1926, defendant Scheib signed the note and signed and acknowledged the mortgage and then finds as follows: "That said note and mortgage, after the same were signed by Charles A. Scheib, were left by him in the possession of S. E. Beach to be recorded and forwarded to plaintiff." The further finding is that Beach thereafter, through his son W. E. Beach, delivered the mortgage in escrow to the Guarantee Building & Loan Association of Hollywood; that in so leaving the mortgage in escrow, young Beach signed himself as the representative of the plaintiff and the escrow party secured the certificate of title, bringing it up to April 8, 1927. The mortgage was also recorded on the same day, and actually forwarded thereafter to the plaintiff.

Inasmuch as the certificate of title was procured and the mortgage recorded, the transaction was complete. Whether the plaintiff received the manual tradition of the papers on that day or six months thereafter, on that day the constructive delivery under section 1059 of the Civil Code took place and the authorities cited in appellant's brief apply, such as Carr v. Howell, 154 Cal. 372, 97 P. 885; Kelly v. Woolsey, 177 Cal. 325, 170 P. 837. Indeed, the following language of Valley Lumber Company v. Wright, 2 Cal. App. 288, 84 P. 58, 59, is directly in point: "Here the note and mortgage were executed for a definite amount, and there was an agreement on the part of the loan association to pay to Wright this amount, with the further understanding that the money should be used for the construction of the building, which latter was to be for the further security of the loan. The loan association was under an enforceable obligation to furnish this money, and the execution of the note and mortgage was sufficient consideration for the agreement."

A kindred line of cases also includes Stone v. Daily, 181 Cal. 571, 185 P. 665, and Hotaling v. Hotaling, 193 Cal. 368, 224 P. 455, 56 A. L. R. 734. In each of them a deed, after execution and symbolical delivery, was actually left with the grantor himself and the delivery was held proper. In this case if Scheib himself had gone to the title company and procured the certificate and caused the mortgage to be recorded, there would have been a delivery of both the note and the mortgage on the happening of this event, even though they had remained physically in the possession of Scheib.

I think the judgment in this cause is clearly wrong and should be reversed.

I concur: CURTIS, J.

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218 Cal. 444

## CHILCOTE v. SAN BERNARDINO COUNTY.

L. A. 14087.

Supreme Court of California.

June 29, 1933.

1. **Automobiles** ⚷187.

To be in "operation" within statute rendering county liable for injuries from negligent "operation of county motor vehicle by county employees," vehicle must be in active exercise of some specific function by performing work or producing effects at time and place injury is inflicted (St. 1923, p. 675; Civ. Code §§ 1714¼, 1714½).

[Ed. Note.—For other definitions of "Operation," see Words & Phrases.]

2. **Automobiles** ⚷260.

Motorcyclist's death from encountering pools of oil spread on highway by county's oil trucks *held* not due to "operation of county motor vehicles by county employees," so as to render county liable (St. 1923, p. 675; Civ. Code §§ 1714¼, 1714½).

In Bank.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Logan A. Chilcote against San Bernardino County. From a judgment for defendant, plaintiff appeals.

Affirmed.

For prior opinion, see 15 P.(2d) 1102.

H. E. Thompson and Harold King, both of San Bernardino, for appellant.

Stanley Mussell, Dist. Atty., James L. King, Chief Deputy Dist. Atty., Ralph E. Swing, and

Swing & Swing, all of San Bernardino, for respondent.

PRESTON, Justice.

Ameliorating to some extent the rigor of the common-law rule that a public corporation exercising sovereign power may not be held liable for the torts of its officers and servants, the California Legislature in 1923 (St. 1923, c. 328, p. 675) enacted a law permitting such actions against counties, municipalities, and school districts, where the injuries complained of resulted from defective conditions in streets, highways, buildings, and grounds, where the governing board of such entity had knowledge or notice of such defective condition.

Later, in 1931, the Legislature, by section 1714½ of the Civil Code, extended the doctrine by adding other classes thereto and by providing a right of action for damages for injury to person or property, or death, where such damage resulted from the negligent operation of a motor vehicle by an officer, agent, or employee of such corporation. So much of the statute as is here involved reads: "Hereafter * * * every county * * * owning any motor vehicle shall be responsible to every person who sustains any damage by reason of death, or injury to person or property as the result of the negligent operation of any said motor vehicle by any officer, agent, or employee or as the result of the negligent operation of any other motor vehicle by any officer, agent or employee when acting within the scope of his office, agency or employment. * * *"

[1] It seems clear, when we view these two enactments along with the provisions of related legislation, such as section 1714¼ of the Civil Code, that it was the intention of the Legislature to use the word "operation" in its popular and ordinary sense as applied to motor vehicles. That is, to be in operation, the vehicle must be in a "state of being at work" or "in the active exercise of some specific function" by performing work or producing effects at the time and place the injury is inflicted. Moreover, to sustain plaintiff in his contention would be to interpret these two enactments as overlapping. For then in some instances, to fasten liability on the municipality, notice of the defective highway would be required, while in other instances liability would be fixed without notice of any kind.

[2] In the cause before us judgment on the pleadings was given for the defendant and plaintiff has appealed. The basic facts alleged are that plaintiff's minor son, while riding on a motor vehicle on the public highway, leading through the city of San Bernardino to Lake Arrowhead, encountered on the highway large pools of oil, spread over a large area thereof, and as a result of encountering this condition, the minor was thrown from the motor vehicle violently to the ground and received injuries which resulted in his death on the same day. Supplementing these facts are allegations that the condition of the highway was due to the negligent operation of motor oil trucks by servants of said county of San Bernardino. The injury under these allegations was primarily based upon the condition of the highway and whether or not it was brought about by the negligence of the servants of the county is not the controlling factor in the situation. Therefore, in view of the construction we have placed on the word "operation" in the statute, the complaint fails to state a cause of action.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

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218 Cal. 449

## PEOPLE v. ROMER et al.

Cr. 3629.

Supreme Court of California.

June 30, 1933.

Rehearing Denied July 28, 1933.

1. **Criminal law 🔑1169(5).**
Admission of testimony showing flight of defendant after being charged with another offense which court instructed jury not to be influenced by, though defendants failed to move to strike out testimony, and seek instruction against its effect, *held* not reversible error.

2. **Witnesses 🔑345(1).**
Witness may, by way of impeachment, be asked whether he has been convicted of felony and its nature (Code Civ. Proc. § 2051).

3. **Witnesses 🔑319.**
Defendants who voluntarily testified in burglary and robbery prosecution were subject to impeachment in same manner as any other witness (Code Civ. Proc. § 2051).

4. **Criminal law 🔑393(1).**
Effect of cross-examination on prior felony convictions of defendants who voluntarily testified in burglary and robbery prosecution, *held* not error as compelling self-incriminating answers (Code Civ. Proc. § 2051; Pen. Code, § 969a).

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Lawrence M. Romer and Charles Barnett were convicted of burglary and robbery, and from the judgments and from orders denying their motions for a new trial, they appeal.

Affirmed.

Prior opinion, 16 P.(2d) 349.

Frederic H. Vercoe, Public Defender, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Clarence S. Hunt, Deputy Dist. Atty., both of Los Angeles, for the People.

PER CURIAM.

Defendants were convicted of the crime of burglary under five counts, and the crime of robbery under seven counts. Their motions for a new trial being denied, this appeal was taken. In a voluminous brief they argue that the evidence against them is weak and that any serious errors must be deemed prejudicial. Their evidence was chiefly directed to the defense of alibi, to offset the testimony of identification. Nevertheless, they do not contend that the evidence is insufficient to support the verdict on any of the twelve counts, and it is therefore unnecessary for us to engage in any extended review of the record.

The first alleged error stressed on behalf of defendants is in the reception of the testimony of C. F. Fordice, a police officer. He was permitted to testify that two days after the date of the last offense charged against defendants, he was on patrol duty checking automobile numbers, on the lookout for stolen cars; that he saw defendant Romer taking some grips and ladies' wearing apparel out of a La Salle sedan; that by the number he knew that the car was wanted; that he told Romer to come to the station, saying, "There seems to be something wrong with the car"; that Romer asserted that the car was his; that Romer then asked him to wait until he could take the contents of the car up to his apartment; and that Romer went upstairs and disappeared. This testimony was offered to prove flight and a consciousness of guilt.

[1] It is contended by defendants that since there was no charge against them of stealing an automobile, the testimony was erroneously admitted, since it did not tend to show flight following a charge of the crime for which they were on trial. Respondent argues, on the other hand, that other testimony in the record shows that Romer possessed and drove a La Salle sedan on the night certain of the crimes were committed, and that the testimony of Officer Fordice tends to show Romer's connection with these crimes. We are not convinced of its admissibility on this ground, but while we might not approve of its reception, we are not prepared to give it the weight of reversible error under the circumstances of this case. Defendants had the opportunity to move to strike it out, and seek an instruction against its effect, which they failed to do. Nevertheless the court did instruct the jury that they were not to be influenced in any way by evidence of any offenses or matters not charged in the information.

Appellants lay their greatest stress upon the alleged error committed in interrogating them on their prior convictions, after they had taken the stand in their own behalf. Barnett was questioned as follows: "Have you ever been convicted of a felony? A. I have. * * * Q. Have you been convicted of more than one felony? * * * A. I have. * * * Q. How many felonies have you been convicted of? * * * A. Two times, but I was pardoned * * * once. Q. What was the first felony you were convicted of? * * * A. Robbery. Q. When were you convicted of that felony? * * * A. 1911, I believe. Q. What was the second felony that you have been convicted of? * * * A. Assault with a weapon." Romer was similarly cross-examined and admitted four felony convictions. Defendants objected to all the questions.

[2, 3] Under section 2051 of the Code of Civil Procedure, a witness may, by way of impeachment, be asked whether he has been convicted of a felony, and may also be asked the nature of the felony. People v. Chin Hane, 108 Cal. 607, 41 P. 697, People v. Putman, 129 Cal. 258, 61 P. 961. Defendants having voluntarily taken the stand, they were obviously subject to impeachment in the same manner as any other witness, under this section. But they make the contention that when section 969a of the Penal Code was enacted in 1927 (St. 1927, p. 1064), the effect was to wipe out the provisions of the other section, in so far as they applied to defendants in criminal cases. Section 969a provides that whenever it shall be discovered that a pending indictment or information does not charge all prior felonies, it shall be amended to charge them, and the defendant shall be rearraigned and be required to plead thereto. It is defendants' theory that if, upon examination under section 2051 of the Code of Civil Procedure, they are compelled to answer as to the conviction of a felony, they are thereby forced to give evidence which may subject them to further criminal prosecution and punishment.

[4] We are unable to agree with defendants that the effect of these questions is to compel self-incriminating answers. It is elementary that a person once convicted can never be prosecuted again for the same offense. The statutory provisions for increased punishment to a subsequent offender do not provide for such second prosecution. There is a single prosecution for the new crime, the punishment being more severe because of the character of the offender. In re Rosencrantz, 205 Cal. 534, 271 P. 902. On the admissibility of these questions, we see no reason to depart from the position taken by us in People v.

La Verne, 212 Cal. 29, where we said at page 32, 297 P. 561, 562:

"The alleged incriminating questions asked him, of which amicus curiæ complain, were whether he had ever been convicted of a felony, answered in the affirmative; then 'What felony?' and other questions along the same line. Had these questions been asked for other than purposes of impeachment, the provisions of section 1025 of the Penal Code would be applicable; appellant, however, having voluntarily offered himself as a witness, was subject, upon cross-examination, to the usual rules for testing his credibility by impeachment, and in particular became subject to the provision of section 2051 of the Code of Civil Procedure to the effect that a witness may be impeached 'by evidence that his general reputation for truth * * * is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness * * * that he had been convicted of a felony.'"

We are satisfied that no reversible error was committed, and the judgment and order are therefore affirmed as to each defendant.

IRA F. THOMPSON, J., being disqualified, does not participate herein.

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218 Cal. 421

## BY-PRODUCTS FUEL MACH. CO. v. DAWSON.

L. A. 13097.

Supreme Court of California.

June 28, 1933.

**Costs** ⚷254(5).

Plaintiff selling defendant transcript for less than amount for which defendant could secure another transcript from reporter cannot complain of allowance of amount paid as costs (Code Civ. Proc. § 1027).

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by the By-Products Fuel Machine Company, a corporation, against John B. Dawson. A judgment for plaintiffs was reversed, and from an order taxing costs, plaintiff appeals.

Affirmed.

Bordwell, Mathews & Wadsworth, Ray W. Bruce, and Odell S. McConnell, all of Los Angeles, for appellant.

Winterer & Ritchie, of Los Angeles, for respondent.

LANGDON, Justice.

Defendant Dawson was sued by R. B. Coleman in one suit and by By-Products Fuel Machine Company in another. Judgment was for the plaintiffs in each case. Appeals were taken by the defendant on the same transcript, and one judgment was affirmed and the other reversed. After final judgment was entered, costs were awarded defendant in the case in which he was successful, and the present appeal is from the order taxing costs. Plaintiff objects to an item of $838.48 for the transcript on appeal. It appears that plaintiff had secured a daily transcript of the testimony from the reporter, and that at the time when defendant took his appeal, he purchased the same from plaintiff for $838.40, which was thereupon paid. It is plaintiff's contention that this sum was not paid to the reporter for a transcript on appeal, and that therefore it was not a proper item of costs under section 1027 of the Code of Civil Procedure. We cannot see how plaintiff can complain of the allowance made, since defendant could have secured another original transcript from the reporter, at additional cost, and an allowance for this would have been proper. Defendant's act in utilizing the transcript already paid for by plaintiff resulted in a substantial saving to both parties. Moreover, it was stipulated between them that the said transcript was "to constitute a full and complete reporter's transcript at the trial of said action after demand for the said transcript was made under section 953a, Code of Civil Procedure, by the appellant." There is no doubt but that the expenditure was made by defendant "in connection with said appeal, and the preparation of the record for the appeal." (Code Civ. Proc. § 1027.)

No other points require discussion. The order is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; IRA F. THOMPSON, J.

218 Cal. 453

## SECONDO v. SECONDO.

S. F. 14150.

Supreme Court of California.

June 30, 1933.

**1. Divorce 🔑130.**

Evidence that wife, in presence of others, charged defendant with acts of cruelty, and he made no denial, and wife's recital of acts, supported finding of cruelty.

**2. Appeal and error 🔑1012(1).**

That testimony was improbable, contradictory, and contradicted was for consideration of trier of facts, not for reviewing court.

**3. Husband and wife 🔑272(5).**

Husband collecting principal and interest on loan from community property was bound on divorce to account to wife.

**4. Divorce 🔑252.**

Court, making disposition of property incidental to granting divorce decree, is limited to property in court's hands for division.

**5. Husband and wife 🔑265.**

Statute does not authorize creation of lien on husband's separate property to secure payment to wife of share in community property (Civ. Code, § 140).

**6. Divorce 🔑301.**

Provision that divorced husband visit sons in presence of probation officer *held* not warranted by evidence.

**7. Divorce 🔑188.**

Finding awarding wife counsel fees in addition to amount theretofore allowed in divorce suit *held* improper, where no application for counsel fees remained undisposed of.

**8. Divorce 🔑188.**

Judgment ordering that costs be paid by defendant in divorce suit *held* not shown to be improper as double taxation.

> Facts disclosed that there was no cost bill in record, and an examination of transcript disclosed several orders for payment of counsel fees and costs, but did not show how much was incurred for costs, and reviewing court had no means of separating the items.

**9. Divorce 🔑111.**

In divorce suit, will offered to show that, when husband struck wife, he did not strike her with intention of putting her out of way so that she could not inherit property, *held* properly excluded.

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In Bank.

Appeal from Superior Court, Santa Cruz County; S. L. Strother, Judge.

Action by Katherine Secondo against Mitchell Secondo, in which defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Reversed and remanded, with directions.

Prior opinion, 18 P.(2d) 403.

Wyckoff, Gardner & Parker and Wyckoff & Gardner, all of Watsonville, for appellant.

Devoto, Richardson & Devoto, of San Francisco, and John J. Batistich, of Oakland, for respondent.

Anthony S. Devoto, of San Francisco, amicus curiæ, for respondent.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, First Appellate District, Division 2. Upon further consideration of the cause, we adopt the opinion of Mr. Justice Sturtevant as the opinion of this court. It reads as follows:

On July 11, 1927, the plaintiff commenced an action to obtain a divorce from the defendant, and in her complaint she charged him with extreme cruelty. He answered the complaint, and at the same time he filed a cross-complaint making the same charge against his wife. She answered the cross-complaint, and on the issues so framed a trial was had before the trial court sitting without a jury. The court made findings in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed, and has brought up typewritten transcripts. The record consists of nearly fifteen hundred pages, but references in the briefs to page or line in the transcript are frequently omitted. Therefore we will confine ourselves to an investigation of that portion of the record to which references have been made.

[1, 2] The first finding is as follows:

"That prior to the commencement of this action, without provocation on part of plaintiff, without any cause, reason or justification, defendant had treated plaintiff with great and extreme cruelty and more particularly in that on the 3rd day of June, 1927, in the residence of plaintiff and defendant at 118 West Lake Avenue in the City of Watsonville, County of Santa Cruz, State of California, defendant repeatedly struck plaintiff upon the head with a blunt instrument, by reason whereof plaintiff sustained a depressed fracture of the skull, necessitating the removal of portions of the skull from the brain, and plaintiff's confinement in a hospital for a period of five weeks thereafter.

"That said act of defendant has caused plaintiff great and extreme anguish and mental and physical suffering, and has greatly undermined plaintiff's health and permanently impaired same."

Defendant claims that the only evidence of the truth of the allegations to which that finding is responsive is the uncorroborated testimony of the plaintiff. That claim may not be sustained. After the assault and injury complained of occurred, at different times the defendant, the plaintiff, and others were in the immediate presence and hearing of each other. On several of those occasions the plaintiff charged the defendant with having committed the acts complained of, and he made no denial.

As a witness in her own behalf, the plaintiff recited what she claimed to be the facts regarding the assault. The defendant asserts her testimony was improbable in its nature, contradictory in its terms, and was wholly contradicted by the defendant. All of those attacks were for the consideration of the trier of the facts, and are not properly for the consideration of a court of review.

[3, 4] The defendant attacks subdivisions 2, 3, 4, and 5 of finding No. II, which find certain funds to be community property. Before this action was commenced, and at least for a while thereafter, the defendant and his two brothers were partners engaged in conducting a packing house at Watsonville. In the transaction of that business they bought and sold crops of apples. The purchases amounted to thousands of dollars annually. During the same period of time the plaintiff and defendant were engaged in loaning their surplus earnings on promissory notes secured by mortgages. Some of those notes were paid after the commencement of the action. Finding No. II, so far as pertinent, is as follows:

"Plaintiff and defendant were, at the time of the commencement of this action, ever since have been and now are, seized and possessed of certain community property described as follows:

"1. All of those certain lots, pieces or parcels of land situate, lying and being in the City of Watsonville, County of Santa Cruz, State of California, and particularly described as follows: (describing them).

"2. The sum of $1200, together with interest thereon, collected by the defendant from Carrie Picanzo under and by virtue of that certain mortgage executed by Carrie Picanzo to Mitchell Secondo recorded in the office of the County Recorder of Santa Cruz County, State of California, in Volume 31 of Official Records, page 352.

"3. The sum of $500, together with interest thereon, collected by the defendant from James A. Covell et ux., under and by virtue of certain mortgage executed by James A. Covell et ux. to Mitchell Secondo recorded in the office of the County Recorder of Santa Cruz County, State of California, in Volume 23 of Official Records, page 206.

"4. The sum of $360.89 together with interest thereon, collected by the defendant from Edna S. Bingham et vir., under and by virtue of certain mortgage executed by Edna S. Bingham et vir. to Mitchell Secondo, recorded in the office of the County Recorder of Santa Cruz County, State of California, in Volume 23 of Official Records, page 374.

"5. The sum of $9136 withdrawn by defendant in 1927 and 1928 from the partnership of Secondo Bros., City of Watsonville, County of Santa Cruz, State of California.

"6. All furniture, furnishings, fixtures, together with silverware annd linens in the former residence of said plaintiff and said defendant at 118 West Lake Avenue in the City of Watsonville, County of Santa Cruz, State of California.

"All of the above described real and personal property was at the time of the commencement of this action, ever since has been, and now is community property of plaintiff and defendant."

In substance the defendant claims that the effect of subdivisions 2, 3, 4, and 5 was to find that the spouses owned, held, and possessed as community property the items mentioned in said subdivisions. He also claims that the items of interest are not supported by the evidence, and moreover are a false quantity. The proof does not show that any one of the loans carried interest. However, if it be inferred that they did, and we think the trial court was entitled so to infer, then it would follow that the defendant collected the principal and interest for which he was bound to account to the plaintiff. The defendant contends, and the plaintiff does not cite any portion of the record to the contrary, that there was no evidence as to the amount of the interest collected. As to the principal, the defendant admitted he had collected the loan. However, he testified that he had spent the money. At that point the evidence stopped. As to the withdrawals from the partnership, the defendant admitted the amount, but testified he had spent the money. As to those expenditures, the evidence stopped. There is no evidence in the record that the defendant spent a dollar in fraud of the plaintiff's rights. There is evidence that, from the time the action was commenced down to the date of the trial, the defendant conducted his business as he had done before the action was commenced; that, after the commencement of the action, the defendant paid the plaintiff alimony and counsel fees. The order for alimony was $250 per month. That order was made July 25, 1927, and commenced to run August 1, 1927. The findings were signed on August 31, 1929. The record, by inference, shows $4,500 was paid by the defendant in compliance with said order. The amount paid in counsel fees is not clear, but was apparently in excess of $1,000. Whether at the time the action was commenced the plaintiff and defendant had debts outstanding for which the moneys collected were disbursed does not appear. Whether, after the action was commenced, the defendant suffered losses in transacting his business, does not appear. Moreover, no effort was made at any time to show to the trial court the amount of personal property on hand and subject to division by the trial court. As the evidence did not show those items of property to be in the hands of the court, the claim is sound. Van Horst v. Van Horst, 96 Wash. 658, 165 P. 886. In that case, at page 888 of 165 P., 96 Wash. 658, the Supreme Court of Washington said: "If this were an action for an accounting between plaintiff and defendant, many elements might enter into the case that cannot properly be considered in a proceeding such as this. The court, in making a disposition of the property of the spouses incidental to granting a decree for divorce, is necessarily limited by the amount of property in the hands of the court for division. Palpably it cannot divide that which does not exist. In making provision for the wife in the way of alimony the court is also powerless to compel the husband to pay more than he is able to pay, no matter what his conduct may have been in wasting or dissipating property belonging to the wife."

[5] Having found the items in subdivisions 2, 3, 4, and 5 of finding No. II to be community property, the trial court added them together, and the total, $11,206.89, was declared a lien on the real estate described in finding No. III and which the trial court found to be the defendant's separate property. The defendant contends that Civil Code, § 140, is not authority for the creation of a lien on the separate property of the husband to secure the payment to the wife of a share in the community property. The contention is fully sustained by the ruling in Mayberry v. Whittier, 144 Cal. 322, 326, 78 P. 16.

[6] The trial court awarded the custody of the two minor sons to the mother. It made a finding that the defendant might visit said minors at least once a month and spend the day with them in the presence of a probation officer of San Francisco. The defendant claims the provision prescribing that the visit should be in the presence of a probation officer was erroneous. In reply, the plaintiff calls to our attention finding No. I quoted above. The record shows that at the time of that transaction the sons were not present and were not in any way whatever connected therewith. There is not a particle of evidence in the record that the defendant was otherwise than a kind and affectionate father. The limitation imposed was not, therefore, sustained by the record.

[7] The court made a finding awarding the plaintiff $500 counsel fees in addition to amounts theretofore allowed. The defendant objects to the finding, and cites and relies on the rule stated in Sheppard v. Sheppard, 15 Cal. App. 614, 618, 115 P. 751; Loveren v. Loveren, 100 Cal. 493, 35 P. 87; Stampfli v. Stampfli, 53 Cal. App. 126, 132, 199 P. 829. The point is well founded. An examination of the record does not disclose that prior to the date of signing the findings and interlocutory decree any application for counsel fees remained undisposed of. The record showed no necessity for making the order at the time it was made.

[8] The judgment ordered that the costs be paid by the defendant. He asserts the order was in effect double taxation, because theretofore he had been ordered to pay the plaintiff $250 for costs and counsel fees, and that it will be presumed he had made the payment. No cost bill is contained in the record. An examination of the transcript discloses several orders for the payment of counsel fees and costs. However, it does not show how much was incurred for costs, and we have no means of separating the items. Therefore the record does not support the contention.

[9] The defendant offered his will in evidence, but the objection of the plaintiff was sustained. The will was dated December 31, 1918, and by its terms all of defendant's property was to go, in the event of his death, to the plaintiff. The defendant claims the will was evidence to the effect that, when the defendant struck the plaintiff, as recited in finding No. I, on June 3, 1927, the striking was not with the intention of putting her out of the way so that she could not inherit his property. Under the facts, we think the court did not err in sustaining the objection to the offer. Estate of Anderson, 185 Cal. 700, 718, 198 P. 407.

For the reasons indicated, the judgment is reversed, and the action remanded to the trial court, with directions to try the issues of fact covered by the following findings: Finding II, subdivisions 2, 3, 4, and 5; finding VI; finding IX; and finding X. Finding IV is hereby modified by striking therefrom the words "in the presence of J. C. Astredo, Chief Probation Officer of the City and County of San Francisco, State of California, or some suitable person designated by him." The other findings are either unchallenged or fully supported by the record, and the issues determined by them should not be retried. Upon retrial of the issues covered by the findings specified above to be retried, the trial court is directed to prepare new findings and conclusions of law not inconsistent with the views expressed in this opinion.

218 Cal. 408

## PEOPLE v. EGAN.

Cr. 3630.

Supreme Court of California.
June 28, 1933.

**1. Criminal law** ⚷301.

Denial of motion to change plea of not guilty of murder to not guilty by reason of insanity *held* not abuse of discretion, where accused's affidavit did not state facts showing that at time of killing he was insane, or so mentally deranged or diseased that he was unconscious of wrongful nature of crime committed (Pen. Code, § 1016).

> Affidavit offered to prove that at time of his birth one of accused's parents was deranged, that a number of his family had been adjudged mentally incompetent, that as a child he was sickly and feeble-minded, that as a school boy he was struck on the head and seriously hurt, as a result of which his brain was injured, that his mentality was further impaired by shooting affray in 1914 in which he was wounded, and that all his life he had been irrational and irresponsible, and that he expected to establish such facts by testimony of sister, two brothers, and an uncle who lived in other states, with whom he had communicated, and that he was unable to prove such facts when his original plea was filed.

**2. Criminal law** ⚷981(2).

Denial of motion for hearing as to present sanity after conviction of murder in first degree and before sentence *held* not abuse of discretion, where evidence at different hearings showed no trace of insanity.

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In Bank.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Dallas Egan was convicted of murder in the first degree, and he appeals.

Affirmed.

William I. O'Shaughnessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

The appellant, Dallas Egan, was charged with the crime of murder. The information also charged four prior convictions, two of which were suffered in other jurisdictions and two in the state of California. Defendant entered a plea of not guilty, and denied the prior convictions. Prior to the date set for his trial, he asked to be permitted to change his pleas to (a) not guilty, (b) not guilty by reason of insanity, and (c) admit the four prior convictions. His motion to enter a plea of not guilty by reason of insanity was denied, but on being rearraigned—and the record indicates being fully advised as to his rights—he admitted the four prior convictions.

The trial of appellant and two codefendants was begun. After it had been in progress for several days, the appellant asked permission to withdraw his plea of not guilty, and to enter a plea of guilty. The court thereupon personally questioned appellant, advising him fully as to his rights, and also questioned his counsel. Being satisfied that the appellant and his counsel fully appreciated the situation, the court ordered the appellant to be rearraigned, and there was entered a plea of guilty. On stipulation that the evidence already taken at the trial could be considered by the court in fixing the degree of the crime, and after hearing further facts and evidence then submitted to it, the court found the degree to be murder of the first degree. Before pronouncement of judgment and sentence, appellant made an oral motion for a hearing as to his present sanity, and a motion for a continuance in order to present testimony as to his then sanity. These motions were denied, and the death sentence was pronounced.

[1, 2] On this appeal two questions are presented: (1) Did the trial court abuse its discretion in denying appellant's motion to be allowed to change his plea of not guilty by the addition of the plea not guilty by reason of insanity? (2) Did the trial court abuse its discretion in denying appellant's motion, made after conviction and before sentence, for a hearing as to his present sanity?

The record shows that appellant and several accomplices, two of whom were subsequently shot to death while engaged with appellant in a bank robbery, were robbing a jewelry store in Los Angeles. While they were so engaged, W. J. Kirkpatrick, an elderly passerby, and unarmed, entered the store to compare his watch with the master clock. Appellant Egan ordered him to the rear of the store, where the proprietor and clerk had been driven, and when he refused to comply fired a bullet into his brain, killing him instantly. Appellant admitted, in answers to questions by the trial court, that by reason of his incarceration in Folsom prison for a number of years, a considerable portion of the time being in solitary confinement, he had "just come out embittered against society * * * and came out with the intention that society owed [him] a duty and [he] was going to collect that duty. [He] didn't come out to kill, but made up [his] mind if necessary [he] would kill for any cause." He further told the court that he "got together this group to go down there and rob" the jewelry store; that he carried a gun with him "for the simple reason to rob"; and that if there had been any protest on the part of the people he intended to rob, he would have been prepared to kill them. When asked further if that was the reason why he shot the decedent, he replied: "That's the reason why. I gave the man full warning." When asked why he did not shoot the proprietor of the jewelry store who had commandeered an automobile to follow the robbers, he replied: "I had an army Springfield [rifle] * * * I figured if he had tailed us four more blocks I would have shot him." Subsequent to the murder of Kirkpatrick, the appellant and others committed the bank robbery in which two of their number were shot to death. One of the bank tellers was shot. When questioned in the present case, appellant admitted doing the shooting.

Section 1016 of the Penal Code provides that the court "may," for good cause shown, allow a change of plea at any time before the commencement of the trial. We cannot, however, accept appellant's view that the trial court abused its discretion in refusing to grant him permission to enter a plea of not guilty by reason of insanity, or in subsequently denying his request that his present sanity be inquired into. No good cause for such action was shown. His motion to be permitted to change his plea was based upon his own affidavit, the substance of which was that he did not enter the additional plea of not guilty by reason of insanity when first arraigned because, at that time, he was unable to prove certain facts, to wit, that at the time of his birth one of his parents was deranged; that a number of his family have been adjudged mentally incompetent; that as a child he was sickly and feeble-minded; that as a schoolboy he was struck on the head and seriously hurt, as a result of which action his brain was injured; that his mentality was further impaired by a shooting affray in 1914, in which he was wounded; and that all of his life he had been irrational and irresponsible; that he expected to establish these facts by testimony of a sister, two brothers, and an uncle, all of whom resided in other states, and, having communicated with affiant, had promised they would testify to the foregoing facts.

Admitting that the witnesses named by the appellant would testify as indicated, and everything set out in the affidavit to be true, no showing is thereby made that appellant was "insane," as that term is used and understood at law, at the time of the commission of the offense. There is nothing in the affidavit to indicate that when the act was committed appellant was so deranged and diseased mentally that he was not conscious of the wrongful nature of the crime committed. See People v. Troche, 206 Cal. 35, 46, 273 P. 767. Furthermore, the trial court had the appellant before him at the time of making the motion for permission to change his plea, and also at the time the appellant made the oral motion in court for a hearing as to his present sanity. There is no room for the claim that the trial court, in either of these matters, abused its discretion or acted arbitrarily in the slightest degree. We have before us the entire record of the proceedings had in the trial court, including the testimony given by the appellant. There is not the slightest doubt that the appellant killed the decedent Kirkpatrick in a cold-blooded and merciless manner in pursuance of the determination he had formed in his own mind before engaging in the robbery. Aside from his own admissions, he was positively identified by the proprietor of the jewelry store, by his assistant, and by others. When the appellant withdrew his plea of not guilty, and changed it to one of guilty, the trial court carefully, even painstakingly, took him on examination and questioned him minutely as to his part in the commission of the crime, resulting in the testimony the substance of which we have given. No trace of insanity or unsoundness of mind of the appellant was found by the trial court, and none can be gleaned from the record. He stands out as a boastful, arrogant, merciless, determined criminal.

The orders appealed from and the judgment of conviction are, and each is, affirmed.

We concur: SEAWELL, J.; SHENK, J.; THOMPSON, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

218 Cal. 423

## CHRISTIE v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

## SAME v. STAFFORD.

S. F. 14685, 14641.

Supreme Court of California.
June 28, 1933.

**1. Certiorari 🔑7.**

Propriety of certiorari to review order, vacating order continuing temporary injunction against execution sale under judgment appealed from by petitioner, need not be considered (Code Civ. Proc. § 1068).

**2. Judgment 🔑461(4).**

Evidence in action to set aside judgment *held* to warrant court's finding that plaintiff was properly served with summons.

**3. Judgment 🔑461(1).**

Presumption arising from judgment is in favor of regularity of service of summons on judgment debtor, and burden of proving contrary is on party attacking it.

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In Bank.

Certiorari to Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Catherine C. Christie against Alice M. Stafford. From a judgment for defendant, plaintiff appeals, and to review an order, granting defendant's motion to set aside an order continuing a temporary injunction, plaintiff brings certiorari to the Superior Court in and for the City and County of San Francisco, George H. Cabaniss, Judge Presiding in Department 3.

Writ discharged, and judgment affirmed.

Joseph A. Brown, of San Francisco, for petitioner and appellant.

Albert Picard, of San Francisco, for respondents.

PER CURIAM.

[1] The above-entitled matters are, first a petition for writ of certiorari; and, second, an appeal by plaintiff from a judgment of the superior court of San Francisco. Both deal with the same controversy, which arose as follows: In a prior proceeding, Alice Stafford sued Catherine Christie and obtained judgment by default, in the sum of $1,020.98. Catherine Christie then brought an action in equity to set aside the judgment on the ground that summons was never served upon her, and in that action she was granted a temporary injunction against the enforcement of the said judgment by execution levied against her property. Upon the trial Judge Conlan gave judgment against the plaintiff, finding that she had been properly served, and that a meritorious case had existed in favor of Alice Stafford in the first suit. This judgment, entered November 12, 1931, dissolved the temporary injunction. To prevent the sale of her property under the execution previously levied, Catherine Christie obtained an order from Judge Conlan continuing in force the temporary injunction "until the further order" of the court. In January, 1932, Alice Stafford moved to set aside this order on the ground that it was beyond the jurisdiction of the court, and on June 3, 1932, Judge Cabaniss granted the motion. Thereupon Catherine Christie petitioned for a writ of certiorari, contending that Judge Cabaniss had no power to vacate Judge Conlan's order. Prior to this time, on January 15, 1932, she gave notice of appeal from the judgment. A writ of certiorari was granted and the matter heard in this court. Thereafter the briefs on appeal were filed, and both matters are now before us for determination. Since the decision on the appeal will finally adjudicate all the issues, it is unnecessary to give consideration to the propriety of the remedy of certiorari, although it may be observed that the statute is explicit in its provision that certiorari does not lie where an appeal is possible. Cal. Code Civ. Proc. § 1068; Stoddard v. Superior Court, 108 Cal. 303, 41 P. 278; Hughson v. Superior Court, 120 Cal. App. 658, 8 P.(2d) 227; Helbush v. Superior Court, 99 Cal. App. 501, 278 P. 1062; Leach v. Superior Court, 215 Cal. 531, 12 P.(2d) 1.

[2, 3] On the appeal, we see no alternative, but to affirm the judgment. The process server testified that he handed the summons to a lady, about sixty years of age, answering the general description of Mrs. Christie, as he saw her in the courtroom, that this lady had said she was Mrs. Christie until handed the summons, and that thereafter she had denied it. He was positive in his statement that the woman could not have been young or middle aged. For the appellant, Mrs. Ruth Prince, niece of Mrs. Christie, who took care of her during a period of illness at this time, testified that the summons was handed to her (Mrs. Prince) in spite of her denial that she was Mrs. Christie. Mrs. Christie also testified that she was never served. Certain contradictions in the testimony of these last two parties as to the circumstances need not be elaborated upon, but they fully warranted the trial court in resolving the square conflict in the evidence against appellant. The presumption arising from the former judgment is, of course, in favor of the regularity

of the service, and the burden is on the party attacking it. See Vail v. Jones, 209 Cal. 251, 287 P. 99; Eichhoff v. Eichhoff, 107 Cal. 42, 40 P. 24, 48 Am. St. Rep. 110. On the merits as well the evidence was strongly conflicting, but there is ample in the record to justify the court's conclusion that Mrs. Christie was indebted to Mrs. Stafford in the amount recovered.

The writ of certiorari heretofore issued is discharged, and the judgment is affirmed.

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218 Cal. 471

## CALDWELL v. TAYLOR et al.

L. A. 13086.

Supreme Court of California.

June 30, 1933.

Rehearing Denied July 28, 1933.

**1. Judgment ⚷403.**

Equity has jurisdiction to afford appropriate relief from judgments generally and from orders and decrees in probate proceedings in proper cases.

**2. Wills ⚷221.**

Equity may not set aside probate of will, but may declare beneficiary trustee for those who have been wrongfully defrauded.

**3. Judgment ⚷445, 521.**

Proceeding for equitable relief from effect of judgment, order, or decree is not "collateral attack," and doctrine of res judicata has no application.

[Ed. Note.—For other definitions of "Collateral Attack," see Words & Phrases.]

**4. Appeal and error ⚷917(1).**

In determining whether trial court correctly sustained demurrer to amended complaint, facts stated therein must be accepted as true.

**5. Judgment ⚷443(1).**

Equity will give relief from effect of judgment only upon proof of "extrinsic" and collateral fraud, as distinguished from "intrinsic fraud," or fraud practiced in former action.

> "Extrinsic fraud" is where an unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent the party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side, and in other cases where, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.
>
> [Ed. Note.—For other definitions of "Extrinsic or Collateral Fraud" and "Intrinsic Fraud," see Words & Phrases.]

**6. Judgment ⚷460(4).**

Complaint for relief against judgment admitting will to probate *held* to show "extrinsic fraud" entitling plaintiff to relief against beneficiary.

> Complaint alleged that beneficiary who had married plaintiff's father, had falsely concealed her real identity, past record, and marital status, by means of misrepresentations to plaintiff, so that he was unable to trace her in time to make effective contest when will was offered for probate; that beneficiary was a notorious woman who had married plaintiff's father for corrupt purposes; and that will had been procured by fraud and undue influence.

**7. Wills ⚷355.**

Plaintiff's difficulty in proving prevention from contesting will by beneficiary's alleged fraud, and that will was procured through fraud, *held* without weight in determining whether complaint attacking judgment admitting will to probate stated cause of action.

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In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Suit by Oscar P. Caldwell against Leonore Taylor, sometimes known as Leonore Fisher Caldwell, and others. From a judgment for defendants, plaintiff appeals.

Reversed, with instructions.

D. A. Knapp, of Los Angeles, for appellant.

Andreani, Haines, Bisher & Carrey and Haines & Bisher, all of Los Angeles, for respondent Leonore Fisher Caldwell.

Harold E. Thomas, of Los Angeles, for respondent Bank of America Nat. Trust & Savings Ass'n.

CURTIS, Justice.

This is an appeal by plaintiff from a judgment of dismissal based upon an order sustaining demurrers filed by defendants to plaintiff's second amended complaint without leave to amend.

By this suit in equity, plaintiff, the only son and heir of Perry Moore Caldwell, seeks to have a beneficiary named in his will as Leonore Fisher Caldwell declared an involuntary trustee for the use and benefit of plaintiff, of the property devised and bequeathed to her, upon the ground that said will was procured by fraud exerted upon the testator by the beneficiary, his supposed wife. Faced at the outset by a judgment sustaining the order admitting the will to probate (Caldwell v. Bank of Italy, 112 Cal. App. 104, 296 P. 312), plaintiff, while admitting the existence of said order, attempts to avoid its effect by seeking the aid of equity upon the ground that said order admitting the will to probate was procured by virtue of fraud practiced upon him (the plaintiff), whereby he was prevented from properly presenting his contest of said will.

Briefly stated the allegations of said complaint are to the effect that the defendant, Leonore Taylor, "a notorious woman who had been arrested many times for grossly immoral acts and for sundry misdemeanors and crimes," induced Perry Moore Caldwell, father of the plaintiff, to accompany her to Tia Juana, Mexico, where in a drugged and intoxicated condition, he was induced to go through a marriage ceremony with her before a Mexican magistrate; that she falsely represented to him that she was a woman of fine character and good reputation and prior to her marriage to him was a single woman; that Perry Moore Caldwell at the time of the marriage was a victim of incurable cancer of the throat and defendant, in order to gain his sympathy, represented to him that she was a victim of a like fatal disease in its earlier stages; that after living with him as his wife for about a fortnight, she induced him to go to a hospital, where he remained until his death less than two months later; that during this time she importuned him to make adequate financial provision by will for her, his legally wedded wife, and "so harassed, urged, cajoled, threatened and nagged him" that he made a will in which he left her the sum of $4,500 for the purchase of a home and devised to the Bank of Italy the sum of $25,-500 as a trust fund, the net income of which should be paid to her during her life; that during this time she prevented to a large extent plaintiff from visiting his father; that the deceased communicated with plaintiff by writing, as he was unable to talk, and by writing informed plaintiff that he had executed the will because of the fact that the defendant was his lawfully wedded wife and she had assured him that she was a woman of fine character and reputation and worthy of his consideration, but that he had become suspicious of her, and that he wished his son to investigate in order that he might act accordingly; that upon discovering the communications between the father and son, the defendant prevented the plaintiff from seeing his father except for brief periods; that "at or about the time of or prior to the probate of the will" by defendant, the plaintiff ascertained from the police records of the city of Los Angeles that said Leonore Taylor was a "vicious, dissolute and grossly immoral woman of the streets"; that "prior thereto" plaintiff talked with defendant and asked her directly what her name and marital status were prior to the time of her purported marriage to plaintiff's father; that she represented to him that she was, on the day of said marriage, a widow, her husband having died many years before, and that her name was Leonore Fisher; that shortly after the six months' period allowed by statute for the contest of the probate of the will, plaintiff ascertained that not only was the defendant, Leonore Taylor, a notorious woman who had been many times arrested, but that on the date of her purported marriage to Perry Moore Caldwell she was in fact the wife of Carl L. Taylor; that said misstatements with reference to her real identity and her marital status were represented and stated by defendant to plaintiff with the intent and purpose of thereby preventing the discovery by plaintiff of sufficient facts to enable plaintiff to fully and properly present a case in contest of said will within six months after the probate thereof, and that by reason of said false and fraudulent representations and of her deceit she succeeded in preventing the plaintiff from presenting a contest of said will; that the estate of Perry Moore Caldwell, at the time of his death of the value of approximately $60,000, had been diminished by the prevailing prices of stocks and bonds to less than $29,500, approximately the value of defendant's interest in said estate. In his prayer, plaintiff seeks to have the Bank of America appointed an elisor by the court to receive all moneys as and when payable to said defendant, Leonore Taylor, in the place of said defendant, to receipt therefor in her name and to pay the same over to plaintiff, the acts of said elisor to be construed as the acts of Leonore Taylor as constructive trustee for the plaintiff, and for such other relief as the court may deem proper.

[1-3] The jurisdiction of equity to afford appropriate relief from judgments generally and from orders and decrees in probate proceedings upon a showing of proper circumstances is well settled. Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 P. 184. It has been specifically held that equitable relief may be granted against orders and decrees of a probate court, including a decree of distribution, and a decree probating a will. Estate of Ross, 180 Cal. 651, 182 P. 752; Nicholson v. Leatham, 28 Cal. App. 597, 153 P. 965, 155 P. 98; Bacon v. Bacon, supra. Since the probate of a will is a matter exclusively within the jurisdiction of the probate court equity may not set aside the probate, but it may declare the beneficiary a trustee for those who have been defrauded. Estate of Ross, supra; Estate of Walker, 160 Cal. 547, 117 P. 510, 36

L. R. A. (N. S.) 89; Campbell-Kawannanakoa v. Campbell, supra; Bacon v. Bacon, supra; Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am. St. Rep. 98. And such character of relief is common. The judgment, order, or decree from the effect of which relief is sought cannot constitute a bar to equitable relief. A proceeding for equitable relief is not a collateral attack, and since its sole aim and purpose is to avoid the effect of said judgment, the doctrine of res judicata can have no application to such judgment. Bacon v. Bacon, supra; Campbell-Kawannanakoa v. Campbell, supra.

[4, 5] The case comes to us upon the question of the correctness of an order sustaining the demurrers, and the facts stated in the complaint must be accepted as true, at least for the purpose of the present argument. Assuming them, therefore, to be true, does the complaint state facts sufficient to entitle the plaintiff to the interposition of the aid of equity to avoid the effects of the judgment affirming the order of probate already made and entered? The claim of plaintiff that he is entitled to such aid is predicated upon the fraud practiced by the defendant, Leonore Taylor, a beneficiary under his father's will. An analysis of the authorities upon the question of what fraud will warrant the aid of equity indicates that only upon proof of *extrinsic* and *collateral* fraud can plaintiff seek and secure equitable relief from the judgment. A showing of fraud practiced in the trial of the original action will not suffice. The authorities hold this to be intrinsic fraud, and uniformly hold that since there must be an end to litigation, and the fraud was part of the case presented in the former action, equity will not reopen the litigation. The leading case of United States v. Throckmorton, 98 U. S. 61, 65, 25 L. Ed. 93, so holds. In that case it was held that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. "The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy." Pico v. Cohn, 91 Cal. 129, 25 P. 970, 971, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159. In United States v. Throckmorton, supra, the court stated that the cases where such relief would be granted are those in which, "by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side;—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. [Citing authorities.] In all these cases, and many others which have been examined, relief has been granted on the ground that by some fraud *practiced directly upon the party seeking relief* against the judgment or decree, that party has been prevented from presenting *all* of his case to the court." (Italics ours.) This definition has become the well-recognized and standard definition of extrinsic fraud. The rule laid down in that case that intrinsic fraud would not justify equitable intervention was stated in Pico v. Cohn, supra, which held that a judgment would not be vacated merely because it was obtained by forged documents, perjured testimony, or by bribing a witness to swear falsely. And in Clavey v. Loney, 80 Cal. App. 20, 251 P. 232, 234, the court held the fact that by mistake an entire interest in property was by decree of distribution distributed to one entitled to only a fractional interest therein, would not in the absence of extrinsic fraud, warrant equitable relief. The court there stated that "the extrinsic fraud, which alone will warrant a court of equity in setting aside a judgment or decree, consists of such fraud as prevents a real trial upon the issues involved in the case, like conduct which prevents the injured party from receiving notice of the action, or which causes the absence of necessary witnesses."

It also seems to be the rule that the fraud alleged must not be the fraud which is in effect the issue in controversy, the fraud upon which the cause of action in the former suit was based. In other words, the rule awarding equitable relief cannot be held to include such frauds as could have been relieved by the probate court itself by refusing probate, where the injured party had actual notice of the probate proceedings in time to make his contest and was not prevented from so doing by some fraud of the other party. In Brazil v. Silva, 181 Cal. 490, 185 P. 174, the court held that, inasmuch as the issues presented by the complaint before it were *not* questions before the probate court, that is, the question as to the instrument being the legal and valid will of the decedent unrevoked at the time of his death, the plaintiffs were *not* concluded by the order admitting the will to probate.

It is apparent from the foregoing discussion that the issue of fraud practiced upon the testator which was the issue involved in the contest of the probate of the will (although in fact the case was decided upon the issue of whether or not the contest had been filed within the statutory time allowed) is forever foreclosed from further consideration unless it be successfully established by plaintiff that by a different and distinct fraud practiced directly upon him by his opponent he was prevented from presenting all of his case to the court. Plaintiff has foreseen and recognized the necessity for the presence of such fraud, extrinsic and collateral to the main issue of fraud involved in the will contest, and seeks to supply it by the allegation of his complaint that "plaintiff talked with said defendant and asked her directly what her name and marital status was prior to and at the time of her purported marriage with plaintiff's father; that defendant then and there stated that she was a single woman on May 29, 1929 (the date of said marriage ceremony in Tia Juana), that her name was Leonore Fisher, that she had never gone by any name except Leonore Fisher since many years before when she had married a man named Fisher * * * that defendant so represented and stated with the knowledge that plaintiff could find in no record of vital statistics or any other public record any fact disclosing the truth as to her marital relationship on said May 29, 1929, and with the intent and purpose of thereby preventing the discovery by plaintiff of sufficient facts to enable plaintiff to fully or properly present a case in contest of said will within six months after the probate thereof, August 21, 1929; that by reason of her said false and fraudulent representations and of her deceit in the premises said defendant succeeded as aforesaid in preventing plaintiff from presenting to the above named court a contest of said will." By this statement, plaintiff has attempted to avoid the pitfalls of pleading either intrinsic fraud, or fraud inherent in the original cause of action, and has attempted to state a cause of action which will come within the classification of extrinsic fraud as indicated by those cases in which relief has been granted. Sohler v. Sohler, supra; Bacon v. Bacon, supra; Simonton v. Los Angeles Trust & Savings Bank, 192 Cal. 651, 221 P. 368; Brazil v. Silva, supra; and Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L. R. A. (N. S.) 579.

[6] We think plaintiff has been successful, in that, in said allegation above set out he has stated facts which distinguish the fraud therein alleged from the fraud which was the subject-matter of the will contest. Although it is true that, in a manner of speaking, the deliberate and intentional falsehood made by defendant, Leonore Taylor, to plaintiff for the purpose of concealing her real identity, her past record, and her marital status, was the same specie of fraud as that designedly practiced upon the testator, plaintiff's father, and was but the final step in the plan of fraud as originally conceived and executed, which step was necessary to prevent the entire structure of falsehood and deceit from collapsing, it is, in fact, not an actual part and parcel of the original fraud which was the subject-matter of the contest of the will. That fraud was fraud practiced upon the testator, the fraud stated in the above allegation was practiced upon the plaintiff with the intent and purpose of misleading him and thereby preventing him from presenting to the court the actual facts with reference to the fraud which would, if established, vitiate the will.

The question remains whether he has stated a case of extrinsic rather than intrinsic fraud. The distinction between intrinsic and extrinsic fraud is quite nebulous and a rather extensive search has failed to disclose any case, either one dealing with intrinsic fraud, or one dealing with extrinsic fraud, in which the facts are closely similar to those set out in plaintiff's complaint. We are of the opinion, however, that the fraud therein alleged does come within the general definition of extrinsic fraud as defined by the above authorities. The main requirement to establish extrinsic fraud is that the unsuccessful party was prevented by his adversary from presenting *all* of his case to the court. One of the examples given is that of a party who is prevented from appearing in court. It would seem that the deceit practiced in the instant case was just as effective to prevent the proper presentation of the contest as if the plaintiff had been prevented from being present at the hearing. In Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L. R. A. (N. S.) 579, supra, the court held that one who was induced to refrain from presenting a proper defense to a foreclosure of a mortgage suit by virtue of the promises and agreement of the plaintiff therein to devise and bequeath the property upon his death to the defendant was, as to the defendant, extrinsic fraud which prevented a presentation at the trial of defendant's meritorious defense. Conceding that the facts are not similar, the underlying thought is the same in that case as in the instant case wherein the plaintiff, by virtue of the false statements of the beneficiary, was prevented from setting up a real defense to the probate of his father's will. In each case, the party seeking the aid of equity had been deprived by the deceit of an opponent from properly presenting the real issues. The instant case is also somewhat similar in principle to the case of Ocean Insurance Co. v. Robert Fields, 2 Story 59, Fed. Cas. No. 10406, a case which involved a suit on an insurance policy in which the court held that the willful concealment of the fact of the original fraud upon which the action to recover the insurance on a lost boat was based was sufficient to warrant the aid of equity, since the fact of such original fraud if known to the defendant would have been a complete answer to the success of the suit.

In determining whether or not the willful concealment by defendant of her real identity and her deliberate falsehood to plaintiff with reference to her marital status at the time of her purported marriage to the testator will warrant the interposition of equity to prevent the retention by her of the fruits of her fraud, it must be borne in mind that, accepting as true the allegations of the complaint, the statements so made were not mere equivocations or slight deviations from truth, but were in fact false declarations deliberately and designedly made for the express purpose of preventing plaintiff from discovering and disclosing to the court the fraud and deceit practiced upon the testator, within the short period of six months now allowed by statute for the contest of a will after probate. It would, of course, be too much to expect one who would designedly enter upon the course of deceit and fraud alleged in the complaint to give aid to her adversary by confessing to him any facts detrimental to the success of her scheme. Plaintiff does not, however, complain that his opponent remained passive and failed to give him assistance, but predicates his claim to relief in equity upon the charge, in effect, that she by active deceit and by intentional and deliberate falsehoods designed to prevent a successful contest of the will within the time limit provided by statute did in fact delay and hinder and prevent him from successfully prosecuting such contest.

[7] We are, therefore, of the opinion that if plaintiff upon a trial of this issue is able to prove that in fact by such fraud he was prevented from adequately and fully presenting his contest of his father's will, then he is entitled to a consideration by the court of the question of whether or not the will was in fact procured by the fraud of the beneficiary, as alleged in his complaint, which question has been heretofore foreclosed to him by the order admitting the will to probate. Upon successful proof by him that it was so procured, he is entitled to whatever relief the court may deem proper. The fact that it may be extremely difficult to successfully prove that plaintiff was prevented from contesting the will by reason of the deliberate falsehoods of the defendant beneficiary of the will, and further that the will was procured through the fraudulent schemes and deceit of the defendant beneficiary can have no weight in deciding the question of whether or not the plaintiff has stated a cause of action in his complaint.

It follows from what we have said that the lower court was in error in its conclusion that the complaint failed to state a cause of action.

Judgment is reversed, with orders to the trial court to overrule the demurrers of defendants.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.

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133 Cal.App. 184

## HAYWARD et al. v. WIDMANN et al.

## WIDMANN et al. v. HAYWARD et al.

Civ. 8944.

District Court of Appeal, First District, Division 1, California.

July 6, 1933.

Rehearing Denied Aug. 5, 1933.

Hearing Denied by Supreme Court Sept. 1, 1933.

**1. Fraud ⚷64(2).**

Where there is any doubt whether representation was intended and understood as mere expression of opinion or statement of fact, question is one of fact.

**2. Fraud ⚷20.**

One who has actually investigated truth of representation, and is given full facilities for doing so, and who acts on his own judgment, cannot recover because of falseness of representation.

**3. Fraud ⚷20.**

Purchasers of indemnity company stock, who were given full access to records of company and conducted independent investigation, could not recover for alleged false representation that loss reserve of company was $150,000.

**4. Attorney and client ⚷141.**

$20,000 *held* not excessive award of attorneys' fees, where 64 days were consumed in trial of suit on $518,300 note providing that, if suit were commenced to collect it, makers would pay such additional sum as court found reasonable as attorneys' fees.

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Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Max E. Hayward and others against E. A. Widmann and others, wherein defendants filed a cross-complaint. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Lawler & Degnan, Barry Brannen, and Newlin & Ashburn, all of Los Angeles, for appellants.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondents.

PER CURIAM.

Plaintiffs brought this action to recover the balance owing them on a promissory note executed to plaintiffs Hayward by defendants; also to foreclose a lien against certain shares of stock which had been deposited with plaintiff Title Insurance & Trust Company as security for the payment of said note. Defendants by their answer denied liability on said note, and alleged that they had been induced to enter into a contract for the purchase of 23,000 shares of the capital stock of the International Indemnity Company through the false representations of plaintiffs Hayward, and that the note sued upon represented a part of the purchase price of said stock. They also filed a cross-complaint in which they alleged that they were induced to enter into said contract for the purchase of said shares of stock by the said false representations, and asked judgment for $270,008.19. Judgment was rendered for plaintiffs for the balance owing on said note, and for the foreclosure of the lien against said shares of stock. From this judgment the defendants appeal.

On March 20, 1928, respondents and appellants entered into an agreement for the sale of the 23,000 shares of the capital stock of the International Indemnity Company to appellants for the sum of $718,300, to be paid as follows: $10,000 at the date of the execution of said agreement, $190,000 on April 2, 1928, and for the remaining sum of $518,300 appellants executed their promissory note payable in installments of $20,000 on the 1st day of May, 1928, and the same amount on the 1st day of each and every month thereafter until the principal sum thereof had been paid, with interest at the rate of 7 per cent. per annum. Said agreement further provided that the 23,000 shares of the capital stock of the International Indemnity Company and 6,000 shares of the Keystone Capital Corporation should be deposited with the Title Insurance & Trust Company as collateral, to secure the payment of the said promissory note. On the same date (March 20, 1928), appellants entered into an agreement with the Title Insurance & Trust Company by which they agreed to deposit with said title company the 23,000 shares of the capital stock of the International Indemnity Company and the 6,000 shares of the capital stock of the Keystone Capital Corporation, to be held a pledge for the payment of said note. Under the terms of this pledge agreement, the said title company became the trustee of said pledged stock, and was authorized, upon default of payment, to sell said security and apply the proceeds to the payment of said note, interest, and costs. Thereafter respondents caused to be issued to appellant Hansen the said 23,000 shares of the International Indemnity Company stock, and appellants deposited said stock, together with the 6,000 shares of the capital stock of the Keystone Capital Corporation, with the said title company as collateral security for the payment of said note.

Appellants paid to respondents the said $10,000 on the execution of said agreement and the $190,000 on the 2d of April, 1928, and on the 1st of May, and for the three succeeding months, paid to respondents the installments of $20,000 called for by said note. They then defaulted in their said payments. It appears from the evidence that, while the note and agreement were dated as of March 20, 1928, the transaction was not consummated until March 27, 1928.

Appellants contend that they were induced to enter into the contract for the purchase of the said shares of stock through the false representations of respondents Hayward; that these false representations were that the contingent liability of said International Indemnity Company for unsettled claims, and losses and expenses in connection therewith, had been accurately and fairly computed, and that the reserves of said company posted against said unsettled claims, losses, and expenses exceeded any possible contingent liability of the said company therefor by the sum of at least $150,000. Upon conflicting evidence, the trial court found against appellants upon this contention, and also found that, while it was true respondent Max E. Hayward stated to appellants in December, 1927, that there was an equity of $150,000 in the reserves carried by the International Indemnity Company on its financial statement of September 30, 1927, for the payment of losses and expenses, this statement was made by the said Hayward as an expression of his opinion; that the appellants did not rely upon said opinion to enter into the said contract for the purchase of said shares of stock, nor were they thereby induced so to do.

On November 24, 1927, appellant Hansen sent a telegram to Max Hayward requesting an option on 21,000 shares of the capital stock of the International Indemnity Company. Following this telegram, negotiations were had between the parties, and on December 7, 1927, an agreement was entered into between appellants and respondents Hayward by which, in consideration of $10,000, said respondents gave to appellants the option to purchase, on or before March 1, 1928, 21,000 shares of stock of said International Indemnity Company at $31.50 per share and 2,000 shares at $28.50 per share, all to be paid in cash not later than March 10, 1928.

On January 21, 1928, appellant Hansen employed Harwood E. Ryan, a member of the insurance auditing firm of Woodward, Fondiller & Ryan of New York to go to Los Angeles to survey and audit the affairs of the International Indemnity Company, and particularly to include in said audit the adequacy of the loss reserve. By virtue of said employment, Ryan went to Los Angeles, where shortly thereafter he was joined by appellants. Max Hayward testified that during the course of Ryan's examination of the affairs of said company Ryan told him it appeared to him that the loss reserves were inadequate. Appellants also informed Max Hayward that Ryan had told them the loss reserves, in his opinion, were inadequate. Dan S. Hammack testified that about March 9, 1928, at a meeting at which appellants were present, they said that according to Ryan's report the reserves were inadequate. Immediately after the said investigation by Ryan was completed, Max Hayward received the following letter from appellants: "Mr. Max E. Hayward, International Indemnity Company, Los Angeles, Cal. Dear Sir: This will formally advise you that option in reference to sale of certain stock in the International Indemnity Co. wherein C. M. Hansen and E. A. Widmann were granted the right on Dec. 8th, 1927, to purchase 23,000 shares—will not for reasons already explained to you and your brother Sam T. Hayward, be exercised, and we hereby make formal demand for return of the $10,000 posted. C. M. Hansen. Our accountant found conditions quite different in many respects, and less advantageous to buyers, than shown by your statement of Sept. 30. Eugene A. Widmann." In answer to this communication Max Hayward wired Hansen refusing to return the $10,000, and Hansen in turn wired him that the amount was too small for a disagreement, and that he was satisfied they would ultimately be of mutual assistance. Thereafter negotiations for the purchase of said shares of stock were renewed, and on March 20, 1928, a written agreement was signed by the respective parties, but the deal was not finally consummated until March 27, 1928. There is some evidence that on March 21, 1928, and before the transaction was completed, appellant Hansen was informed by A. Hall McAllister, the claims manager of the International Indemnity Company, that the loss reserve was inadequate. This was denied by Hansen, who claimed that he had no knowledge of the inadequacy of the loss reserve until after the deal had been closed.

The International Indemnity Company was engaged in the writing of a general fidelity and casualty business. In the course of this business claims would arise, some of which would be adjusted and settled over a period of months, and others were resisted and defended in the courts. At the date of the agreement and negotiations, there were some 8,000 unsettled claims existing against said company. Under these conditions, the estimate of the reserve against loss contained in the statement of September 30, 1927, could not be mathematically calculated, and must have been so understood by appellant Hansen, who possessed wide experience in these matters, since he had been engaged in similar insurance business continually from the year 1907.

[1-3] It seems to be well settled that, where there is any doubt whether a representation was intended and understood as a mere expression of opinion, or a statement of a fact, the question is not one of law, but one of fact for the court or jury. French v. Freeman, 191 Cal. 579, 217 P. 515; Dickey v. Dunn, 80 Cal. App. 724, 252 P. 770; Palladine v. Imperial Valley F. L. Ass'n, 65 Cal. App. 727, 225 P. 291; McKeever v. Locke-Paddon Co., 58 Cal. App. 51, 207 P. 1040; Stockton v. Hind, 51 Cal. App. 131, 196 P. 122. Furthermore, there is evidence that appellants did not rely on the statement of Max Hayward that the equity in the loss reserve was $150,000 as shown by the financial statement of September 30, 1927, but undertook an independent investigation of their own into the affairs of the International Indemnity Company and its loss reserve by employing Ryan, an expert, to make an audit of the affairs of said company, and particularly by direction of appellants was Ryan instructed to include in such audit the adequacy of the loss reserves.

In Maxon-Nowlin Co. v. Norswing, 166 Cal. 509, 137 P. 240, 241, the court used the following language: " 'To entitle a person to relief or redress because of a false representation, it is well settled that it is not enough to show merely that it was material, that it was known to be false, and that it was made with intent to deceive, but it must also be shown that it actually did mislead and deceive; or, in other words, it was relied upon by the party complaining.' [Citing authorities.]"

In Pomeroy's Equity Jurisprudence (4th Ed.) § 893, it is said: "If, after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled. * * * "

One who has actually investigated the truth of the representation, and is given full and fair facilities for doing so, and who acts upon his own judgment and knowledge, cannot be said to rely upon the representation. Colton v. Stanford, 82 Cal. 351–383, 23 P. 16, 16 Am. St. Rep. 137; Spinks v. Clark, 147 Cal. 439, 82 P. 45; San Jose Ranch Co. v. San Jose L. & W. Co., 132 Cal. 582, 64 P. 1097; Shermaster v. California Home Bldg., etc., Co., 40 Cal. App. 661, 181 P. 409. In the instant case Ryan was given full and free access to the records of said company and had full opportunity to examine into its affairs and its loss reserve. We are therefore of the opinion that appellants did not rely upon the representation of Max Hayward that the loss reserve as shown by the financial statement of September 30, 1927, was $150,000.

[4] The note sued upon in this action provides that, in case suit is commenced to collect it, or any part of it, appellants agree to pay such additional sum as the court may find reasonable as attorneys' fees. Appellants claim that the attorneys' fee of $20,000 is excessive. On behalf of respondents, reputable attorneys placed the value of the services rendered by these attorneys at a much larger figure than that allowed by the court. Appellants offered no evidence as to the value of these services. Taking into consideration the sum involved in this case, and that sixty-four days were consumed in the trial, we cannot say that $20,000 was an unreasonable amount to allow respondents as attorneys' fees.

The findings sufficiently cover the issues in this case, and are supported by the evidence. The judgment is affirmed.

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133 Cal.App. 207

## MITCHELL v. STRINGER.

## WISSIG v. SAME.

## BOOTH v. SAME.

Civ. 8778.

District Court of Appeal, First District, Division 1, California.

July 7, 1933.

**Trial 🔑345.**

Plaintiffs must call court's attention to defects in verdict before jury is discharged, and failure to do so constitutes waiver of defects (Code Civ. Proc. § 619).

Appeals from Superior Court, Alameda County; E. C. Robinson, Judge.

Actions by Helen B. Mitchell, by Henry L. Wissig, and by Nellie M. Booth against S. W. E. Stringer, who filed a cross-complaint. From judgments for defendant except on his cross-complaint in the second case, plaintiffs appeal.

Affirmed.

Ford & Johnson, of San Francisco, for appellants.

Cooley, Crowley & Supple, of San Francisco, for respondent.

PER CURIAM.

The above actions, consolidated for the purpose of trial, are for damages resulting from injuries received in a collision of two automobiles.

Plaintiff Wissig, the driver of one of the automobiles, was traveling southerly along the Santa Cruz mountain highway. With him, as his guests, were plaintiffs Mitchell and Booth. Respondent was driving an automobile northerly on said highway. The two automobiles collided, resulting in the injuries to plaintiffs and the damage to defendant's automobile. Plaintiffs alleged in their complaints that the collision of said automobiles which resulted in their injuries was caused by the negligence of defendant. The defendant in his answers to the complaints denied that he was negligent, and by his cross-complaint alleged negligence upon the part of plaintiff Wissig and asked judgment for the damages sustained by his automobile. The jury returned a separate verdict in each of the cases in favor of the defendant, except in the Wissig case it returned a verdict against defendant on his cross-complaint. Each of the plaintiffs moved for a new trial and, said motions being denied, separate judgments were rendered in accordance with the verdicts.

The evidence in these cases is conflicting and warrants the jury in finding either for plaintiffs or defendant. Apparently the appeal by Wissig has been abandoned. The one point urged for a reversal in the cases of Mitchell and Booth is that the verdicts of the jury are inconsistent in this: that while the verdict of the jury in the Wissig case was in favor of respondent, by said verdict it also found for Wissig on respondent's cross-complaint. In other words, that while the jury found respondent was not guilty of negligence in the Wissig case, it did find him guilty of negligence on his cross-complaint, and for that reason returned a verdict against him; that therefore Mitchell and Booth, occupying the positions merely as guests of Wissig, were entitled to recover from respondent for the injuries sustained by them. The fault in this contention is that it cannot be said with certainty that the jury, in returning the verdict on the cross-complaint, did so upon the theory that respondent was negligent. Under the instructions the jury, in view of the conflict in the evidence, might well have found that neither Wissig nor respondent was guilty of negligence and this is borne out by the verdict in all three of the actions, where the jury found that respondent was not negligent and where by the verdict on the cross-complaint it found that Wissig was not guilty of negligence. If the verdict was defective, it was the duty of appellants to call the attention of the court to such defects before the jury was discharged in order that it might retire and correct its verdict. By their failure to do this they waived the defects if any existed. Code Civ. Proc. § 619; Asebez v. Bliss, 178

Cal. 137, 172 P. 595; Manufacturers' Finance Corporation v. Pacific Wholesale Radio, Inc. (Cal. App.) 19 P.(2d) 1013; Joerger v. Pacific Gas & Electric Co., 207 Cal. 8–21, 276 P. 1017.

The judgments are affirmed.

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133 Cal.App. 58

## DOOLEY et ux. v. WEST AMERICAN COMMERCIAL INS. CO. et al.

Civ. 7859.

District Court of Appeal, Second District, Division 2, California.
June 28, 1933.

**1. Principal and agent 🔑22(1).**

Declaration of person that he is agent of another is not competent evidence of agency, unless made in presence of, or communicated to, and acquiesced in by, principal.

**2. Principal and agent 🔑22(2).**

Declarations of alleged agent are admissible where prima facie evidence of agency is shown.

**3. Assault and battery 🔑35.**

Evidence, in action for assault, established prima facie case of authority of person repossessing automobile to represent alleged principal (Code Civ. Proc. § 1963, subds. 1, 5, 20).

> Evidence showed that automobile was owned by company which had offices with alleged principal, that person taking possession of automobile subsequently rightfully used tags prepared by alleged principal for use in repossessing automobiles insured by it where there was default in payments, and that in repossessing automobile he was acting for alleged principal. Such evidence was sufficient because, in absence of controversion, it must be assumed under Code Civ. Proc. § 1963, subds. 1, 5, 20, that person repossessing automobile was innocent of crime or wrongdoing in using tags or in seizing automobile, that alleged principal possessed evidence as to whether person repossessing automobile was acting for it, and that such evidence was not produced because it would have been unfavorable to it, and that the ordinary course of business was pursued in repossessing automobile and use of tags.

**4. Assault and battery 🔑35.**

Evidence sustained judgment that agent was guilty of assault in using more force than was necessary to protect himself or repossessed automobile.

**5. Assault and battery 🔑40.**

$1,250 *held* not excessive for numerous bodily injuries, including injuries to knee, spine, and shoulder, inflicted on woman by agent protecting possession of repossessed automobile.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by George J. Dooley and Neva Dooley against the West American Commercial Insurance Company and another. From a judgment for plaintiffs, named defendant appeals.

Affirmed.

Rex Hardy and Vernon W. Hunt, both of Los Angeles, for appellant.

Abbott & Ashton, of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

The complaint herein alleged in substance that defendant Carl C. Vianelli was the agent of the defendant corporation, and that, while acting in that capacity, he assaulted the plaintiff Neva Dooley, injuring her. From a judgment in favor of plaintiffs the corporation has appealed.

Appellant contends that (1) the evidence is totally insufficient to prove that at the time of the alleged assault Vianelli was in its employ or acting as its agent; (2) that, irrespective of what the evidence shows as to agency, it does not show that appellant was liable for the assault by Vianelli; and (3) that the amount of the judgment is excessive.

Neva Dooley parked her car in the street at a neighbor's, left the "switch key" therein, and started up the steps to the neighbor's home. As she was about halfway up the porch steps, she saw a man get into the car, afterwards identified as the defendant Vianelli. She thereupon ran to the curb and jumped on the running board of the car. The alleged assault occurred while the car was being driven some three blocks, evidently in an attempt to force her to get off the vehicle. Mrs. Dooley, however, was able to steer the car into a service station, where she was joined by her husband. At this service station Vianelli presented plaintiffs with a card, introduced as Exhibit No. 1, on which appeared the following:

"Complete Automobile and Casualty Cove——ge.
"West American Commercial Insurance Company.
"I. W. Langeloh    Trinity 6681
"Claims Department 201 Roosevelt Building
"Los Angeles.
"by Carl C. Vianelli."

The last line was in pencil, the balance of the card being printed. Defendant corporation refused to stipulate to the agency of Vianelli, and objected to any conversation had with plaintiffs on the ground that the same was incompetent, irrelevant, and immaterial, hearsay, and no foundation laid. The court, on promise that the agency would be shown, permitted the conversation to be detailed. Vianelli asked the husband if he were Mr. Dooley, to which the latter replied: "Yes; what is coming off here?" Mrs. Dooley then said: "This man is stealing the car," to which Vianelli replied: "No, I am not. I am a representative of the West American Insurance Company, and I am repossessing the car." Mr. Dooley then asked Vianelli to identify himself as the man named on the card, which he did by producing an American Legion card. The automobile was then taken to the garage of one H. D. Tapley by Vianelli and Mrs. Dooley, where Vianelli presented a tag to Tapley, which on one side contained a check of the car equipment and on the reverse side the following:

"West American Commercial Insurance Co.
201 Roosevelt Bldg. Los Angeles
Telephone Trinity 6681
"Claim No. 27927 No. 2071
"Geo. J. Dooley—C D C
"Assured
"11941 1609 Worthington Ave.
"Dealer
"Make
"A 533-526 Ford Cpt. 3 N 2903
"Motor No. License No.

"This automobile is stored with you for our account. Deliver same only upon our order or the surrender of other part of this check.
"Placed in Storage by (Signed)
"Carl E. Vianelli."

The witness Tapley testified that on the day the car was taken from the garage, and the storage, gasoline, and oil paid for, he was given another tag, which also contained a check of the car equipment and description of same as on the first card, but in lieu of the storage order contained on the first tag was the following:

"Place of Storage

"Upon payment of your charges, this authorizes you to deliver to bearer the above mentioned automobile, and this will act as our receipt for the same.
"West American Commercial
Insurance Co.
"By [Signed] Carl C. Vianelli
"Receipt must be signed by authorized agent of this Company."

With regard to the second tag Tapley testified: "It is a part of the same card, I suppose. They correspond in number and also in tear." The car was evidently not taken from the garage by Vianelli, but by "a man with a star."

In buying the car on installment payments, and when he was given the machine, Dooley was handed an "Instalment Coupon Book" which requested him to make payments "without notice" to "Commercial Discount Company, 201 Roosevelt Building," Los Angeles, which, it is to be observed, is also the address of appellant as given on the cards and tags above mentioned. The coupon book also contained, immediately after the last coupon, the following:

"Lest You Forget

"* * * The renewal date of your insurance policy is near at hand.

"* * * To act now on this reminder with instructions to us for its renewal will insure continuous protection.

"* * * It has been a privilege to serve you in the past, and we will value the opportunity to continue as your source of protection.

"* * * May we have your renewal instructions now that you will be certain of continuous protection.
"West American Commercial
Insurance Co.
"Home Office, Roosevelt Building,
Los Angeles."

There is evidence from which it might be concluded that Dooley was in default in his payments and had changed his place of residence.

At the trial, the defendant corporation presented some five witnesses for the purpose of testifying as to the character of plaintiffs. Most of them testified that the reputation of Mr. Dooley for truth, honesty, and integrity in the community in which he lived was bad, but they did not testify as to that of Mrs. Dooley, and the court remarked, in summing up the case: "We are concerned primarily with the testimony, of course, of Mrs. Dooley and not Mr. Dooley."

[1, 2] 1. Unquestionably, the mere declaration of a person that he is the agent of another is not, in and of itself, competent evidence of the agency, unless made in the presence of, or communicated to, and acquiesced in by, the principal. Union Construction Co. v. Western Union Telegraph Co., 163 Cal. 298, 125 P. 242. Where, however, prima facie evidence of such agency is shown, such declarations are admissible. Union Const. Co. v. Western Union Tel. Co., supra. In the case cited it was held that, where one had called defendant's office by telephone, and in answer to his inquiry was told that it was the office of defendant, there was prima facie proof "that the person answering was the agent of defendant at its said office, employed there by it to receive for it such communications as should come in that manner," and that "all of these conditions were shown to exist upon the trial of the case, either by direct evidence or by fair and rea-

sonable inference, or as matters of judicial knowledge."

[3] In our opinion, the evidence in this case, as well as inferences fairly to be drawn therefrom, establishes a prima facie case of authority to represent appellant on the part of Vianelli in taking possession of plaintiffs' automobile. It appears therefrom that the contract covering the car belonged to Commercial Discount Company, which company had offices in the same suite with appellant, the insurance carrier of said car; that Vianelli in storing said car, after taking possession, rightfully used tags prepared by appellant for use in repossessing cars insured by it where there was default in payments and apparent "wrongful conversion, embezzlement or secretion" of such property, and that he was acting as the agent of appellant in making such repossession. In the absence of controversion, we must assume, under section 1963 of the Code of Civil Procedure, that Vianelli was innocent of crime or wrong in the use of such tags and in seizing such car (subdivision 1), and that the ordinary course of business was pursued by him in so doing (subdivision 20); and we are of the opinion, in view of the fact that appellant must have possessed evidence as to whether or not Vianelli was acting for it in so doing, which evidence was not produced at the trial although appellant defended the action, that such suppressed evidence would have been adverse to it had it been in fact produced (subdivision 5).

[4] 2. Granting appellant's contention that Vianelli, being in possession of the car, had the right to use all force necessary to protect himself or his property, still we are of the opinion that, considering all the evidence in the case, the court was justified in concluding that his actions were not justified and that they constituted an assault.

[5] 3. Appellant urges that the judgment is excessive. Mrs. Dooley testified that Vianelli hit her in the mouth, pinched her on the arms, tore her dress in front, that she was dragged for about two blocks, with first one foot and then the other on the ground, before she could get back on the car, that Vianelli choked her while she was on the running board, and that she was in bed a little over a week because thereof. Dr. Scott, who was called to see Mrs. Dooley the day of the accident, testified that she appeared to be suffering greatly from pains in the lower part of the spine and in the left knee; that the pain in the left knee apparently left between his visit on the 6th of October and his visit on the 10th, but that the pain in the spine persisted and that the patient still complained of it. The doctor gave osteopathic treatment to relax congested muscles and relieve the pain. He made seven visits to the home, and Mrs. Dooley called at his office seventeen times. In addition, her testimony shows that she was still under treatment. The doctor described seven scratches on Mrs. Dooley's right arm above the elbow, and twenty-three scratches on the left arm between the elbow and wrist, as well as the imprint of fingers on the right forearm "as if the four fingers had been compressed deeply there." He further testified that there were "black and blue spots on the left shoulder, a large discolored area, black and blue, on the lower part of the spine, over the left hip," a "decided mark across the front [of the] right leg between the knee and the ankle," and "a bruising of the lower lip on the right hand side." There were many scratches on her forearms, and one about the middle of the back, four or five inches long, "evidently where the dress had been torn," which were apparently made by a young lady companion of Vianelli, who was trying to assist him in getting the car away from Mrs. Dooley.

We cannot say that under such evidence a judgment of $1,250 is so grossly disproportionate to any reasonable compensation for the injuries sustained as to raise a presumption that it is based on prejudice or passion instead of sober judgment. Counsel for appellant cites as authority for the action desired the case of Ware v. McPherson, 63 Cal. App. Dec. 1063. The opinion in that case does not appear in the bound volumes of the California Appellate Reports for the reason that on a hearing granted by the Supreme Court of such case the latter tribunal came to a different conclusion from that reached by the District Court of Appeal. 213 Cal. 120, 1 P. (2d) 433. It is only fair to counsel to say, however, that the opinion last cited was handed down after appellant's brief was filed herein.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

133 Cal.App. 124

## SHANNON et al. v. CENTRAL–GAITHER UNION SCHOOL DIST. et al.

**Civ. 4788.**

District Court of Appeal, Third District, California.

June 30, 1933.

Rehearing Denied July 29, 1933.

Hearing Denied by Supreme Court Aug. 28, 1933.

**1. Schools and school districts 🔑89.**

School district operating bus solely for convenience of pupils at particular school *held* mere private carrier, and only ordinary prudence for safety of children was required (Civ. Code, §§ 2096, 2100, 2168).

Distinction between a "common carrier" of passengers and a "private carrier" is that the former must receive all who apply for passage so long as there is room and no legal excuse for refusing, while such duty does not rest on the latter.

[Ed. Note.—For other definitions of "Common Carrier" and "Private Carrier," see Words & Phrases.]

**2. Negligence 🔑7.**

Generally, greater care must be exercised for protection of young children than for adults.

**3. Schools and school districts 🔑122.**

Negligence of principal of school who, in operating school bus, stopped on traveled portion of pavement on side opposite boy's home, and apparently failed to give boy warning of rapidly approaching automobile, *held* question for jury in action for injuries to 10½ year old boy struck by approaching car while crossing highway.

The evidence disclosed that the injured boy was of an impulsive nature, and that, when he left the bus, he started for home on the run, and principal knew it was the custom of the children to walk along the side of the bus to the rear end before crossing the highway, so that their view of approaching machine was obscured by the bus.

**4. Automobiles 🔑245(74).**

Contributory negligence of 10½ year old boy struck by automobile while running across highway without looking, after alighting from school bus, *held* question for jury in action against school district for negligent failure to warn.

**5. Automobiles 🔑223(3).**

Child of tender years need not exercise same care in looking for approaching vehicles as adults.

**6. Negligence 🔑141(10).**

Questions of negligence of young children are generally for jury's determination.

Appeal from Superior Court, Sutter County; Eugene P. McDaniel, Judge.

Action by Grover Shannon, individually and as guardian ad litem for Samuel Shannon, against the Central-Gaither Union School District and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Len H. Honey, of Stockton, and Loyd E. Hewitt, of Yuba City, for appellants.

Rich, Weis & Carlin, of Marysville, and Arthur Coats, of Yuba City, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiff's ten and a half year old boy was struck and seriously injured by a passing automobile while he was crossing the highway from the school bus to his home. Suit for damages was brought against the school district and the trustees. A jury returned a verdict of $1,109.40 against the defendants. From the judgment, which was accordingly rendered, they have appealed.

It is claimed the evidence fails to prove negligence on the part of the defendants or their driver of the school bus, and, on the contrary, that the boy's contributory negligence is established as a matter of law.

The plaintiff, Grover Shannon, lives on the river road in Sutter county near Tudor. His residence adjoins the public highway in a rural district. The highway has an 18-foot paved strip with wide receding shoulders. It is straight and level at this point. There is ample room for a vehicle to park on the shoulders of the roadway without resting the wheels on the concrete pavement. The plaintiff's young son Samuel and his daughter Barbara, who was a couple of years older, had attended the Central-Gaither Union School for several years. The district operated a school bus by means of which the pupils were conveyed to and from school. At the time of the accident, the regular bus driver was absent, and Mr. Manners, the principal of the school, was engaged in driving the bus. Six children ranging from ten to fourteen years of age were riding in the conveyance. The machine was 22 feet in length with doors on the sides near the front of the vehicle. Mr. Manners stopped the bus across the highway opposite the Shannon home. The machine was parked with two-thirds of its width overlapping the concrete pavement contrary to section 136 of the California Vehicle Act (as amended by St. 1931, p. 2128, § 50), although the driver admitted "there was no difficulty to drive off if I had driven off" the pavement. Before he opened the door for the Shannon children to leave the bus, he saw a machine approaching on the highway from in front. He said it was then 100 or

150 yards away and traveling toward them at the rate of about 40 miles an hour. Neither of the children saw or heard this approaching machine. He knew it was the custom of the children to leave the conveyance and walk along the side to the rear end of the bus before crossing the highway. Their view of the approaching machine was thus obscured by the intervening bus. Although Manners testified that he warned the Shannon children of the approaching machine, all six of the children who were riding in the bus denied that they heard any such warning. Mrs. Shannon also testified that, when Manners carried her boy into the house after the accident occurred, he said to her, "I have warned them repeatedly, and this time I failed to warn them." There was therefore a conflict of evidence regarding the warning. Barbara preceded her brother across the highway. Samuel reached a point about halfway across the paved portion of the highway, when his sister suddenly observed the approaching car and the danger which threatened him. The car was driven by a Filipino. It had reached a point nearly opposite the bus. She called to her brother, who, for the first time, saw the machine. He stopped and turned too late to escape. He was struck and dragged a considerable distance before the Filipino's car was stopped. The child was rendered unconscious and suffered severe injuries. The doctor testified that he received ruptures of both a kidney and the liver. Injury to the nerves of one leg left a weakened condition of the limb. He suffered from severe shock and hemorrhage. Blood transfusion was necessary to restore his strength. He was confined to the hospital at Sacramento for nearly a month.

The plaintiff Grover Shannon brought suit against the school district and its trustees for the medical and hospital expenses incurred as a result of the accident. As guardian of his minor son, he also asked for damages for the injuries suffered. The answer denies the charges of negligence against the defendants, and affirmatively alleges that the injuries were sustained as the proximate result of the boy's contributory negligence. The cause was tried with a jury. The following verdict was returned: "We, the jury, find our verdict in favor of the plaintiff Grover Shannon and fix his damages in the sum of $1,109.40, and we find our verdict in favor of the plaintiff Samuel Shannon and fix his damages in the sum of $———."

A judgment for that sum was accordingly rendered. From this judgment the defendants have appealed.

Three questions are raised on this appeal. The respondent contends the driver of a school bus which conveys only the pupils of its school is, nevertheless, a common carrier of passengers which must be operated with the "utmost care and diligence" under the provisions of section 2100 of the Civil Code. The appellants assert that the evidence fails to support the judgment, for the reason that it does not appear the driver of the bus was guilty of negligence, and that upon the contrary the record discloses the fact to be that the injured boy was guilty of contributory negligence as a matter of law.

[1] We are of the opinion that a bus which is operated only for the convenience of a particular school under the circumstances of this case is a mere private carrier as distinguished from a common carrier, and that ordinary prudence for the safety of children under similar circumstances is all that is required of the district or the driver of the bus. Gornstein v. Priver, 64 Cal. App. 249, 221 P. 396; Klein v. Baker, 112 Cal. App. 157, 296 P. 631; 4 Cal. Jur., 815, § 2. Section 2168 of the Civil Code defines common carriers as follows: "Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry."

Section 2096 of the same Code provides that: "A carrier of persons without reward must use ordinary care and diligence for their safe carriage."

In the case of State v. Nelson, 65 Utah, 457, 238 P. 237, as it is reported in 42 A. L. R., note, at page 855, this statement of the law is found: "One who operates a bus or stage in accordance with the terms of a contract, for the benefit of a particular class, and not for the benefit of the public generally, is not a common carrier."

In 6 Words and Phrases, Third Series, 118, the following distinction between common and private carriers is expressed. The quotation is with reference to Orr & Lanning v. Boockholdt, 10 Ala. App. 331, 65 So. 430. It is there said: "The distinction between a 'common carrier' of passengers and a 'private carrier' is that the former must receive all who apply for passage so long as there is room and no legal excuse for refusing, while such duty does not rest on the latter."

Since a school bus is operated for the sole convenience of the pupils of a particular school, and there is no legal obligation for it to carry passengers generally or even to carry the pupils of other schools, it may not be deemed to be a common carrier of passengers, and the highest degree of care and diligence in its operation is therefore not required. We assume that the defendants in the present action are liable only for failure to exercise ordinary care and prudence for the safety of their pupils under the particular circumstances of this case.

[2] There is ample evidence to support the implied finding of the jury to the effect that the driver of the school bus was guilty of

negligence, under the circumstances of this case, which proximately contributed to the injuries of the child. It is ordinarily necessary to exercise greater care for the protection and safety of young children than for an adult person who possesses normal and mature faculties. One should anticipate thoughtlessness and impulsiveness in the conduct of a young child. In Victory Sparkler & Specialty Co. v. Latimer (C. C. A.) 53 F. (2d) 3, it is said: "One dealing with children must anticipate ordinary behavior of children."

And likewise it is said in 45 C. J. 702, § 78: "The known characteristics of children should, * * * be taken into consideration in determining whether or not sufficient care for the safety of a child has been exercised in a particular case. Accordingly, the fact that children cannot and do not ordinarily exercise the same degree of prudence and care for their own safety as adults imposes upon those by whose acts or omissions a child may be injured an obligation of exercising more vigilance and caution than might be sufficient with respect to an adult, and conduct which might reach the standard of ordinary care with respect to an adult might, in the case of a child, amount to negligence."

[3] The question of the negligence of the defendants in the present case should therefore be determined with due regard to all the surrounding circumstances, including the age, mentality, and childish impulses of the injured boy. The boy was but ten and a half years of age. He was full of life and activity. He was addicted to hilarious pranks. He was armed with a sling shot which he carried in his trousers' pocket at the time of the accident. The moment he left the bus he started for home on the run. He was just the sort of an eager, active boy that lacks deliberation. The principal who drove the bus had charge of the boy in school. He must have known of his impulsive temperament, yet the record contains evidence which warranted the jury in assuming that Manners permitted the child to leave the bus and dart back behind the vehicle to cross the highway without warning him of the rapidly approaching machine which was but a short distance away.

The evidence presents the following questions regarding the negligence of the driver of the bus: Was he justified in stopping the school bus on the side of the roadway opposite the children's residence, requiring them to cross the traffic of the highway to reach their home? Did the parking of the bus at the roadside so as to overlap the traveled portion of the pavement some 4 feet, in violation of the statute, increase the danger to the children and proximately contribute to the accident? It may be reasonably assumed that, if Manners had complied with the statute and had parked the bus on the shoulder, as he admitted he might have done, there would have been more space after passing the rear end of the bus within which to discover the approaching machine. Finally, with full appreciation of the youthful immaturity of the boy, with knowledge of his impulsive temperament and his habit of darting to the rear of the bus to cross the highway, it is important to determine whether it was negligent for the driver of the bus to permit the child to leave the machine without warning him of the danger of the rapidly approaching car. These are all questions of fact to be determined by the jury. In view of the conflict of evidence, the court may not resolve these questions in favor of the defendants as mere matters of law. From the verdict it must be inferred the jury found that the driver of the bus was guilty of negligence with respect to one or more of the foregoing acts or omissions and that this negligence proximately contributed to the injuries which were sustained by the child.

[4, 5] The remaining problem is whether the admission of the boy to the effect that he did not look for approaching machines before he attempted to cross the highway constitutes contributory negligence under the circumstances of this case. We conclude that the question of the contributory negligence of a ten and a half year old boy under the circumstances of this case was a problem for the determination of the jury, with the solution of which this court may not interfere on appeal.

The appellants contend that the admission of the boy that he failed to look for approaching machines before he attempted to cross the highway is conclusive proof of his contributory negligence as a matter of law. On cross-examination which was conducted by appellants' attorney, Mr. Honey, the following record appears:

"Q. You knew better than to run across the road without looking to see if any machine was coming? A. Yes sir.

"Q. You knew if you did that you were likely to get hit? A. Yes.

"Q. You just ran across there without looking this time? A. Yes sir.

"Q. That's all."

Without any disposition to criticize counsel, this reads like the ingenious examination of a skillful attorney. It indicates the obliging answers of a timid youth who is unfamiliar with the solemn proceedings of a courtroom. It is significant that, when these favorable answers were elicited from the boy, the subject was immediately and wisely abandoned by the attorney. The jury observed the boy upon the stand and the adroit manner in which he was examined. They were better able to determine the weight and effect of these admissions. In view of the serious result of the accident, it is not surprising that he should admit after much subsequent thought over the matter that he knew he was likely to get hit if he attempted to cross the highway. And the last alluring question, "You just ran across there without looking this time?" probably propounded with a friendly smile, naturally induced the reply, "Yes sir." Of course, it is material to know whether the boy actually did thoughtlessly run onto the highway without looking. It seems quite likely he did not look in the direction from which the automobile came or he would have seen the machine. This failure to look for approaching machines might be deemed to furnish conclusive evidence of contributory negligence on the part of an adult person. But the same degree of care is not required of a child of tender years. In the case of Oberholzer v. Hubbell, 36 Cal. App. 16, 171 P. 436, it was held that the failure of an adult person of mature judgment to look for approaching machines at the intersection of cross streets did not constitute contributory negligence so as to defeat her right to recover damages as the result of an automobile collision. The court there said: "It was developed upon the cross-examination of the plaintiff that there was nothing to obstruct her view or that of her husband of the approach of the defendant's automobile; that neither she nor her husband looked to see if other vehicles were approaching; and that if they had looked in the direction from which the defendant's automobile approached they could have seen it and 'would have stopped.'"

Notwithstanding these facts, a judgment in favor of the plaintiff was affirmed on appeal, and a rehearing was denied by the Supreme Court. Contributory negligence was an issue in that case. This merely means that the mere failure to look for machines before one crosses a highway does not necessarily charge him with contributory negligence. This failure should be considered with all the other facts and circumstances of the case in determining whether one is guilty of contributory negligence.

In the present case the failure of the child to look for approaching machines is of much less consequence than it appears to have been in the Oberholzer Case. That case involved the crossing of a busy thoroughfare of a city street by intelligent adult persons. The present case involves the crossing of a highway in a rural district with scarcely any traffic in sight. The boy who is charged with negligence was but ten and a half years of age. He possessed a child's mind and thoughtless disregard of unseen dangers. The intervening autobus concealed his view of the highway until he emerged from behind the vehicle. In spite of the admissions contained in the foregoing evidence, the question of his contributory negligence was a problem for the determination of the jury. It does not constitute negligence as a matter of law, under the circumstances of this case.

[6] The question of the negligence of a child of tender years is usually and naturally a problem for the determination of a jury. Almost uniformly the question of the negligence of young children is considered a problem for the decision of a jury. In the case of Loftus v. Dehail, 133 Cal. 214, 65 P. 379, 380, relied upon by the appellants, it was not decided that the infant child of seven years of age was guilty of contributory negligence in falling into an open, unguarded cesspool which was maintained on the property of the defendants. The court said: "She was pushed in, in a fit of temper, by her younger brother. His act was the proximate cause of the injury." Upon this theory, that case was decided. It has no bearing on the present suit.

The rule applicable to the question of the responsibility for the negligence of a child is clearly stated in 5-6 Huddy's Encyclopedia of Automobile Law, 195, § 116, as follows: "Children of very tender years are not chargeable in law with contributory negligence; and if children are sui juris, so that contributory negligence may be attributed to them, judgment is not passed on their conduct with the same strictness as in the case of adults. Children are not regarded as possessing the same mental capacity to appreciate the dangers incident to the use of the public thoroughfares as those of mature age. What is required of a child is that it shall exercise the same degree of care as would ordinarily be exercised by a reasonably careful child of the same age and intelligence under like circumstances; and this rule applies in the absence of evidence on the subject of his intelligence. This requirement as to care may, of course, result in a finding that a child was guilty of negligence which contributed to its injury. Generally the negligence of the child is a question for the jury."

To the same effect is the text found in 1 Thompson on Negligence, 292, §§ 310-313. This is but a sensible and humane doctrine. It would be unreasonable to judge of the responsibility of a child for its conduct and acts upon the same rules which are applicable to an adult person of mature intelligence. See, also, Rosenberg v. Durfee, 87 Cal. 545, 26 P. 793. Likewise in the case of Sanders v. Toberman, 192 Cal. 13, 218 P. 394, in affirming the order of court granting a new trial in a suit for damages for the killing of an eight year old boy while he was crossing a street, in which a verdict was rendered in favor of the defendant, the court said: "The question as to whether or not a child of eight years was guilty of negligence is ordinarily a question of fact to be determined by the jury, notwithstanding the fact that the child may have done things which in an adult would be held contributory negligence as a matter of law. Mayne v. San Diego Elec. Ry. Co., 179 Cal. 173, 175 P. 690, and cases there cited. See, also, Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 139, 138 P. 712. It is sufficient for the purposes of this appeal to say that the accident occurred at the intersection of two streets on one of which the defendant was traveling with his automobile, and that the deceased child was attempting to draw a little wagon across the street, accompanied by his sister. The question of whether or not the child was negligent in failing to exercise due caution in observing the traffic at the street intersection was a question for the jury to determine under proper instructions."

We are persuaded the same principle which is above stated applies to the case at bar. There is ample evidence to support the implied finding of the jury in this case to the effect that the child was not guilty of contributory negligence as a matter of law, in spite of his admission that he failed to look for approaching machines before he attempted to cross the highway.

The appellants were very fully protected by elaborate, forcible, and favorable instructions which were given to the jury at their request upon every possible defense to the action.

The judgment is affirmed.

We concur: **PULLEN, P. J.; MILLER, Justice pro tem.**

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133 Cal.App. 27

## MEADS v. WARNE.

Civ. 4922.

District Court of Appeal, Third District, California.

June 26, 1933.

Hearing Denied by Supreme Court Aug. 24, 1933.

**Certiorari** ⚿28(2).

Certiorari *held* not to lie to review affirmance by superior court of judgment of small claims court, since by appealing to superior court petitioner submitted to jurisdiction of that court though small claims court had no jurisdiction.

Petition by O. E. Meads for writ of certiorari to the Superior Court of Calaveras County, J. T. B. Warne, Judge Pro Tempore, to annul a judgment of affirmance on appeal from the Small Claims Court.

Judgment of Superior Court affirmed.

A. H. Carpenter, of Stockton, for petitioner.

Virgil M. Airola, Dist. Atty., of San Andreas, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

An action was commenced against O. E. Meads as defendant in the small claims court of San Andreas township, county of Calaveras, for the recovery of an amount within the jurisdiction of that court.

The defendant appeared and after the taking of testimony upon behalf of both sides, a judgment was rendered in favor of plaintiff and against the defendant therein.

Thereafter the defendant appealed from the judgment of the small claims court to the superior court of Calaveras county, and there answering, objected to the jurisdiction of the court to proceed with the matter on the ground that defendant was not at the time of commencement of the action in the small claims court, and never was a resident of San Andreas township, but was at the commencement of the action, and at the time of the appeal was, a resident of the county of San Joaquin. Upon that issue and special appearance, the superior court found against the defendant Meads and judgment was entered accordingly. Thereupon defendant Meads sought by this writ of review to test the jurisdiction of the court and the validity of the judgment so given.

Petitioner contends that the small claims court had no jurisdiction of the action against him. Let us, without determining that fact, assume that to be true; nevertheless by the taking of the appeal to the superior court the defendant submitted himself to the jurisdiction of that tribunal, and the issues there presented having been determined by a court having jurisdiction, a writ of review will not lie to this court.

The case of De Matei v. Superior Court, 74 Cal. App. 147, 239 P. 853, 854, arose from a justice's court in Lake county wherein an action was brought for goods sold and delivered. The complaint was served on one of the petitioners in the city and county of San Francisco. No allegation was contained in the complaint that any of the defendants were residents of the county of Lake nor that defendants or either of them, contracted in writing to perform the obligation in the county of Lake. In due time the petitioner moved to quash the service of summons claiming the court had no jurisdiction. The justice's court ruled against petitioner, and he, refusing to proceed further, his default was entered. From said judgment by default petitioner appealed to the superior court and in time that court affirmed the ruling of the justice's court. Thereupon petitioner by a writ of certiorari sought to review the judgment of the superior court, claiming that court acted in excess of its jurisdiction.

Mr. Justice Hart, for the court, said:

"In the present case, even if, in point of fact, it be true, as is the claim, that the justice's court never acquired jurisdiction of the persons of the petitioners, the latter certainly submitted themselves or their persons to the jurisdiction of the respondent court by the very act of taking the appeal from the judgment of the justice's court. If this were not true, there would be presented the very novel and, indeed, absurd, situation in which the superior court, in the exercise of its appellate jurisdiction in the case, would be limited to the doing of one of two things, viz.: Reverse the judgment or dismiss the action. In truth, the necessary assumption of the petitioners herein is that the superior court has jurisdiction to reverse the judgment, but is without jurisdiction to affirm it, the practical effect of which position is that, in such a situation as is presented here, the appellant would have it in his power to control the discretion of the superior court in the decision of the appeal. Or, as one of our cases has well interpreted a like position taken by the appellant on an appeal from the justice's court to the superior court, he thus was asking the Supreme Court to restrain the superior court 'from trying (and determining) the appeal which he was prosecuting.' Sanborn v. Superior Court, 60 Cal. 425.

"But it is well settled, at least in this state, that the writ of certiorari will not lie 'to review the judgment of a justice's court after appeal taken and determined in the Superior Court.' Olcese v. Justice's Court, 156 Cal. 82, 86, 103 P. 317. * * * It was held therein that the defendant in the justice's court, by taking an appeal to the superior court, submitted his person to the jurisdiction of said court; that said court, being one of general jurisdiction and empowered to pass upon the law and the facts of the case, its determination thereof was res adjudicata and operated as an estoppel. It is further stated in that case that an appeal from a justice's court is tantamount to a writ of error, and that to sanction the review of the decision of the superior court on the appeal would in effect amount to the entertainment of a second writ of error aimed at the judgment of the justice's court, a procedure which is, of course, not allowable. See, also, American Law Book Co. v. Superior Court, 164 Cal. 327, 128 P. 921; Albers v. Superior Court, 30 Cal. App. 772, 775, 159 P. 453; Bogmuda v. Young, 58 Cal. App. 19, 207 P. 915."

This court, in the case of Behrens et al., Petitioners v. Superior Court, 23 P.(2d) 428, had a somewhat similar situation under consideration, and there authorities which are applicable to this case are assembled and considered.

We are therefore of the opinion that petitioner, having submitted himself to the jurisdiction of the superior court, has had his day, and we cannot through a writ of certiorari again review the issues presented by him.

The judgment of the superior court is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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133 Cal.App. 167

## PEOPLE v. MASTERS.

Cr. 2378.

District Court of Appeal, Second District, Division 1, California.

July 5, 1933.

**1. Burglary ⟹41(5).**

Evidence in respect to whether burglary was committed before sunrise *held* sufficient to warrant conviction for first degree burglary.

**2. Criminal law ⟹304(1).**

Trial court is empowered to take judicial notice of exact minute when sun rose on certain date.

**3. Criminal law ⟹775(3).**

Instruction in respect to defense of alibi *held* properly refused as constituting argument combined with erroneous statement of law.

> Court instructed the jury that it need hardly say that effective alibi was a perfect defense, and that all effort to make it effective was entitled to the same serious and earnest consideration on the evidence that they were expected to give to any other material element of case involved, and that defense of alibi stood upon same footing as any other defense which law recognized as legitimate one.

**4. Criminal law ⟹1036(1), 1137(5).**

Evidence in burglary prosecution respecting prior arrests of defendant *held* properly admitted, where there was no objection thereto and information respecting such arrest was elicited on cross-examination (Code Civ. Proc. § 1854).

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

George W. Masters was convicted of first degree burglary, and he appeals.

Affirmed.

Ralph D. Paonessa and Alexander L. Oster, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

DESMOND, Justice pro tem.

The defendant, convicted by a jury of first degree burglary, seeks a reversal on the grounds of insufficiency of the evidence, refusal of the court to give one of his requested instructions, and the admission of certain evidence hereinafter mentioned in some detail. The appeal is also from the order of the trial court denying a new trial.

[1] The complaining witness, one Anderson, had a room upon the sixth floor of a hotel in Los Angeles. Shortly after midnight of February 2, 1933, he went to bed, leaving his trousers on a chair in his room. In a pocket of his trousers was a single-fold wallet containing a $10 bill, a $5 bill, and a check. The bills were folded once. The house officer of this hotel, one Brophy, testified as follows: While he was making his rounds at 5:50 a. m. February 3d, he saw the defendant in his stocking feet back out of Anderson's room and slowly and quietly close the door; that at this time witness was only eight or ten feet away from the defendant, who then passed within a foot of him and bounded up two flights of stairs, the officer pursuing, but failing to see him in the hallway when he reached the eighth floor, hearing one of the doors in that hall shut just before he reached the top of the stairs. Brophy then went back to the sixth floor, entered Anderson's room and awakened him. Anderson found that his wallet was gone. Brophy then returned to the eighth floor, summoned the elevator operator and the two went to the defendant's room on that floor and knocked for admittance. Before the knock was answered, both these witnesses, according to their testimony, heard the toilet in defendant's room flushed several times. Brophy searched the defendant upon entering his room and in his side trousers pocket found a $10 bill and a $5 bill folded once. Mr. Morey, the manager of the hotel, was summoned to the room, and later Brophy went down to the sixth floor, where Anderson had remained meanwhile, and then both of them went back to the defendant's room at about 6:20 a. m., according to Anderson. Two police officers entered shortly afterward, and the defendant was searched again by one of them, who found $23 in bills in defendant's watch pocket near the belt strap of his trousers. In the water at the bottom of the toilet in defendant's bathroom, Brophy found two keys of unusual make, characterized by one of the officers as "picks." No wallet was found upon the person of the defendant, but one of the officers, going to a window in defendant's room, focused a powerful flash-light on the roof of a garage building about 30 feet below defendant's bedroom window, and there saw an object which later proved to be Anderson's wallet. The other officer went down to the third floor of the hotel, and there gaining access to the garage roof from a window directly below the window of defendant's room, picked up the wallet, and, on a second trip, the check, which belonged to Anderson and which had been in his wallet when he went to bed. Other officers were called in, and one of them, Jones, handcuffed the defendant, took him to Anderson's room, and in the presence of defendant, using the "picks" which Brophy had found, succeeded in opening Anderson's door, although it was locked at the time with the room key. Anderson testified that he had locked his door upon retiring.

The defendant testified that he had gone to bed in his room between 9:30 and 10:30 p. m. of February 2d, and had never been out of his room up to the time Brophy knocked upon his door shortly before 6 a. m. the following morning, which defendant estimated was about 45 minutes after he arose and dressed. He was fully dressed at the time he admitted Brophy.

[2] It is not contended that upon the facts above related the evidence is insufficient to support a verdict of burglary, but appellant argues that there was no evidence placed before the jury upon which they could base a verdict of first degree burglary, and suggests that this court has power under section 1181, subd. 6, Penal Code, if satisfied that the evidence was sufficient to fix the crime of burglary upon the defendant, to modify the judgment in such manner as to establish the offense as second degree burglary. The question on this point then resolves itself into this: Was there evidence upon which the jury could find beyond a reasonable doubt that Anderson's room was entered before sunrise? This is a question of fact, and, having in mind that the offense, according to the testimony, was committed early in February at 5:50 in the morning, and that when Anderson went to the defendant's room at about 6:20 it was necessary for the officer, in order to survey the roof of the adjoining garage building, to use a flash-light, we see no reason to disturb the finding of the jury upon that point. Neither did the trial court, empowered as it was to take judicial notice of the exact minute when the sun rose on February 3, 1933. 10 Cal. Jur. 720; People v. Mayes, 113 Cal. 618, 625, 45 P. 860.

[3] Appellant predicates error upon the court's refusal to give the following instruction, as copied from the record: "Defendant's Instruction No. 2. The court instructs the jury that I need hardly say to you that an

effective alibi is a perfect defense and that all effort to make it effective is entitled to the same serious and earnest consideration upon the evidence that you are expected to give to any other material element of the case involved. The defense of an alibi stands upon the same footing as any other defense which the law recognizes as a legitimate one, and it may be and often is the first and only refuge of the innocent. Refused—covered Hahn." If for no other reason, the proposed instruction was properly refused because of the apparent fact that in effect its language constitutes an argument combined with an erroneous statement of the law. We cannot agree with the statement that "the defense of an alibi stands upon the same footing as any other defense." One difference was noted by this court in People v. Vasquez, 93 Cal. App. 448, at page 452, 269 P. 549, 550, where the degree of proof required to establish insanity as a valid defense is contrasted with the proof which, in connection with a claimed alibi, is sufficient to secure an acquittal. We observe the word "covered" in the notation upon this instruction, and it may be that the trial court was under the impression that another instruction upon the specific subject of alibi had been given. We also observe that among the instructions given were several marked merely "Refused" and several marked "Refused—covered." Possibly through inadvertence or mistake the word "covered" was entered upon this particular instruction. At any rate, since it does not state a correct principle of law, it cannot be said that it was improperly refused. Therefore no error arises.

[4] In regard to the remaining contention, that the court erroneously permitted testimony to go to the jury relative to prior arrests of this defendant, we have reviewed the evidence bearing on this subject, and find that the first mention of it was made by Officer Jones under direct examination when, in detailing certain conversations had with the defendant after his arrest, he said, as to one of them "about ten or fifteen minutes later I took him around to the fingerprint bureau and got a record card. He said, 'Well, this is a bum break. It is a bad beef.' He said 'This is my thirteenth pinch on a Friday, with a $2 bill in my pocket.'" No objection was made to the introduction of this testimony, nor was there a motion to strike the answer. On the contrary, under cross-examination information was elicited from this witness, to the effect that the card in question was in fact the record card of the defendant and showed that under three aliases, all differing from the name Masters, he had been arrested twelve times, four times upon suspicion of burglary. This conversation having been gone into in such detail upon cross-examination, the court permitted the respondent to inquire upon redirect examination as to whether any portion of the conversation in question had been omitted. The proceedings becoming somewhat confused, the learned judge took a hand in the examination, but we are satisfied that his purpose was to clarify the situation as to the particular conversation and the time when it was held; the ruling being that, since inquiry had been made under cross-examination as to the conversation, the jury was entitled to hear it all. Section 1854, Code Civ. Proc. No objection was made at any time that the inquiries of the court and the district attorney related to matters incompetent, irrelevant, or immaterial, but merely that the questions were not proper upon redirect examination. As to this objection, the following statement is pertinent: "It frequently happens that evidence which might be inadmissible under strict rules is nevertheless introduced into the case through inadvertence or otherwise, under which circumstances it is held that the adverse party is entitled to introduce evidence on the same matters lest he be prejudiced, the rule being that the party who first introduces evidence which is irrelevant to the issues cannot assign error on the admission of evidence from the adverse party relating to the same matter." 22 Cor. Jur. p. 195, Evidence, § 163.

We fail to find any error in this record which, in our opinion, worked prejudicially to the rights of the defendant.

Judgment and order affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

133 Cal.App. 192

## PEOPLE v. RANDOLPH.

Cr. 2381.

District Court of Appeal, Second District, Division 2, California.

July 6, 1933.

Hearing Denied by Supreme Court Aug. 3, 1933.

**1. Burglary 🔑41(3).**

Evidence *held* sufficient to support convictions of burglary with intent to commit theft.

**2. Poisons 🔑4.**

Neither intent nor knowledge is element of offense of possessing opium without prescription; mere possession being violation of statute (St. 1929, p. 380, as amended by St. 1931, p. 1496).

**3. Criminal law 🔑260(11).**

Any other defense against charge of possessing opium than valid prescription is for trial judge or jury to consider, and, trial court having rejected it and found possession, nothing remains for consideration on appeal from conviction (St. 1929, p. 380, as amended by St. 1931, p. 1496).

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Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Samuel A. Randolph was convicted of burglary and violation of the state Narcotic and Drug Act, with prior convictions, and he appeals.

Affirmed.

Orbison & Irwin, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Appellant was accused by the district attorney of Los Angeles county, in an information consisting of two counts, of burglary. The first count alleged that appellant entered the office of Dr. H. B. Griffin, located at 5107 Hollywood boulevard, with intent to commit theft. The count also charged three prior convictions. The second count contained a similar allegation on the same day, in entering the offices of Dr. Donald H. Wilkins, located at 4471 Sunset boulevard. By another information appellant was charged with a violation of the state Narcotic and Drug Act, on the same day, in having in his possession a preparation of morphine containing more than one-fourth grain of morphine to the avoirdupois ounce, in violation of said act. This information also alleged three prior convictions. A jury was waived and the two cases consolidated for trial before the court. The court found defendant guilty on all counts of both informations. From the judgment of conviction and the order denying his motion for a new trial, defendant appealed.

Both doctors are dentists. The office of Dr. Griffin is located in a building at the northwest corner of Normandie and Hollywood boulevard in Los Angeles. On January 8, 1933, at about 7 p. m. one Joe Meyer, who was standing on the southwest corner of said street, opposite said building, had his attention directed to the offices of Dr. Griffin, across the street by "the flashlight I seen running up and down the wall." Accompanied by Eugene Barner and Ed Pugh, the janitor of the building, they went to Dr. Griffin's office, opened the door, walked in, and turned on the lights. Just as they did this appellant came out of the dentist's laboratory. Appellant said he wished to see the doctor, as he had a toothache. The doctor was called and treated the tooth. Appellant was asked by Meyer what he was doing with the flashlight, to which he replied that "he used it in his car." Two officers came and questioned appellant. Officer Workman asked him "if he did not think it was an unusual hour to be 'in a dentist's office, that time of the night, Sunday evening, when there was no one there,' and he said, 'Well,' he thought 'maybe it did look rather unusual, but he had a toothache and wanted to see a dentist to have his tooth treated.'" Nothing was missing from the office, but after appellant left with the officers, Dr. Griffin found that gold that was "in several different places" in his laboratory "had been disturbed," and "part of it had been piled together in one little box."

Two police officers questioned appellant on January 9, 1933, at the jail "and he was sick, * * * too sick to talk." A doctor was called and "said he was a narcotic addict" and "was sick from narcotics." Before defendant was locked up he asked the officer "to look for his car," "a Buick 1926 coach, in the vicinity of where he was arrested," which had his bluish gray overcoat in it. On January 10th the officers found appellant's car in the Classic Garage, at Lexington and Vine streets. Appellant went with the officers to the car, "produced a pink slip to the Buick automobile, and stated the car and overcoat was his." In the car the officers also found "flashlight batteries for a small vest-pocket flashlight, several pieces of gold, and gold solder, gold solder inlays, crowns and bridgework." This scrap gold and dental work was identified by Dr. Wilkins as his. He testified that he left his office on Friday night and, except for a few minutes on Sunday afternoon, was not there until Monday morning, at which time he missed such scrap gold, etc. The officers, in searching appellant, found among other things "a couple of passkeys" and "four bindles of morphine" sewed "in the seam of" the right-hand upper coat pocket.

This morphine was the basis of the alleged violation of the state Narcotic and Drug Act.

Appellant contends that the evidence is insufficient to support the judgment.

[1] There would seem to be no question about the sufficiency of such evidence to support the judgment as to count 1 involving the entering of Dr. Griffin's office. Patients seeking to have an aching tooth treated do not search for a dentist in the laboratory of a dark office on Sunday evening, with a flashlight. The fact that the gold scrap was partly piled in a small box in the laboratory from which appellant came when he was disturbed speaks volumes as to his intent.

As to the second count, appellant contends that the mere fact that the gold taken from Dr. Wilkins' office was found in his car two days after the burglary does not justify the inference that he entered Dr. Wilkins' office with intent to commit theft therein. Undoubtedly these facts standing alone would not justify the inference that must have been drawn by the court to justify the finding of guilt. People v. Hurley, 60 Cal. 74, 44 Am. Rep. 55. Regardless of where the car was found, the evidence clearly justified the inference that appellant left it near Dr. Griffin's office, where he was arrested and where he was caught under circumstances justifying the conclusion that he was after the same kind of booty, in the same kind of an office, on a day when the dentist conducting such an office is not apt to be in. In other words, the evidence under count 1 of the information charging burglary, in connection with the fact that similar gold stolen from a similar office was found in defendant's car which was used by him in an evident attempt to get more of the same kind, justifies the inference that the gold so found was obtained in the same way, and indicates that the offense charged in the second count was also the act of appellant.

[2, 3] The evidence shows that four bindles of morphine were found sewed in the lining of appellant's coat. Appellant denies having any knowledge of its presence in his coat and claimed to have purchased the coat second hand in some place on Main street some time before. The act makes it unlawful for any person to have in his possession any opium, excepting upon the written order or prescription of a physician, dentist, or veterinary surgeon, licensed to practice in this state. Stats. 1929, p. 380, as amended by Stats. 1931, p. 1496; vol. 2 Deering's Gen. Laws 1931, p. 3007, Act 5323. Such defense merely created a conflict with the prima facie case made out by the people showing that such morphine was in plaintiff's possession. Neither intent nor knowledge is an element of this offense. The mere possession is a violation of the act. People v. Le Baron, 92 Cal. App. 550, 268 P. 651, 269 P. 476. The only perfect defense is a valid prescription under the act. Any other defense is for the consideration of the judge or jury, as the case may be; and the defense made having been rejected by the trial court, nothing remains to be considered on appeal in view of the fact of possession which the court must have found.

Judgment and order affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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133 Cal.App. 46

## PEARSON et al. v. CITY OF LOS ANGELES et al.

Civ. 9003.

District Court of Appeal, First District,
Division 2, California.
June 28, 1933.

**1. Municipal corporations 🔑514(12).**

Whether transfer from general fund to special street assessment fund constituted loan or payment *held* question of fact for trial court in determining city's authority to make supplemental assessment (Gen. Laws 1931, Act 8205, §§ 18, 22).

**2. Municipal corporations 🔑514(11).**

Jurisdiction obtained by city council when proceedings were instituted for formation of assessment district included jurisdiction to levy supplemental assessment.

**3. Municipal corporations 🔑514(11).**

Property owners who filed no protest to supplemental assessment for street improvements waived objections.

**4. Municipal corporations 🔑514(12).**

Property owners who filed protest to supplemental assessment for street improvements *held* limited in subsequent proceeding to grounds assigned in protests.

**5. Municipal corporations 🔑514(12).**

Decision of city council that deficit in amount of assessments levied for improvements should be paid by ordering supplemental assessment *held* final (Gen. Laws 1931, Act 8205, §§ 18, 22).

Appeal from Superior Court, Los Angeles County; Edward Henderson, Judge.

Suit by Dan A. Pearson and others against the City of Los Angeles and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

S. C. Schaefer, of Los Angeles, for appellants.

Erwin P. Werner, City Atty., of Los Angeles, Frederick von Schrader, Asst. City Atty., and Arthur Loveland, Deputy City Atty., all of Los Angeles, for respondents.

NOURSE, Presiding Justice.

Plaintiffs sued for an injunction and to cancel an assessment for improvements of a public street. from a judgment denying them relief, they have appealed upon typewritten transcripts.

Proceeding under the Street Improvement Act of 1913 (Deering's Gen. Laws 1931, Act No. 8205), the city of Los Angeles took the necessary steps for the formation of an assessment district to provide sufficient funds for the improvement of Cabrillo avenue, and to that end assessed the benefits to each piece of property within the district and determined the damages and the incidental expenses to be paid on account of the proposed improvement. Certain property owners having refused to accept the damages awarded to them by the city council, eminent domain proceedings were commenced in the name of the city, and judgments were entered against the city fixing the damages to these property owners at approximately $30,000 more than the sums fixed by the council. Prior to the entry of these judgments, the assessments theretofore levied had been collected and the proceeds thereof had been paid into a special fund known as the street improvement assessment fund. After the entry of the judgments, the city council directed the transfer from the general fund of the city to the special street assessment fund of sufficient moneys to pay the damages awarded in the court proceedings, and directed that a supplemental assessment be levied upon the property in the improvement district, the proceeds thereof to be used in replacing in the general fund the moneys transferred therefrom for the benefit of the district. Due notice of the supplemental assessment was given, and some of the plaintiffs protested on the sole ground that they believed the excess damages should be paid from the city's general fund. These protests were overruled, and the supplemental assessment was thereafter levied and partially collected.

On this appeal the appellants state their principal point to be that, after the city had paid the damages out of its general fund, it had no legal authority to make a supplemental assessment. Four "secondary" points are listed which may all be considered under the single question, Did the city have jurisdiction to levy the supplemental assessment?

[1] To understand the first question, a brief reference to the statute will suffice. Section 18 of the 1913 act provides: "To expedite the making of any such improvement the legislative body may at any time transfer into said special fund out of any money in the general fund such sums as it may deem necessary, and the sums so transferred shall be deemed a loan to such special fund. * * *" The "special fund" mentioned is the fund created for the particular street improvement. Section 22 provides that, if the funds raised under these proceedings are insufficient, the council "may pay the deficit, out of the general fund, or may order a supplemental assessment to raise such deficit. * * *" It is the position of appellants that, if the council pays the deficit out of the general fund, it cannot thereafter order a supplemental assessment under this section. With this there seems to be no quarrel, but the respondents insist that the record here discloses no payment from the general fund, but merely a loan made under the express provisions of section 18 of the act. The trial court so found, and there is ample evidence to support the finding. In fact, all the evidence, oral and documentary, shows that nothing but a loan from the general fund was intended at any stage of the proceedings. Every resolution, recommendation, and report of the council and subordinate officials discloses a well-defined purpose to loan the money from the general fund to be returned from the proceeds of a supplemental assessment. In any event, what was done was a question of fact to be determined by the trial court, and the appellants have not advanced any reason why the finding on this issue of fact should be disturbed.

[2-5] Appellants' criticism of the proceedings leading to the supplemental assessment are not sound. The council obtained jurisdiction when the proceedings were instituted, and this included jurisdiction to levy a supplemental assessment. No additional notice of the proposed improvement or of the formation of the special assessment district was necessary after those acts had both been accomplished pursuant to the statutory notice. When it was determined that a supplemental assessment would be necessary, notice thereof was given in full conformity with the act. In response thereto, some of the appellants appeared and filed protests upon the sole ground that they believed the money should be paid by the city out of its general fund. To this branch of the appeal there are two answers: First, as to those appellants who filed no protest, they are deemed to have waived all objections to the supplemental assessment and cannot attack it in this proceeding (Farley v. Reindollar, 174 Cal. 703, 707, 165 P. 19); second, as to those who filed protests, they are limited here to the grounds assigned in their protests—that the deficit should be paid out of the general fund (Blake v. City of Eureka, 201 Cal. 643, 648, 258 P. 945). The question raised by these protests was one of policy only, which the council must decide. Such decision is final. Duncan

v. Ramish, 142 Cal. 686, 696, 76 P. 661; Blake v. Eureka, supra.

The judgment is affirmed.

We concur: STURTEVANT, J.; OGDEN, Justice, pro tem.

133 Cal.App. 191

## Ex parte HENDERSON.

Cr. 1755.

District Court of Appeal, First District, Division 1, California.

July 6, 1933.

**1. Habeas corpus** ⟹55.

Habeas corpus petition alleging petitioner's detention under warrant issued on complaint charging violation of allegedly unconstitutional ordinance *held* insufficient where copy of neither ordinance nor complaint accompanied petition.

**2. Habeas corpus** ⟹11.

Person allegedly violating ordinance and released on his own recognizance cannot on habeas corpus test validity of subsequent restraint invited for such purpose only.

> Such person will not be permitted on habeas corpus to test validity of his subsequent restraint where such restraint is invited and voluntarily submitted to before trial for that purpose only, and where his nominal restraint remains such only so long as it is necessary to file petition and procure order for writ.

Petition by Harry G. Henderson for a writ of habeas corpus against the Chief of Police of the City and County of San Francisco.

Writ denied.

Harry G. Henderson, of San Francisco (H. H. McPike of San Francisco, of counsel), for petitioner.

PER CURIAM.

[1] Petitioner has applied for a writ of habeas corpus, alleging that he is unlawfully detained and restrained of his liberty by the chief of police of the city and county of San Francisco under the authority of a warrant of arrest issued out of the municipal court of said city and county upon the filing of a complaint therein on March 18, 1933, charging petitioner with having violated the provisions of a municipal ordinance. The ground urged for the issuance of the writ is that the ordinance is unconstitutional. Neither a copy of the ordinance nor of the complaint is presented as a part of or with the petition, and for that reason the petition is legally insufficient to authorize the issuance of the writ. In re Crowley, 171 Cal. 58, 151 P. 739.

[2] Moreover, as held in Re Gow, 139 Cal. 242, 73 P. 145, when a person accused of violating an ordinance has been allowed to go at large on his own recognizance he will not be permitted to test the validity of his subsequent restraint on habeas corpus, where such restraint is invited and voluntarily submitted to before trial for that purpose only, and his nominal restraint remains such only so long as it is necessary to file a petition and procure an order for the writ. To the same effect is In re Bocci, 84 Cal. App. 269, 257 P. 888. In the present case, it appears from the statements made in applying for the writ, that after the criminal proceeding was instituted petitioner was released and has since been at liberty on his own recognizance, and that his present restraint was invited and submitted to voluntarily for the purpose of testing the constitutionality of said ordinance before trial on habeas corpus. Upon that ground, too, therefore, the writ should be denied. It is so ordered.

133 Cal.App. 151

## JOHNSON v. JOHNSON.

Civ. 673.

District Court of Appeal, Fourth District, California.

July 1, 1933.

**Appeal and error** ⟹597(1).

Record consisting of copies of order appealed from, notice of appeal, various orders and affidavits, and containing no judgment roll, reporter's transcript, bill of exceptions, or judge's certificate could not be considered on appeal (Code Civ. Proc. § 951).

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Mabel E. Johnson against Derwood V. Johnson. From an order vacating the levy of an execution and quashing the writ, plaintiff appeals.

Affirmed.

Margaret B. Connell and Halverson & Halverson, all of Los Angeles, for appellant.

Theo. G. Krumm, of San Bernardino, for respondent.

MARKS, Justice.

This is an appeal from an order vacating the levy of an execution and quashing the writ. The record presented is most deficient.

There is no judgment roll, reporter's transcript, nor bill of exceptions. The record consists of copies of the order appealed from and the notice of appeal and various orders, minute orders, and affidavits. The clerk certified that they were true and correct copies of the originals on file in his office. There is no certificate of the judge contained in the record. In cases of this kind counsel should have a bill of exceptions settled.

As the record before us is not authenticated in the manner required by law and is totally deficient, we cannot consider it. Section 951, Code Civ. Proc.; Guyot v. Cassab, 118 Cal. App. 742, 5 P.(2d) 912; Salinas v. Riverside Finance Co., 126 Cal. App. 675, 14 P.(2d) 1025.

Order affirmed.

I concur: BARNARD, P. J.

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133 Cal.App. 50

## ORKOW v. ORKOW.

Civ. 9000.

District Court of Appeal, First District,
Division 2, California.
June 28, 1933.

**Assignments** ⊂⊃13.

Assignment by husband to wife of portion of earnings from writing, not based upon present employment or existing contract, *held* void (Civ. Code, § 1045).

Appeal from Superior Court, Los Angeles County; J. C. Needham, Judge.

Action by Vera Orkow against B. Harrison Orkow. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment reversed.

Golden & Kaufman by Arthur V. Kaufman, all of Los Angeles, for appellant.

Philip Cohen, of Los Angeles, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for an accounting under a written assignment. From a judgment in her favor the defendant has appealed upon typewritten transcripts.

Plaintiff and defendant were husband and wife. On September 1, 1926, while living together in the state of New York, the defendant executed and delivered to the plaintiff an assignment in these words:

"In consideration of moneys advanced to me by my wife Vera I hereby assign to her thirty-three and a third (33⅓%) per cent. in all plays, novels, motion picture scenarios and stories now and hereafter written by me and any and all returns or money received by me.

"It is understood that this assignment is free of all considerations or differences or eventualities that may arise between the parties hereto in the event of separation.

"I do this that her future may be happier than her past and secure.

"[Signed] B. Harrison Orkow

"This makes any and all previous assignments invalid. B. H. O."

Thereafter the plaintiff sued in the state of New York for a divorce. She prayed for alimony, but the decree which was in her favor, did not award alimony and did not refer to the assignment. On August 11, 1930, plaintiff commenced this action in Los Angeles county. She alleged the execution of the agreement and that defendant had obtained considerable sums of money from the sale of plays, novels, motion picture scenarios and stories. On the trial the execution of the contract was proved along with the fact that for twenty-eight weeks defendant had been employed by Warner Brothers at a salary of $400 a week. The character of his employment was not shown, and when he offered to prove that none of these earnings came from writing under the terms of the assignment his offer was rejected; the trial court ruling that the assignment covered all earnings from whatever source and for all future time.

The judgment must be reversed. So far as the assignment purported to transfer a portion of earnings not based upon present employment or an existing contract it was void. Civ. Code, § 1045; 5 C. J., p. 871; 2 R. C. L. pp. 603–604; Walker v. Rich, 79 Cal. App. 139, 144, 249 P. 56; Metcalf v. Kincaid, 87 Iowa, 443, 54 N. W. 867, 869, 43 Am. St. Rep. 391; Billings v. O'Brien, 45 How. Prac. (N. Y.) 392, 401; Rodijkeit v. Andrews, 74 Ohio St. 104, 77 N. E. 747, 5 L. R. A. (N. S.) pages 564, 567, 6 Ann. Cas. 761.

The distinction between the two classes of cases and the elements necessary to support such an assignment are pointed out in Metcalf v. Kincaid, supra: "In the one an attempt is made to assign something which exists in expectancy only. In such a case it is apparent that there is nothing to assign. The expectancy may never become a reality. The earning of wages or the accumulation of property in such a case will depend on the ability of the assignor to procure employment in the future. There is no present employment which may reasonably be expected to result in the earning of wages. In the other class of cases one has entered into a contract or upon an employment whereby, in the ordinary course of events, wages will be earned

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⊂⊃For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes or property acquired as the direct result of the contract, employment, or engagement. The true rule is that an assignment of wages to be earned is good if accepted, and if at the time it is made there is an existing engagement or employment by virtue of which wages are being, and in future may reasonably be expected to be, earned, even though there is no contract or fixed time of employment."

We have found no departure from this general rule in any of the cases from New York. Cases cited by respondent involving assignments of proceeds from existing contracts or interests in claims to specific property are not helpful. The New York statutes do not touch upon the subject and, in the absence of any decision to the contrary, we may assume that the general rule was applicable in that state, when the contract was made.

Such evidence as was received indicates that after the divorce the defendant came to California and entered an employment different from that in which he was engaged in New York; that his former efforts in writing had been unsuccessful and had brought him no returns after the assignment was made. The judgment carries a charge upon "wages" earned under a specific employment differing from that contemplated at the time the assignment was made, and apparently not in existence at that time. The plaintiff failed to prove a case under the assignment.

The judgment is reversed.

We concur: STURTEVANT, J.; OGDEN, Justice pro tem.

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133 Cal.App. 80

## In re CASELLA'S GUARDIANSHIP.

## CASELLA v. CASELLA.

Civ. 9037.

District Court of Appeal, First District, Division 2, California.

June 29, 1933.

**1. Guardian and ward** ⟹8.

Juvenile court of Santa Clara county *held* without jurisdiction of petition for guardianship alleging that minor children were in Richmond with mother whose place of residence was Richmond (Gen. Laws 1931, Act 3966, § 3).

**2. Evidence** ⟹10(2).

Court of Appeal takes judicial notice that city of Richmond is located in Contra Costa county.

**3. Domicile** ⟹5.

Residence of minor children followed that of divorced mother entitled to their custody (Civ. Code, § 213).

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Petition for the guardianship of Mildred and Perina Casella, minors, by Paul Casella, opposed by Mary Casella. From an order of the Juvenile Court of Santa Clara County, adjudging the minors to be wards of the court, the opponent appeals.

Reversed.

Owen D. Richardson, of San Jose, for appellant.

A. G. Shoup, of San Jose, for respondent.

NOURSE, Presiding Justice.

This is an appeal from an order of the juvenile court sitting in Santa Clara county adjudging two unmarried minor children to be wards of that court.

[1, 2] The order must be reversed because it was outside the jurisdiction of that court. Such jurisdiction is limited to minors found "within the county, or residing therein." Section 3, Juvenile Court Act, Deering's Gen. Laws 1931, Act No. 3966. The petition filed in the juvenile court alleged that the two minors "are with their mother in Richmond" and that the mother's "place of residence" is Richmond. We may take judicial notice that the city of Richmond is located in Contra Costa county.

Upon the face of the petition it appears that the minors were not "within the county" of Santa Clara when the petition was filed there and the trial judge found in accordance with the allegations of the petition.

[3] The matter of residence appears from the undisputed evidence upon which the court failed to make any finding. The father and mother of the minors had been divorced and the custody of both minors had been awarded to the mother. She took the children to Contra Costa county, where she established her residence. The residence of the minor children thus followed that of the mother. Section 213, Civ. Code; Cole v. Superior Ct., 28 Cal. App. 1, 6, 151 P. 169; Hunt v. Hunt, 94 Ga. 257, 21 S. E. 515; 53 A. L. R. note, pages 1160, 1164. As the minors were actually living in Contra Costa county and, as their legal residence was in that county while their mother resided there, both essentials of jurisdiction of the person of the minors placed that jurisdiction in the juvenile court of Con-

tra Costa county and withheld it from the court of Santa Clara county.

The order is reversed.

We concur: STURTEVANT, J.; OGDEN, Justice pro tem.

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133 Cal.App. 40

## PEOPLE v. HALL et al.

Cr. 1707.

District Court of Appeal, First District, Division 1, California.

June 28, 1933.

**1. Conspiracy 🔑47.**
**False pretenses 🔑49(1).**

In prosecution for attempt and conspiracy to commit grand theft, evidence established falsity of defendants' representations, including representation of large winnings on horse races.

**2. Conspiracy 🔑38.**
**False pretenses 🔑22.**

That prosecuting witness in prosecution for attempt and conspiracy to commit grand theft expected share of defendants' fictitious winnings on horse races *held* no defense.

**3. Criminal law 🔑37.**

Where prosecuting witness in prosecution for attempt and conspiracy to commit grand theft, having agreed to advance certain sum to enable defendants to collect ostensible winnings on horse races, became suspicious and offered money with police concealed nearby, no entrapment existed.

> It was contended that offering of money with request that defendants accept it was by consent, and hence such attempted entrapment terminated conspiracy, but it appeared that crimes originated in minds of defendants and were practically consummated when arrest was made.

**4. Criminal law 🔑37.**

Entrapment constitutes defense only when criminal intent originates in entrapper's mind and defendant is lured into committing offense in order to prosecute him.

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Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

J. W. Hall, alias E. C. Rice, and another were convicted of attempt to commit grand theft and of conspiracy to commit grand theft, and they appeal.

Affirmed.

Leo A. Sullivan, of Oakland (J. L. Royle, of Oakland, of counsel), for appellants.

U. S. Webb, Atty. Gen., and Siebert Sefton, of San Francisco, for the People.

TYLER, Presiding Justice.

Appellant Hall, alias E. C. Rice, was jointly tried and convicted with Thomas J. Lewis, alias Leo A. De Grasse, of the crimes of attempt to commit grand theft and conspiracy to commit the same. This appeal is from the final judgment of conviction and from orders denying each of defendants a motion for a new trial. As one of the points relied upon for a reversal is that there was no proof of falsity of alleged representations, a somewhat extensive review of the evidence becomes necessary.

[1] Defendant Lewis, operating under the assumed name of Leo A. De Grasse, introduced himself to one Frank W. Stine and his wife, who were traveling in their automobile across the continent. Lewis presented his card, which indicated he was a director of the Fox Film Company. Upon arriving in Oakland, Lewis suggested that they all stop at a certain hotel. This they did. Shortly thereafter, while Stine and his wife were sitting in the lobby talking to Lewis, appellant Hall appeared and was introduced to the Stines as a betting commissioner for a rich man. Lewis and Hall, in the presence of Stine and his wife, then began talking about betting on horse racing. Hall stated that he had been in the business for thirty-one years and had never lost a bet, as the people he worked for had a private wire whereby they knew ten minutes before each race the horses on which to bet. Lewis asked Hall if he could give him a tip on a race or make a bet for him so that he might make some money. Hall explained that he was not permitted to make any wagers for himself, but that, if Lewis wished to bet, he (Hall) would advise him which horse would win. Thereupon Lewis was informed what horse would win a certain race, and Hall gave him his supposed membership card so that Lewis might enter the "Exchange" and make his bet. Lewis took the card and disappeared. He returned in a few minutes and stated he had made his bet, and later showed a sum of money which purported to be the amount he had won. Another bet was made and won, and then Hall stated that the people operating the "Exchange" were reluctant to take bets as small as $1,500, and that he was going to make a larger one. Hall thereupon handed Lewis what purported to be a credit slip for $50,000, together with the amount of their previous purported winnings, and told Lewis to bet the amount on a certain horse. Lewis returned and stated he had made the bet. Hall then left and shortly afterward returned with the information that they had won $103,300. The membership card was

then given to Lewis with instructions to collect the winnings, together with the amount bet, or $153,300 in all. Upon his return, Lewis produced a draft for $153,300, which he claimed the "Exchange" issued to him, and informed Hall and the Stines that the people at the "Exchange" demanded, before cashing the draft, that the winner would have to produce $50,000 in money in order to prove that this sum could be collected by the "Exchange" if the horse they bet on had lost. Hall then stated that he could easily produce the sum, stating he had a rich uncle in the East who would advance him the money. He then left, ostensibly to telegraph this uncle. Upon his return he stated that his relation had left on a vacation and could not be located. He produced certain telegrams in support of his statement. At this time a third man, representing himself as the manager of the "Exchange," appeared upon the scene with a brief case, supposed to contain money, and stated that, if Hall would sign the credit slip, he would pay the bet. Hall refused, giving as a reason that he did not want his employer to know he was betting on his own account. Later Hall suggested to Lewis and the Stines, who had been present during all of these supposed transactions, that they raise the money between themselves. The Stines were asked what amount they could supply, and they stated $10,000. Hall replied that this amount would be sufficient, as he and Lewis could raise the balance. It was agreed that, by reason of this arrangement, each party was to receive one-fourth of the profits. It was then suggested that Stine leave by airplane for his home in Massachusetts and return with the money. Stine left, and upon arriving at his destination he related the transaction to his brother-in-law. Becoming suspicious, he visited New York City and ascertained from the Fox movie people that Lewis had no connection with the company. Certain other inquiries were made by him which confirmed his suspicion that the transaction was a fraudulent scheme. On his way back to Oakland Stine informed the police authorities at Chicago of the facts and they telegraphed to the police department at Oakland. Upon arriving in Oakland, Stine was met by Hall and Lewis. Stine informed them he had the money, and offered what purported to be the amount he was to furnish. They refused to take it until such time as they could produce the amounts they were to raise under the arrangement. The police, who had secreted themselves in the hotel, then arrested appellants. When searched, there were found on the person of Lewis cards bearing the name of Leo De Grasse which indicated he was a director of the Fox Picture Corporation. In searching Hall's room at a different hotel, where he was registered as E. R. Hill, the officers found his grips packed, indicating that he was about to depart. They found the black grip that the supposed manager of the "Exchange" had used, and also blank credit slips of the same character as the one used by appellants to represent the $50,000 credit. Other documents of an incriminating nature were also found, among which were the purported telegrams and the answers thereto which Hall had used in his pretended endeavor to get in touch with his uncle. These telegrams were proved by officers of the telegraph companies not to have been sent or received by their companies. A check protector that had been used on the draft of $153,300 was found and also a typewriter upon which the various documents had been prepared. At the trial, for the purpose of proving guilty intent, it was shown that Lewis had fraudulently obtained the sum of $12,000 from a victim of his operations, which sum was procured by him under precisely the same circumstances herein involved. We think sufficient of the facts are related to show the character of the misrepresentations.

Appellants first urge as ground for reversal that there was no proof of the falsity of the alleged representations. In support of this contention, it is claimed that the offense was built around the statements to Stine that there was a turf exchange in Oakland, in which and through which one of the defendants operated, so that he could place bets with certainty of winning, and there was no proof indicating there was not such an exchange or that defendant Hall did not obtain and receive advance information of fixed horse racing precisely as he had represented. The contention is without merit. The existence or nonexistence of the "Exchange" was but one of the representations made by appellants. Moreover, the finding of the membership card and the draft for $153,300, which was supposed to have been issued by the "Exchange," the $50,000 credit slip supposed to have been deposited with the "Exchange," and which it was represented had to be made good, together with other documents all proved to have been written by Hall himself to accomplish the fraudulent scheme, were sufficient to raise the inference that no such institution as the "Exchange" existed; that it was a fictitious entity existing only in the minds of Hall and Lewis.

[2] It is next contended that the indictment was insufficient for the reason that it was not directed against innocent parties. In support of this contention we are cited to cases to the effect that neither the law nor public policy designs the protection of rogues in their dealings with each other in dishonest practices; the policy being to protect those who for some honest purpose are induced, upon false and fraudulent representations, to give credit or part with their property to another, and not to protect those who for unworthy or illegal purposes part with their goods. McCord v. People, 46 N. Y. 470. The

doctrine announced in the case cited has been expressly rejected by our Supreme Court in the case of People v. Martin, 102 Cal. 558, 36 P. 952. It is there declared that, if the party defrauded is also guilty of a violation of the law, he too should be prosecuted rather than his offense should serve as a shield to another's crime. The offense is committed against the public and not against the individual. There is no principle of law that will bar the state from prosecuting a criminal because some other person is a particeps criminis. Moreover, Stine did not and could not under the circumstances commit any offense, whatever his intent might have been. The entire representations were false, and no bets were ever made; the "Exchange" being a fictitious entity. People v. Martin, supra.

[3, 4] The final contention is made that the attempted entrapment by the prosecuting witness and the police officers, by aiding and urging the commission of crime, terminated the conspiracy, because the offering of the money, with the request that appellants accept the same, was by consent. The crimes for which appellants were tried and convicted were that of an attempt to commit grand theft and conspiracy to commit the same. The crimes originated in the minds of defendants, and they were practically consummated when the arrest was made. It is only when the criminal intent originates in the mind of the entrapping person, and the accused is lured into the commission of the offense in order to prosecute him, that the entrapment will constitute a defense. Here, as shown by the evidence, the conspiracy originated in the minds of appellants and the acts of the officers merely amounted to apprehension of appellants, and did not constitute such an entrapment as is prohibited. People v. Malone, 117 Cal. App. 629, 4 P.(2d) 287, In re Wong Poy, 113 Cal. App. 677, 298 P. 1029.

The judgment and orders denying a new trial are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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133 Cal.App. 35

## GREENE v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 9044.

District Court of Appeal, First District, Division 1, California.

June 28, 1933.

Rehearing Denied July 26, 1933.

Hearing Denied by Supreme Court Aug. 25, 1933.

**1. Attachment 🔑137.**

Superior court has jurisdiction and power to increase amount of undertaking on attachment.

**2. Mandamus 🔑28.**

Mandamus will not issue to control exercise of discretionary power, or to review conclusion reached by fact-finding body, after discretionary power has been exercised, notwithstanding erroneous conclusion.

**3. Mandamus 🔑28.**

In cases of palpable abuse of discretionary power, and where act is purely ministerial and duty becomes absolute, mandamus may issue.

**4. Mandamus 🔑53.**

Plaintiff in action wherein attachment was levied, *held* not entitled to mandamus to compel trial judge to set aside discretionary order increasing amount of undertaking.

Original application by Thomas H. Greene for a writ of mandate prayed to be directed to the Superior Court, City and County of San Francisco, Edward P. Shortall, Judge, to require respondent to set aside an order fixing amount of undertaking on attachment.

Writ of mandate denied.

Dinkelspiel & Dinkelspiel, of San Francisco, for petitioner.

Waldo F. Postel, of San Francisco, for respondent.

KNIGHT, Justice.

Pursuant to a motion made by one of several defendants in an action pending before the respondent court, and after a full hearing on the merits of said motion, the court made an order directing that the amount of an undertaking on attachment be increased from $4,000 to $25,000. Shortly afterwards petitioner as plaintiff in the action moved the court to set aside said order, and after hearing the motion the court indicated, so petitioner alleges, that the same would be denied. Without waiting further action in the matter, petitioner instituted this proceeding in mandamus to compel the respondent court to grant his motion. We find no legal ground upon which the writ may issue.

The action was filed in July, 1932, by petitioner, an attorney in New York City, against Nathan, Abe, and Jack Scharlin, First and Second Doe, and Scharlin Bros., a copartnership, to recover the sum of $113,617 claimed to be due for legal services; and an order was issued for the publication of summons based upon an affidavit averring that Nathan and Abe Scharlin were nonresidents of this state, and that Jack Scharlin was a resident of this state but was concealing himself to avoid service of summons. Up to the time the present proceeding was instituted there had been no publication of the summons, nor had personal service thereof been made on the nonresident defendants. About four months after the action was filed, upon furnishing an undertaking in the sum of $4,000 and an affidavit which contained the averment also that Jack Scharlin was concealing himself for the purpose of avoiding service of summons, petitioner obtained a writ of attachment which he caused to be levied on numerous bank deposits in San Francisco, aggregating $13,000, all of which stood in the name of Lucy Scharlin, the wife of Jack Scharlin. She served upon the sheriff a third party claim thereto, and in order to prevent the release of the attachment, petitioner furnished the sheriff with an indemnifying bond in the sum of $26,000. Thereupon, petitioner caused said writ to be levied on several parcels of real estate situate in the city and county of San Francisco and in the counties of Lake and San Mateo, of the estimated value of $57,500, the record title to which stood also in the name of Lucy Scharlin, the same having been conveyed to her by her husband about a year prior to the date of said levy; and she made third party claim thereto. In January, 1933, Jack Scharlin, appearing through his attorney, presented a motion to discharge the attachment upon the ground that his whereabouts were not concealed and that summons could be easily served upon him. The motion was denied and during the following month, February, 1933, he appeared in the action and presented the motion above mentioned to increase the amount of the undertaking on attachment upon the ground that the amount of the original undertaking was inadequate. As stated, the motion was heard on the merits and granted; and petitioner's motion to set aside said order followed.

[1] As will be seen, the determinative question presented by the pending proceeding is one of jurisdiction, that is, whether a superior court is vested with jurisdiction and power to order an increase in the amount of the undertaking on attachment. The decisions of this state hold uniformly that it is—that such jurisdiction and power is incidental to the provisional remedy of the attachment (see Francis v. Superior Court, 58 Cal. App. 618, 209 P. 80, and cases cited therein; also American, etc., Co. v. Superior Court, 19 Cal. App. 497, 126 P. 497), and petitioner expressly so concedes, but contends that "in this particular instance in view of the particular showing, or rather lack of showing, made by the defendant that the present undertaking was inadequate security as to him," the respondent court "was not authorized or justified in, and was powerless to, order the undertaking on attachment increased." This contention is based upon defendant's failure to refute certain averments set forth in two affidavits filed on behalf of petitioner at the time of the hearing of said motions, to the effect that said defendant had at all times disclaimed any interest in or to the properties concerning which the levies were made, and had at all times asserted that his wife was and is the sole owner thereof. One of said affidavits was filed in opposition to the motion to increase the amount of the undertaking and the other in support of petitioner's motion to set aside the order made in that behalf.

[2-4] It is evident that the foregoing contention is entirely foreign to the jurisdictional issue, that is, as to whether the court had the power to entertain and decide said motion to increase the amount of the undertaking, and that it relates exclusively to the question of the weight of evidence, that is, as to whether the court properly exercised its discretionary power in granting said motion upon the evidence then before it; and in this latter respect it is well settled that a mandamus proceeding may not be used for the purpose of controlling the exercise of discretionary power, nor of reviewing the conclusion reached by the fact-finding body, after the discretionary power has been exercised, however erroneous such conclusion may be. Kerr v. Superior Court, 130 Cal. 183, 62 P. 479; Splivalo v. Bryan, 102 Cal. 403, 36 P. 780; Gammon v. McKevitt, 50 Cal. App. 656, 195 P. 726; Richards v. Superior Court, 145 Cal. 38, 78 P. 244; Realty, etc., Mtg. Co. v. Title, etc., Co., 165 Cal. 543, 132 P. 1048; Fairbank v. Superior Court, 34 Cal. App. 66, 166 P. 864; Los Angeles A. T. Co. v. Superior Court, 94 Cal. App. 433, 271 P. 363. True, in exceptional cases of palpable abuse, "where the discretion ceases, and the act to be done is purely ministerial, [and] the duty becomes absolute," it has been held that mandamus may be invoked. Pacific Palisades Ass'n v. City of Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A. L. R. 782; Alexander v. Superior Court, 91 Cal. App. 312, 266 P. 993. But we have no such case here. In causing the real property to be attached, and thereafter in insisting upon maintaining the levy against the third party claim, petitioner was compelled necessarily to take the definite position that defendant was and is the owner of said property or of some substantial interest therein which was subject to attachment; and since the title thereto had not been adjudicated at the time of the hearing of defendant's motion to increase the amount of the undertaking, a question of pure fact was presented to the trial court to determine whether the amount of the original undertaking adequately protected whatever interest the court believed from all the circumstances before it the defendant possessed in said property, and if not to what extent the amount thereof should be increased; and the fact that defendant may have failed to refute the averments of petitioner's affidavits did not operate to deprive the court of the right to exercise its discretionary power in either granting or denying the motion for the reason that the filing of the motion

by the defendant for such increase in itself may have been considered as an assertion of title on his part to some interest in the property; or, as the trier of the facts, the trial court may have refused to accept as true those particular averments of petitioner's affidavits which defendant did not see fit to deny. The trial court may have taken into consideration also, in deciding the matter, petitioner's apparently contradictory position in seeking to maintain the attachment against said third party claim upon the ground that the property belonged to the defendant and not to the third party, and at the same time seeking to defeat defendant's motion to increase the amount of the undertaking upon the ground that the property belonged to the third party and not to the defendant. Without going into further details, we believe that the circumstances above stated sufficiently show that the trial court was confronted with a situation calling for the exercise of a discretionary power, and therefore, under the decisions above cited, mandamus will not lie to review the manner in which it was exercised, even though it be conceded that the conclusions reached were erroneous. Lapique v. Superior Court, 24 Cal. App. 313, 141 P. 223; First National Bank v. Superior Court, 71 Cal. App. 64, 234 P. 420.

Moreover, section 963 of the Code of Civil Procedure affords a right of appeal from an order dissolving an attachment, which the trial court would inevitably grant if petitioner declined to furnish the undertaking in the increased amount; and for that reason it would seem that petitioner is not entitled to the issuance of a writ herein. However, since it is clear that the writ must be denied upon the ground first mentioned, it is unnecessary to inquire into the merits of this latter point.

The writ is denied.

We concur: TYLER, P. J.; CASHIN, J.

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133 Cal.App. 197

## TOLER v. SMITH et ux.

Civ. 670.

District Court of Appeal, Fourth District, California.

July 6, 1933.

Hearing Denied by Supreme Court Sept. 1, 1933.

**1. Appeal and error** ⟹1010(1).

Trial court's fact finding, supported by substantial evidence, will not be disturbed on appeal.

**2. Records** ⟹9(13).

Proceedings under Land Title Act and jurisdiction on which judgment and title certificate depend will be presumed sufficient and part of record on appeal from judgment quieting certificate holder's title (Land Title Act [St. 1915, p. 1932]).

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Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Jessie Lee Toler against S. M. Smith and wife. Judgment for defendants, and plaintiff appeals.

Affirmed.

See, also, 23 P.(2d) 788.

C. A. Stice, of Los Angeles, for appellant.

Head, Wellington & Jacobs, of Santa Ana, W. S. Knott, of Los Angeles, and J. H. Ardis, of Downey, for respondents.

ANDREWS, Justice pro tem.

This appeal is from a judgment quieting title of defendants, involving the division line between lands of the parties.

[1] 1. The principal question argued in the briefs is whether the evidence given at the trial supports the findings and judgment. Plaintiff discusses at length the facts developed at the trial bearing upon the location of different fences and landmarks and the question of the true line between the lands of the parties and whether some different line than the original dividing line should be established, due to adverse possession. The transcript discloses that much evidence was introduced upon both sides upon all the bearings relating to the proper dividing line to be established and the holdings of land to be settled with reference thereto, and the case comes undoubtedly within the often-repeated rule that there is substantial evidence supporting the finding of the trial court.

[2] 2. The other question adverted to very briefly in the briefs submitted is the legality of the certificate of title issued in proceedings instituted under the Land Title Act (St. 1915, p. 1932) and the question as to whether the court had jurisdiction to make such certificate valid. The only evidence which appears in the transcript or which is before this court is this certificate, there being no judgment roll or other record of the proceedings out of which the certificate was issued. The transcript indicates that the judgment roll was offered in evidence, indeed all the proceedings were offered in evidence, and were to be passed upon as to what part of the record could be admitted as judgment roll, but whatever was finally considered by the court in arriving at its conclusion was not made a part of the return to this court. That issue, then, rests upon the certificate alone, and, being the result of a final adjudication of a court of general jurisdiction, the proceedings and jurisdiction upon which the

judgment and certificate would depend will be presumed to be sufficient and a part of the record. This makes it necessary to affirm the judgment of the trial court upon this issue.

These being the only two issues involved, the judgment of the trial court is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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133 Cal.App. 199

## TOLER v. SMITH et ux.

Civ. 690.

District Court of Appeal, Fourth District, California.

July 6, 1933.

Hearing Denied by Supreme Court Sept. 1, 1933.

**1. Records 🔑9(7).**

Service of notice of land registration proceedings on adverse claimant as adjoining owner required such claimant to take notice of its source and purpose (Land Title Act [St. 1915, p. 1932]).

**2. Records 🔑9(7).**

Statement of person, serving notice of land registration proceedings on adverse claimant, that it would not affect latter's rights, afforded no legal justification for ignoring and failing to act on information in notice (Land Title Act [St. 1915, p. 1932]).

**3. Records 🔑9(7).**

Land claimant, served with notice of land registration proceedings, was charged with knowledge, which her prompt examination of all records of proceeding, including petition not served on her, would have disclosed (Land Title Act [St. 1915, p. 1932]).

**4. Records 🔑9(13).**

Claimant's use of land after issuance of title certificate to others in land registration proceeding did not affect court's jurisdiction or validity of judgment and certificate (Land Title Act [St. 1915, p. 1932]).

**5. Judgment 🔑435.**

Party cannot defeat judgment against her on ground that she did not understand legal effect of notice served on her as required by law.

**6. Records 🔑9(11).**

Thirteen years' delay, shown on face of complaint, in bringing action to cancel title certificate issued in land registration proceedings, barred action (Land Title Act [St. 1915, p. 1932]).

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Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Jessie Lee Toler against S. M. Smith and wife. Judgment for defendants, and plaintiff appeals.

Affirmed.

See, also, 23 P.(2d) 787.

C. A. Stice, of Los Angeles, for appellant.

Head, Wellington & Jacobs, of Santa Ana, for respondents.

ANDREWS, Justice pro tem.

This is an appeal from a judgment entered upon a demurrer to plaintiff's second amended complaint without leave to amend.

1. This action was brought for the purpose of canceling a certificate of title issued under the Land Title Act (St. 1915, p. 1932) on lands of defendant on the 23d day of May, 1917, and the action which was first filed to call in question the validity of this certificate on the part of plaintiff was on the 17th day of July, 1930.

Either the three-year statute of limitation or that provision of the Land Title Act which makes the certificates of registration final, unless attacked within one year after the registration of the land, would prevent the bringing of, or maintaining of, this action, unless it is shown in the complaint that there is a legal justification for the delay of thirteen years which is the outstanding feature of this complaint. The complaint does undertake to show that the service on plaintiff in the land registration proceedings of a copy of the notice issued in such proceedings was made by a son of defendants, who undertook to assure plaintiff that the proceedings would not affect the title to her land. The complaint also alleges that after the granting of the certificate the plaintiff for about ten years continued to use the land covered by the certificate adjoining the boundary line of plaintiff's land as a turning row, as did also the defendants. The complaint further alleges that the plaintiff cultivated the strip of land in dispute yearly and continuously during the time from the issuing of the certificate until about March 1, 1927; that during that time plaintiff was unaware of the existence of the record of the proceedings out of which the certificate was issued; and that plaintiff did not understand the significance of the notice served upon her in said land registration proceedings. The plaintiff also claims in her complaint that as she was known to be in possession and to be a claimant to the lands in dispute, such facts should have been set forth in the petition, that under the Land Title Act she should have been served with a copy of the petition as well as a copy of the notice issued in the proceedings, and that failure to do so was a fraud upon the court and the plaintiff which invalidated the proceedings. In the petition she was in fact alleged to be an adjoining owner and was served with the notice issued in the proceedings. In the steps taken under this act, the petition roughly corresponds to the complaint in a civil action and the notice to the summons in such actions.

[1] The act requires that the petition must contain a statement of whether the land described therein is occupied, the name and address of the occupants, the interest each has or claims in the land, any other person who claims an interest, the name and address of such person, and the names and addresses of owners of adjoining lands. The law provides that the notice must contain the name of the court, names of applicants, description of lands involved and notice that the parties served must answer or that a decree will be granted and that persons served will be forever barred from all interest in the property. Plaintiff having been served with notice on the theory of being an adjoining owner, that service was fraught with legal significance and required plaintiff to take notice of its source and its purpose.

[2-6] The statement of the person serving the notice that it would not affect plaintiff's rights affords no legal justification for ignoring and failing to act upon the information furnished by the notice itself. That notice contained all the information which the petition would have disclosed had it also been served, and plaintiff could only ignore the service of this notice at her peril. Pursuing the knowledge which the notice imparted, as it was the duty of plaintiff to do, would have led to an examination of all the records of that proceeding, including the petition, and plaintiff must therefore be charged with the knowledge which her investigations would have disclosed and that discovery she was required to make promptly. The use of the land subsequent to the issuance of the certificate would in no way bear upon the jurisdiction of the court or affect the validity of the judgment and certificate. Plaintiff cannot be permitted to defeat a judgment upon the ground that she did not understand the legal effect of the notice served upon her, as to permit such a questioning of the binding force of legal proceedings, where the notices required by law have been given, would make every judgment uncertain and unsettled. The delay shown upon the face of the complaint constitutes a bar to this action, and justifies the sustaining of the demurrer without leave to amend.

The judgment of the trial court is sustained.

We concur: BARNARD, P. J.; MARKS, J.

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## MORROW v. BOARD OF DIRECTORS OF IMPERIAL IRR. DIST. et al. *

Civ. 1077.

District Court of Appeal, Fourth District, California.

July 6, 1933.

Rehearing Denied Aug. 4, 1933.

Hearing Granted by Supreme Court Aug. 31, 1933.

**1. Waters and water courses** ⚷227.

Statute providing that if irrigation district officer is not recalled in election for that purpose, no further recall petition shall be filed within 6 months of date of recall election prohibits holding of two recall elections within 6 months (St. 1897, p. 254, § 28½, as added by St. 1911 [Ex. Sess.] p. 135).

**2. Waters and water courses** ⚷227.

Upon filing of recall petition signed by required number of registered electors, and in absence of fraud, secretary of irrigation district must certify and deliver petition to directors and directors must call election (St. 1897, p. 254, § 28½, as added by St. 1911 [Ex. Sess.] p. 135).

**3. Mandamus** ⚷74(2).

Where appeal is pending in Supreme Court from judgment restraining calling of election to recall director of irrigation district, mandamus directing calling of similar election on petition filed less than 3 months after first petition will be denied, since two elections within period prohibited by statute might result (St. 1897, p. 254, § 28½, as added by St. 1911 [Ex. Sess.] p. 135).

Application by Charles H. Morrow for a writ of mandate to be directed to Board of Directors of the Imperial Irrigation District and others to compel the calling of a recall election.

Peremptory writ denied, and alternative writ discharged.

S. P. Williams, of El Centro, for petitioner.

Charles L. Childers and D. B. Roberts, both of El Centro, for respondents.

MARKS, Justice.

This is an original proceeding seeking a peremptory writ of mandate requiring respondents, as all of the members of the board of directors of the Imperial irrigation district, to call a special election to determine whether or not director Burleigh E. Adams shall be recalled and his successor elected. All of the respondents were served, but directors Hewes and Young have not appeared. The other directors have demurred and answered to the petition. The answer controverts some of the material allegations of the petition, but from the view we take of the cause it will not be necessary to have these controversial facts settled before we proceed to a determination of the merits of the case.

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*For subsequent opinion see 26 P.2d 292.

The Imperial irrigation district was organized under the California Irrigation District Act. (St. 1897, p. 254, as amended.) Burleigh E. Adams had served as a director of the district from division No. 4 for more than six months prior to February 21, 1933. On that day a petition for his recall and the election of a successor, containing sixteen signatures, was filed with F. H. McIver as secretary of the board of directors of the district. This petition was certified insufficient by McIver on February 25, 1933. Thirteen additional sections of the petition were filed on March 6, 1933. He examined the records of registration of Imperial county and determined that the petitions were then signed by registered voters in number more than "twenty-five per cent of the highest vote cast within such district for candidates for the office, the incumbent of which is sought to be removed, at the last general election in such district at which an incumbent of such office was elected." Section 28½, California Irrigation District Act, as added by St. 1911 (Ex. Sess.) p. 135. Subsequent to this examination and prior to March 14, 1933, eleven sections of the supplementing petitions were surreptitiously removed (probably stolen) from his office. They have not been recovered. The secretary had made and still retains copies of the names signed on all of the sections of the petition. He certified to these facts and attached his certificate to the sections of the petition remaining in his possession preparatory to delivering them to the board of directors.

On, or immediately after, March 16, 1933, two electors, Box and Martin, residents and taxpayers of the district, instituted an action in the superior court of Imperial county seeking to enjoin McIver from certifying to the petitions and delivering them to the directors, and the directors from calling an election.

Directors Hewes and Young filed answers which in effect joined in the prayer of the complaint. McIver answered denying many of the allegations of the complaint and setting forth the facts already mentioned concerning the filing of the recall petitions, his examination of the signatures and comparison with the registration records, his finding the petitions sufficient, the loss of part of them, and his execution of his certificate for delivery to the board of directors. Directors Rose, Aten, and Adams answered, denying numerous allegations of the complaint, and made allegations similar to those in the McIver answer, which we have summarized. By failing to deny certain allegations of the complaint, they admitted they would call the recall election if not enjoined. The plaintiffs and defendant directors Hewes and Young moved for judgment on the pleadings. This motion was granted and judgment entered in accordance with the prayer of the complaint on April 17, 1933. An appeal from this judgment, by McIver and directors Adams, Rose, and Aten, is now pending in the Supreme Court.

On May 8, 1933, a second petition for the recall of Adams was filed with McIver. Immediately thereafter a second suit was filed against McIver and others seeking to restrain McIver from examining and certifying this petition, and the board of directors from receiving and acting upon it. A temporary injunction was refused and McIver certified to the sufficiency of the second petition.

On May 31, 1933, a petition was filed here asking a peremptory writ of mandate to compel the directors to meet and call the recall election. It is alleged that Adams, Rose, and Aten have conspired and agreed together to stay away and are staying away from directors' meetings so that a quorum will not be present and the election cannot be called.

It is not necessary for us to consider the objection of the answering directors that this proceeding was brought prematurely, twenty-three days after the second recall petition was filed and thirteen days after the expiration of the ten days during which McIver should have certified to the sufficiency of the second petition. It has been stipulated that on June 13, 1933, there was a meeting of the board of directors at which all members were present; that McIver submitted the second petition with his certificate of its sufficiency; that action upon it was deferred until the regular meeting to be held on July 11, 1933.

While neither of the petitions are before us, it seems to be conceded by counsel, for the purpose of this proceeding, that both were sufficient in all respects. We will, therefore, assume this to be true and that, considering the sufficiency of the petitions alone, the secretary should have certified them and the board of directors should have called the recall election.

[1] The last sentence of section 28½ of the California Irrigation District Act provides as follows: "If the vote at any such recall election shall not recall the officer, no further petition for the recall of such officer shall be filed before the expiration of six months from the date of such first recall election." As this section prohibits the filing of a recall petition for a period of six months after the failure to recall an officer at an election, it would seem to us that it was the intention of the Legislature to prevent the harassing of an official with proceedings which might result in holding two recall elections within six months.

[2] It seems to be evident from the provisions of section 28½ of the California Irrigation District Act that if a recall petition is sufficient in form and is signed by the requisite number of registered electors, it is the duty of the secretary of the board of directors to certify to its sufficiency and to deliver the petition and certificate to the board of directors. It is also clear that it is the duty of the board of directors to call the election upon receipt of the petition and the certificate of its sufficiency, in the absence of fraud as that term is used in the decisions upon this subject. City of Watts v. Superior Court, 36 Cal. App. 692, 173 P. 183; Koehler v. Board of Trustees, 83 Cal. App. 648, 257 P. 187; Martin v. Board of Trustees, 96 Cal. App. 705, 274 P. 1015.

[3] Petitioner urges that we cannot decide the case of Box et al. v. McIver et al., now pending on appeal in the Supreme Court. This is quite true. As the judgment in that case is not final, we cannot overlook the possibility of a reversal and the possible ultimate success of the defendants in that action. If the defendants should prevail, it would then become the duty of the board of directors to call a recall election under the first petition filed. Martin v. Board of Trustees, supra. If that should happen and we should order respondents to call and hold the election under the second petition, it would result in the holding of two recall elections against the same official on petitions filed within less than three months of each other. We think this contrary to the intent of the Legislature as expressed in the last sentence of section 28½ of the California Irrigation District Act, which we have already quoted.

Peremptory writ of mandate denied and the alternative writ is discharged.

I concur: BARNARD, P. J.

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133 Cal.App. 173

## J. I. CASE CO. v. REDFERN.

Civ. 4789.

District Court of Appeal, Third District, California.

July 5, 1933.

Hearing Denied by Supreme Court Sept. 1, 1933.

**1. Principal and agent ⚷14(3).**

Machinery company's salesman paid flat salary and devoting all his time to interests of company *held* company's agent in fraudulently obtaining dealer's signature as guarantor to buyer's notes, though agreement appointing dealer provided that company's employees were dealer's employees while assisting dealer in procuring sales.

**2 Guaranty ⚷25(3).**

Evidence in action against machinery dealer as guarantor on notes sustained finding that machinery company's agent fraudulently induced dealer to sign buyer's notes as guarantor on representation he was signing as witness.

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Action by the J. I. Case Company against F. E. Redfern. From a judgment for defendant, plaintiff appeals.

Affirmed.

Dunn, White & Aiken and Hamilton Wright, all of Oakland, for appellant.

L. M. Linneman, of Dos Palos, and F. W. Docker and Claude Minard, both of Fresno, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This action was commenced against I. R. Stevens and A. R. Van Antwerp, as the makers of seven promissory notes given in part payment of certain farm machinery purchased from appellant; respondent being made a party in the action as guarantor of each of the notes. The makers defaulting, judgment was entered against them, and the trial proceeded against Redfern as guarantor. At the conclusion of the trial judgment was entered in favor of defendant Redfern, and this is an appeal therefrom.

Appellant was engaged in the business of selling farm machinery through local dealers, of whom respondent was one, and also by salesmen employed directly by the company operating out of its various branch offices.

Here, a salesman, James K. Hopkins, acting through a dealer, sold certain farm machinery to defendants Van Antwerp and Stevens. These buyers lived in Dos Palos, within the territory of Redfern, and, in accordance with his agreement, he demanded that he be given credit for the sale.

At that time the machinery had all been delivered to the purchasers and all the papers evidencing the deal had been executed, but through an error the proper forms had not been used, and it was necessary to re-execute them, which was done at the time appellant recognized the right of respondent to a commission in the deal.

The question here involved is whether or not Redfern guaranteed the second set of notes which were executed. The corrected forms were sent by the company to its agent, Hopkins, who, in company with Stevens, one of the purchasers, went to Dos Palos, where Hopkins informed Stevens and Redfern that new forms had been sent by the company and had to be re-executed. It is admitted by the pleadings that respondent actually signed his name to a guaranty clause on each note in question. The entire disagreement is as to whether his signature was so placed as the result of fraudulent representations on the part of Hopkins, and if he was entitled to rely upon these representations, and, finally, whether or not Hopkins was at the time of making the representations an agent of the appellant company.

The trial court found that respondent subscribed his signature to each of the agreements of guaranty upon the notes, but signed the same without the knowledge he was thereby agreeing to become guarantor, and that his signature was obtained under the direction of James K. Hopkins, and that Hopkins did then and there fraudulently and with intent to deceive defendant, represent that said signatures of defendant were subscribed solely for the purpose of witnessing the signatures of the makers thereof, and would impose no obligation upon him.

The appeal is based upon the insufficiency of the evidence to support the findings. Appellant recognizes the rule that, when there is a substantial conflict in the evidence as to a material fact, the findings of the trial court cannot be disturbed, and that it is also the duty of the trial court to decide which witness has told the truth when there is a conflict in the testimony, but appellant contends that, after all of the conflicts are resolved in favor of respondent, nevertheless the facts here in evidence are wholly insufficient to support the judgment.

[1] The first question to determine is the status of Hopkins to the parties involved. In the agreement entered into between appellant company and respondent wherein respondent was appointed a dealer, appears the provision that the company's branch managers or other employees who assist the dealer in soliciting sales, etc., do so as his employees for the time they are so working. It is the contention of appellant that under the foregoing provision Hopkins was the employee of respondent and not of the Case Company at the time of the execution of the notes, and therefore any representation by Hopkins to respondent as to the nature of the document for the purpose of obtaining his signature thereto was not binding upon appellant.

At the time of the transaction in question, Hopkins was a regular salesman for the company, devoting all of his time exclusively to their interest, paid a flat salary therefor rather than commissions. The contract forms for this deal were made out by the company and sent to him. He was authorized to collect payments on behalf of the company, and did so collect payments made on account of these transactions in question, and, after the notes were signed, accepted them, and forwarded the same to the branch office of the appellant. At all times Hopkins acted as the representative of the company, and the courts so found, and it is clear that he was so acting in obtaining the signature of the parties to the notes. Should Hopkins have failed to account to the company for the money paid in closing the transaction, under no theory could the dealer have been responsible, or, should the salesman have been injured in the course of closing the deal, we doubt if the company would have escaped an employer's liability by virtue of the terms of the agreement referred to.

Therefore, accepting the findings of the court that Hopkins was the agent of the company, let us examine the evidence to ascertain what representations were made to respondent and whether they were true or false.

[2] Respondent testified that upon the day the notes were signed by him he was met by Hopkins, who told him the original papers were not upon the forms prescribed by the company, and said: "You will have to sign this. * * * You are supposed to sign as a witness." Thereupon, as respondent testified, believing that he was signing as a witness and not otherwise, and having had dealings with appellant and always having found it reliable, he signed.

One of the witnesses to the transaction testified that, after he had signed, "the notes were shoved over to Mr. Redfern to sign it and it was all done in a hurry—it was all done quick, you know."

Respondent was a rancher in the Dos Palos section and not engaged in the sale of farming equipment except as local agent for appellant, and had acted for appellant in that capacity only about a year and a half, during which time three sales were involved, all of which sales were closed by a salaried employee of appellant. His relations with the company had been cordial, and he knew Hopkins as a representative of the company and relied upon him as such.

The following from Thomas v. Whitney, 186 Ill. 225, 57 N. E. 808, is quoted with approval in Hemenway v. Abbott, 8 Cal. App. 450, 97 P. 190, 195: "The relation exists and relief is granted in all cases in which influence has been acquired and abused in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations, and those informal relations which exist wherever one man trusts in and relies on another."

It is argued by appellant that the facts proved were not sufficient to constitute fraud, but after a conflict of testimony the trial court found that fraudulent representations were made and were relied upon by respondent. They were made knowingly by appellant, and we have found nothing that will justify disturbing the finding in this respect.

It is apparent that the facts material to the validity of the judgment were fully found and established by the evidence, and judgment should be affirmed. It is so ordered.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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133 Cal.App. 202

**BERNSTEIN et al. v. TIMMERMAN et al.**

**Civ. 676.**

District Court of Appeal, Fourth District, California.

July 6, 1933.

Rehearing Denied Aug. 4, 1933.

Hearing Denied by Supreme Court Sept. 1, 1933.

**1. Exchange of property ⊂⊃8(4).**

In action to cancel deeds delivered from escrow, evidence sustained finding that there was no mutual agreement to rescind before delivery.

**2. Exchange of property ⊂⊃8(4).**

In action to cancel deeds constituting part payment on bungalow court, evidence sustained finding that no misrepresentations regarding bungalow court were made or relied on.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Morris Bernstein and another against Henry D. Timmerman and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Charles E. Hobart, of Los Angeles, for appellants.

Duckworth & Harrison, of San Bernardino, for respondents.

BARNARD, Presiding Justice.

This action grew out of a real estate transaction in which the plaintiffs agreed to purchase from the defendants Timmerman a bungalow court in the city of San Bernardino, giving in part payment therefor several parcels of real and personal property. The various instruments and papers involved were placed in escrow with a title company, and later delivered to the respective parties in accordance with the terms of the escrow. This action was brought against the Timmermans and against the real estate agents concerned in the deal, for the purpose of canceling the deeds and assignments by which the several properties of the plaintiffs had been conveyed to the defendants. While the complaint contains a number of causes of action, the essence of the action is that the delivery of the instruments sought to be canceled constituted a conversion of the properties represented thereby, since a rescission had been mutually agreed upon by the parties before delivery, and that the transaction should be set aside because of fraudulent representations alleged to have been made by the defendants Timmerman. The trial court found for the defendants on every material issue and entered a judgment in their favor, from which this appeal is taken.

The only point raised is that the evidence does not sustain certain of the findings. While the appellants concede that there is a conflict in the evidence on most of the issues, they insist that there is no real conflict with respect to certain matters, this contention being based largely on the argument that the entire evidence discloses that the testimony of the principal defendant was not worthy of belief.

[1] With respect to the first contention, that there was a mutual rescission and that the papers in question should not have been delivered, the following appears: On June 7, 1929, deeds and assignments covering all of the properties concerned were placed in escrow with instructions, signed by all the parties, authorizing the title company to bring down the titles, record the papers, and complete the transaction. According to these escrow instructions and the papers deposited, the Timmermans were to receive the conveyances of the Bernstein properties, and the appellants were to receive a deed to the bungalow court property, giving back a trust deed thereon securing a note representing the balance of the purchase price. Later, the appellants notified the respondents that they would not go on with the deal and on June 10, 1929, all of the parties met for a conference. At this time the appellants stated that they were fearful they could not make the payments; that if there should be any large number of vacancies they would be unable to do so; and that they did not like to assume the responsibility of taking care of the incumbrances against the bungalow court. The defendants suggested handling the matter on a contract of sale instead of by a deed. There is evidence that for the reasons named the parties agreed to make this change and also agreed that the monthly payments were to be materially reduced and that the Timmermans would lease one unit of the property for a substantial amount. In accordance with this agreement the parties met at the escrow office the next day, at which time an agreement of sale was drawn and signed by the parties and left in escrow to be substituted therein for the deed. The escrow agent was instructed to use the deeds and assignments previously deposited with it by the appellants as the down payment on the contract and not to deliver the contract to the appellants until the title to the Bernstein properties was found to be satisfactory. At the same time the escrow agent told

all the parties that the deal was now closed and there could be no backing out. On June 20, 1929, the respondent H. D. Timmerman complained to the appellants concerning the title to one parcel of property he was to receive and stated that they must either put up cash for that or give him other security of equal value. The appellants admit that there is a conflict in the testimony as to what occurred at this conversation. While they testified that Timmerman told them that the deal was off, this is flatly denied by him. Mr. Timmerman and another witness testified that he then told the appellants that the deal had gone too far to stop and would have to be completed. On June 30, 1929, Mr. Timmerman told the appellants he was ready to accept the title to the lot about which he had previously complained. There is a conflict as to what was said at this time, the appellants having testified that they stated they would go on with the deal only on certain named contingencies, while Timmerman and one of the real estate agents testified to the contrary. The latter parties also testified that at that time the appellants agreed to come to the bungalow court on July 2, 1929, and take possession of the property. On July 2, 1929, the parties met at the bungalow court and, on being told that several other vacancies had occurred through parties moving out, refused to go on with the deal. There is evidence that the appellants at that time stated that they had no complaint in so far as the court or its equipment were concerned, but that they were afraid of the vacancies. Shortly thereafter, the escrow agent delivered the papers to the respective parties and this action followed.

It is appellants' contention that the evidence shows a mutual agreement of rescission and that the escrow should not have been closed and the papers delivered until they took possession of the property. While they notified the escrow agent not to deliver the papers before the same were delivered, under the view of the evidence taken by the trial court, they had no right to then prevent the transfer. Under the instructions the papers were to be delivered when certain titles were found satisfactory, and no such condition as taking possession appears therein. The court's finding that there was no mutual agreement to rescind is sustained by the evidence. The appellants contend that this rescission took place on June 20th and at the same time admit that there is a conflict in the evidence with respect thereto. Two witnesses testified that while the appellants mentioned canceling the exchange, at that time, the respondents told the appellants that the same could not be canceled or abandoned. There is also evidence that on June 30th, when the respondents told the appellants they were satisfied with the other title, the parties arranged a day on which the appellants were to take possession of the property, and that they were in the act of taking possesion when they became alarmed at being told of some vacancies that had occurred in the meantime.

[2] The appellants contend that the respondents falsely represented the value of the property; the amount of the monthly income and rental when the apartments were full; the amount of the income and rental then being received; that it was completely furnished and equipped; the cost of the furnishings; that during the period of one year the proportion of vacancies had not amounted to more than 10 per cent.; and that a certain man took care of the property in return for the right to occupy a small house situated thereon. The respondents denied making any misrepresentations, although they admitted an error of $5 in stating the amount of monthly rental then being received from one apartment, with an explanation of how the same came to be made. The court found that a mistake had been made in this respect; that the same was made in error and that there was no intent to defraud; and that the same was not relied upon. This matter is not material, being only incidental to the claim of misrepresentation in regard to the income of the entire property, and the entire evidence fully sustains the court's finding in that regard. The court found that no misrepresentations were made, and further, that none were relied upon. In regard to the latter finding, there not only was evidence that the appellants made their own investigation, but that they refused an opportunity to examine respondents' books showing the income from the apartments, saying that "anyone could fix up the books." It appears that appellants had been in the business of buying and selling apartment houses and running them. It would serve no useful purpose to set forth the evidence relating to the various misrepresentations claimed, but the same supports the findings made, and the attack upon the weight of the testimony of one of the respondents has no place here.

While considerable evidence was introduced which would have justified findings favorable to the appellants, no more appears than a conflict in the evidence upon certain issues, in every one of which the trial court has found the other way.

The judgment is affirmed.

I concur: MARKS, J.

133 Cal.App. 31

## LIAL v. SUPERIOR COURT IN AND FOR MERCED COUNTY et al.

Civ. 4962.

District Court of Appeal, Third District, California.

June 27, 1933.

**1. Appeal and error 🔑1195(1).**

Opinion rendered by District Court of Appeal on appeal established law of case.

**2. Appeal and error 🔑1207(1).**

When appellate court passes on merits and directs trial court to render particular judgment, there is no authority to permit amendment of pleading, change issues, or try cause de novo.

**3. Appeal and error 🔑1207(1).**

Reversal of judgment on appeal with direction to trial court to enter specific judgment determines merits as effectively as though judgment were affirmed.

**4. Appeal and error 🔑1216.**

Trial court's setting aside judgment rendered under direction of District Court of Appeal to enter specific judgment that plaintiff take nothing *held* unauthorized.

**5. Prohibition 🔑5(2).**

Where trial court improperly set aside judgment entered in conformity with directions of appellate court, writ of prohibition should issue enjoining court from permitting filing of amended plea and from retrying cause.

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Petition by Joao Lial, also known as Joao Leal, also known as John Leal, against the Superior Court in and for Merced County, Hon. E. N. Rector, as Judge thereof, for writ of prohibition.

Writ issued.

C. Ray Robinson and James D. Garibaldi, both of Merced, for petitioner.

F. M. Ostrander and G. P. Ross, both of Merced, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is a petition for a writ of prohibition to restrain the retrial of a cause of action in which the judgment was reversed on appeal by this court, with specific directions for the court to enter a judgment that plaintiffs take nothing by their action.

A suit in assumpsit was commenced in the superior court of Merced county based upon an alleged contract for the purchase price of certain cattle. As security for the satisfaction of whatever judgment the plaintiffs might recover, an attachment was levied upon the cattle under the provisions of section 537 of the Code of Civil Procedure, and they were seized and held by the sheriff pending the determination of the suit. Issues were joined, and the cause was tried. Findings were adopted, and a judgment was entered, in which it was determined that the contract upon which the plaintiffs relied was void for lack of mutual understanding of the terms. Thereupon the court held that plaintiffs were not entitled to recover judgment upon the contract, but, upon the contrary, did determine that the cattle should be returned to the defendants only on condition that they pay to the plaintiffs the sheriff's costs as keeper of the cattle. Unless this were done within five days, the sheriff was directed to sell the cattle in the manner provided by statute for an execution sale of property. Upon appeal from that judgment, this court held the trial court was unauthorized to make the conditional order for the return of the cattle to the defendant. Young v. Lial (Cal. App.) 17 P.(2d) 170. That was a simple suit for a money judgment based upon a contract which the court held was void. It was not a possessory action. There were no equitable issues in the case. Under the provisions of section 1024 of the Code of Civil Procedure, the defendant was entitled to his costs as of course. The court was powerless to assess the costs, or any part thereof, against the defendant in whose favor the judgment was rendered. Upon appeal this court so held. The cause was not remanded for a new trial. Upon the contrary, on the record presented to this court, the trial court was directed to enter judgment to the effect that the plaintiffs take nothing by their suit. Upon receipt of the remittitur, the court did enter judgment that the plaintiffs take nothing, as directed by this court. A motion for a new trial was subsequently made by the plaintiffs and granted.

The petition for a writ of prohibition alleges that unless it is restrained the lower court will proceed to permit the filing of amended pleadings so as to raise new issues and retry the cause in disregard of the directions of this court. In granting a new trial after rendering the judgment directed by this court, the trial judge said: "There is only one ground upon which this court can consistently at this time order a new trial, and that is with the direct end in view of having the pleadings amended so as to admit of the introduction of evidence" concerning the equities of the case.

[1] The opinion which was rendered by this court in the case of Young v. Lial, established the law of the case. After the issues of a case have been established and a judgment has been passed upon on appeal, it is ordinarily too late to amend the pleadings so as to change the nature of the cause.

Such applications should be looked upon with suspicion. They tend to encourage fabrications of the issues. Dressler v. Johnston (Cal. App.) 21 P.(2d) 969. There is nothing in this case for the court to retry. It is said in 2 Freeman on Judgments (5th Ed.) 1345, § 639: "The judgments of appellate courts are as conclusive as those of any other court. They not only establish the facts, but also settle the law, so that the law as decided upon any appeal must be applied in all the subsequent stages of the cause, and they are res judicata in other cases as to every matter adjudicated."

[2, 3] It is a well-established principle which has been frequently announced by the courts that, when an appellate court has passed upon the merits of a cause on appeal and has directed the trial court to render a particular judgment or decree, there is no authority to permit amendments to the pleadings, change the issues which were determined, or try the cause de novo. Under such circumstances the trial court is without jurisdiction to enter any judgment at variance with the directions of the appellate court. Keller v. Lewis, 56 Cal. 466; Heinlen v. Martin, 59 Cal. 181; Cowdery v. London & San Francisco Bank, Ltd., 139 Cal. 298, 307, 73 P. 196, 96 Am. St. Rep. 115; Argenti v. Sawyer, 32 Cal. 414; Chafoin v. Rich, 92 Cal. 471, 28 P. 488; Todd v. Bettingen, 102 Minn. 260, 113 N. W. 906, 18 L. R. A. (N. S.) 263, note. The reversal of a judgment on appeal with directions to the trial court to enter a specific judgment, determine the merits of the cause just as effectively as though the judgment were affirmed on appeal. In the case of Keller v. Lewis, supra, the syllabus clearly expresses the holding of the Supreme Court as follows: "The opinion of this Court, on a former appeal, and its direction that the Court below render judgment in accordance with the views therein expressed, became the law of the case; that the Court below had but to follow the direction thus given; and that it had no authority to open the case for the purpose of permitting supplemental pleadings to be filed."

In the case of Heinlen v. Martin, supra, on a second appeal it was contended the trial court erred in refusing to permit amended pleadings to be filed and a retrial of the cause to be had. The Supreme Court said: "But no new trial was ordered, and none was necessary; for the Supreme Court had determined the rights of the parties, and that determination was a final adjudication of the case, itself, which only required to be embodied in form by the entry of a proper judgment in the lower Court, to make it enforceable. The entry of such a judgment was the only duty devolved upon the Court, under the mandate of the Supreme Court. (Keller v. Lewis, 56 Cal. 466.) If upon the going down of the remittitur from the Supreme Court the lower Court had retried the case, and upon such new trial had rendered a judgment, it would have been void. (Argenti v. San Francisco, 30 Cal. 460.)"

[4] In the present case, since the appellate court passed upon the merits of the cause and directed the trial court to enter a specific judgment "that the plaintiffs take nothing by their action," it follows that the setting aside of the judgment which was subsequently rendered in conformity with the directions of the appellate court, was unauthorized and void. The avowed intention of the court to permit the filing of new pleadings which will have the effect of changing the issues which have been finally determined, and try the cause de novo is in conflict with the clear mandate of the appellate court, and is unauthorized.

[5] The writ of prohibition should therefore issue enjoining the court from permitting the filing of amended pleadings and from proceeding to retry the cause. It is so ordered.

We concur: PULLEN, P. J.; PLUMMER, J.

133 Cal.App. 135

## PEOPLE v. MAAS.

Cr. 86.

District Court of Appeal, Fourth District, California.

June 30, 1933.

**Obstructing Justice 🔑16.**

In prosecution for removing motorist involved in automobile accident with intent to obstruct officer from discharging his duty, evidence *held* insufficient to sustain conviction (Pen. Code, § 148; St. 1923, p. 563, § 142, as amended by St. 1931, p. 2130, § 56).

> Evidence disclosed that motorist had visited accused, and shortly thereafter accused found motorist unconscious on highway and took him to motorist's home, and summoned physician; that officer whom he was charged with obstructing in performance of duties had not arrived on scene of accident until after parties left; that accused did not know nature of injuries of parties involved in accident, nor that officer was summoned.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Arthur D. Maas was convicted of removing from scene of an automobile accident the driver of one of cars involved therein, with intent of obstructing a certain officer of California highway patrol from discharging the duties of his office, and he appeals.

Reversed.

Stanley Visel, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Alberta Belford, Deputy Atty. Gen., and S. B. Kaufman, Dist. Atty., of Orange County, and Preston Turner, Deputy Dist. Atty., both of Santa Ana, for the People.

BARNARD, Presiding Justice.

The defendant was accused of violating section 148 of the Penal Code, it being charged that he removed from the scene of an automobile accident the driver of one of the cars involved therein, with the intent of obstructing a certain officer of the California highway patrol from discharging the duties of his office. This appeal is from a judgment after the conviction of the defendant by the court sitting without a jury, and the only question presented is as to the sufficiency of the evidence.

The only evidence before the court was a stipulation, which is as follows:

"* * * It is stipulated by and between counsel in this proceeding that on or about the 21st day of October, 1932, there was an automobile accident on North Main Street of Santa Ana or South Main Street of Orange, in which accident one Rolf Von Eckhartsberg was the driver of an automobile which collided with an automobile on said highway; that immediately following the said collision there were three children killed outright. The said Rolf Von Eckhartsberg was rendered unconscious thereby and that at the time and immediately before said collision said Rolf Von Eckhartsberg had been at the home of the defendant, Arthur B. Maas; that said Rolf Von Eckhartsburg was proceeding from the home of the said defendant, Arthur B. Maas, in a general northerly direction on said highway and was so proceeding at the time of said collision; that immediately following said collision, said defendant, Arthur B. Maas, proceeded in the same direction, stopped his automobile in the immediate vicinity of said automobile accident and took the said Rolf Von Eckhartsberg from the scene of the accident and placed him in the defendant's automobile and took him to the home of the said Rolf Von Eckhartsberg in Glendale, California. Whereupon the defendant, Arthur B. Maas, called a physician where medical aid was rendered the said Rolf Von Eckhartsberg, the driver of the automobile in question; that at the time of said automobile accident there was riding with the said Rolf Von Eckhartsberg a man by the name of Curtis and another man by the name of Griffen, who received some injuries in the accident; that the said highway heretofore referred to in this stipulation was located in Orange county, California, and was a public highway in Orange county, California; that immediately following the collision between the automobiles heretofore referred to, one Vernon Barnhill, as a member of the California highway patrol, received a call and arrived at the scene of the automobile accident for the purpose of making an investigation pursuant to the provisions of the California Motor Vehicle Act, the time being about three or four minutes after the said defendant, Arthur B. Maas, had left the scene of the accident with said Rolf Von Eckhartsberg; that at all times mentioned in the information said Vernon Barnhill was a state traffic officer of the California highway patrol, being clothed with full power to perform all of the duties of the office to which he had been appointed by the director of the department of public works and chief of the division of motor vehicles, pursuant to the California Motor Vehicle Act and the Political Code of the state of California and, in order that this stipulation may be broad enough, that he was at all times a duly qualified and acting traffic officer of the California highway patrol and was on duty at that time and attempting to discharge the duties of such office, being stationed at Santa Ana, in Orange county, California; that at the time of the taking away of the said Rolf Von Eckhartsberg by the defendant, Arthur B. Maas, said Arthur B. Maas made no investigation with respect to the extent of the injuries sustained by the three children who were killed by the said accident, and, therefore, had no knowledge about the nature and extent of the injuries of the occupants of the Ford automobile, being the automobile in which the three deceased children were riding at the time of the accident and that said Arthur B. Maas did know, of his own knowledge, that the said Curtis and Griffen, being passengers in the automobile operated by Rolf Von Eckhartsberg, had received personal injuries, and that the said Ford automobile, being the automobile in which the three high school children heretofore referred to were riding, was at the time of the arrival of the said Arthur B. Maas, on its side of said highway."

From these facts it appears that Rolf Von Eckhartsberg had visited the appellant; that shortly thereafter the appellant found him unconscious on the highway, took him to his home, and summoned a physician to care for him; that the officer, whom he is charged with obstructing in the performance of his duties, had not arrived on the scene of the accident until after these parties had left; and that the appellant did not know the nature or extent of the injuries suffered by the occupants of the car with which the automobile driven by Von Eckhartsberg had collided.

While it appears that the appellant knew that two other occupants of the car which had been driven by Von Eckhartsberg had received personal injuries, it neither appears that these injuries were such that these parties needed aid or attention nor that the appellant knew that an officer had been summoned or was coming.

It may first be observed that while it was Von Eckhartsberg's duty, under section 142 of the California Vehicle Act (as amended by St. 1931, p. 2130, § 56), to report this accident to the office of the highway patrol or to the police department, he had twenty-four hours within which to do this and we know of no law that required him to remain on the scene of the accident. This being true, we are unable to see how any duty rested upon the appellant to refrain from removing him, especially in view of the fact that he was unconscious and in need of a doctor's care. The act of taking him away, in itself, was not criminal. To compel the leaving of injured persons on the scene of an accident until the arrival of an officer might, in many cases, cause unnecessary suffering and death.

The respondent relies entirely upon the proposition that the appellant took this person away with the intent or purpose of concealing him and preventing the officer from obtaining information from him. The only evidence relied upon to support this is the fact that this injured man was taken to his own home at Glendale instead of being taken to a hospital nearer at hand. If judicial notice may be taken of the fact that there were hospitals nearer at hand, it does not follow that there might not be many good reasons for preferring to take such a person to his own home and to summon doctors chosen by himself or his family. If it can be said that the one fact that this injured party was taken to his home instead of to a hospital justifies a possible inference that there was an intent to spirit him away and conceal him from the officers, it certainly cannot be said that this inference is sufficient to establish such an intent beyond a reasonable doubt. Apparently, the car driven by Von Eckhartsberg remained at the scene of the accident, presumably the registration slip therein disclosed his name and address, and in any event his two companions were still there when he was taken away. There appears to have been no difficulty in establishing his identity. We can see in the facts stipulated, at most, nothing more than grounds for suspicion that the appellant might be guilty of the offense with which he was charged.

In our opinion, the fact that the appellant, at a time when no officer was present, took an unconscious man to his home and there called a physician, instead of taking him to a hospital, is not sufficient to sustain a judgment based upon the theory that he obstructed an officer in the performance of his duties, in the absence of any other proof of concealment or intentional prevention of any proper questioning on the part of the officer.

For the reasons given, the judgment is reversed.

We concur: MARKS, J.; ANDREWS, Justice pro tem.

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133 Cal.App. 163

## FRED C. SILVERTHORN & SONS v. PACIFIC FINANCE CORPORATION et al.

Civ. 1023.

District Court of Appeal, Fourth District, California.

July 3, 1933.

Hearing Denied by Supreme Court Aug. 31, 1933.

**1. Chattel mortgages ⟾152, 197(2).**

Subsequent purchasers and incumbrancers are protected against prior deficient chattel mortgage only when they take conveyance for value and without actual notice of prior mortgage, while as to creditors such good faith is not essential (Civ. Code, § 2957).

**2. Chattel mortgages ⟾182.**

General creditor of mortgagor cannot set aside deficient chattel mortgage until creditor has acquired special interest in or claim on particular property involved (Civ. Code, § 2957).

**3. Chattel mortgages ⟾182.**

Claim on property enabling general creditor to successfully attack prior deficient chattel mortgage must be one arising from legal proceeding or one in nature of process authorizing immediate seizure of property (Civ. Code, § 2957).

**4. Chattel mortgages ⟾155.**

Subsequent chattel mortgage is "incumbrance" and, when taken with notice, mortgagee acquires no rights as against prior deficient mortgage (Civ. Code, § 2957).

[Ed. Note.—For other definitions of "Incumber; Incumbrance," see Words & Phrases.]

**5. Chattel mortgages ⟾155.**

General creditor, although not losing rights as such by taking chattel mortgage, could not, by taking chattel mortgage with notice, attack prior deficient mortgages (Civ. Code, § 2957).

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Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Fred C. Silverthorn & Sons against Pacific Finance Corporation and another. From a judgment for defendants, plaintiff appeals.

Affirmed.

Liggett & Liggett, of San Diego, for appellant.

Paul R. Watkins, John L. Rush, and William Hamilton, all of Los Angeles, for respondents.

BARNARD, Presiding Justice.

The Pacific Finance Corporation took two chattel mortgages upon a dairy herd owned by one Raymond, the first of which was dated December 19, 1929, and the second April 21, 1930. Neither mortgage contained an affidavit of good faith on the part of the mortgagor, as required by section 2957 of the Civil Code. On those dates and for some years prior thereto the mortgagor was indebted to this plaintiff on account of hay and grain sold and purchased. This indebtedness to plaintiff gradually increased until February 27, 1931, at which time Raymond executed and delivered to the plaintiff a note secured by a chattel mortgage covering the same herd of cattle. It is conceded that the plaintiff had actual notice of the existence of these prior mortgages for some sixty or ninety days before taking its mortgage. All three mortgages were recorded immediately after their execution. Before the plaintiff's mortgage became due, the Pacific Finance Corporation commenced foreclosure of its mortgages by reason of defaults in payments and also commenced an action in claim and delivery and took possession of the dairy herd in question. The cattle were sold at a mortgage sale for their reasonable value and the proceeds applied upon the two mortgages first referred to. This action in conversion was then begun and from a judgment in favor of the defendants, the plaintiff has appealed.

The appellant contends that such a defective chattel mortgage is void as against creditors of the mortgagor, even though such a creditor has full knowledge of the existence of the mortgage; that while, under the decisions, such a creditor must have or secure a specific interest in or a lien of some kind upon the mortgaged property, such interest or lien may be one other than that of an attachment or execution; that the appellant secured such a special interest or lien when it obtained its chattel mortgage; and that it did not waive its status as a creditor by accepting the chattel mortgage security.

[1, 2] It has been pointed out in Cardenas v. Miller, 108 Cal. 250, 39 P. 783, 41 P. 472, 49 Am. St. Rep. 84, that the statute makes a plain distinction between creditors on the one hand and subsequent purchasers and incumbrancers on the other, the latter being protected against a prior deficient mortgage only when they take their conveyances for value and without actual notice of the prior mortgage, while as to the former such good faith is not essential. It has been thoroughly settled, however, that a general creditor of the mortgagor cannot set aside such a deficient mortgage until he has himself acquired a specific interest in or claim upon the particular property involved. Lemon v. Wolff, 121 Cal. 272, 53 P. 801; Ruggles v. Cannedy, 127 Cal. 290, 53 P. 911, 915, 59 P. 827, 46 L. R. A. 371; Wolpert v. Gripton, 213 Cal. 474, 2 P.(2d) 767, 769. In Wolpert v. Gripton, the court said: "Only a creditor who has acquired a lien upon the mortgaged property by virtue of some legal proceeding, or who is armed with some process authorizing seizure of the property, can question its compliance with the formalities prescribed by the Code."

In Ruggles v. Cannedy, it is said: "Of course, it is true in general that a creditor at large of the mortgagor cannot set aside a mortgage for lack of recordation, any more than can such a creditor set aside a sale void for want of immediate delivery. He must come first with his judgment lien, execution levy, attachment, or some other process or right by which he has acquired a specific interest in or claim upon the particular property."

[3] The essential question here presented is whether a party having a chattel mortgage, who is not an incumbrancer in good faith within the meaning of section 2957 of the Civil Code, having taken the same with actual knowledge of the existence of a prior defectively executed mortgage, has such an interest in or lien upon the mortgaged property as gives him, as a creditor, a priority over the holder of the former mortgage.

The language used in the cases above cited would indicate that the interest in or claim upon the property involved which must be acquired by a general creditor in order to enable him to successfully attack a prior mortgage not executed in full conformity with the statutes must be one arising from some legal proceeding or one in the nature of some process authorizing an immediate seizure of the property, and that something more is required than the lien of a subsequent mortgage securing a note not yet due which is taken with notice.

[4, 5] Even if the lien of such a new mortgage were, in itself, sufficient to give the specific interest required under the decisions, the subsequent mortgage is an incumbrance and, under the terms of the statute, when the same is taken with notice the incumbrancer acquires no rights as against the first mortgagee. The statutory restriction applies to the entire mortgage, including any lien in connection therewith. While, as argued, a creditor does not lose his rights as such by taking a chattel mortgage to secure his debt,

it is equally true that he gains nothing as against the prior mortgage, by becoming an incumbrancer with notice. The statute makes a distinction between a creditor and an incumbrancer, in so far as the matter of notice is concerned, but it makes no distinction between an incumbrancer who with notice enters into a new transaction and one who with notice relies upon and takes security for a prior obligation. In either case the new mortgagee is an incumbrancer and is bound by the provisions of the statute.

The case of Harms v. Silva, 91 Cal. 636, 27 P. 1088, was one where a mortgage did not contain the proper certificate, and where another party took a subsequent mortgage to secure a debt due him with full knowledge of the prior mortgage. It was there held that the second mortgagee was an incumbrancer within the meaning of section 2957 of the Civil Code; that he was not an incumbrancer in good faith, since he took with knowledge; and that it made no difference that the second mortgagee was a creditor of the mortgagor, since he was relying upon his mortgage and was, in fact, a subsequent incumbrancer within the meaning of the statute.

We conclude that the appellant is in the position of a general creditor who, within the meaning of the statute and the decisions, has acquired no lien on the mortgaged property by virtue of a legal proceeding and who is not armed with any process authorizing the seizure of the property.

The judgment is affirmed.

I concur: MARKS, J.

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133 Cal.App. 53

## PIGOTT v. CLARK.

Civ. 7650.

District Court of Appeal, Second District, Division 1, California.

June 28, 1933.

**1. Appeal and error** ⟹1011(1).

Trial court's finding on conflicting testimony, that seller made no express warranty that tubing purchased was steel, *held* conclusive.

**2. Sales** ⟹288(2).

Use of tubing for almost a year after its purchase *held* to preclude buyer from claiming it was not of character expressly warranted by seller.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Lydia Pigott against L. G. Clark, wherein defendant filed a counterclaim. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Bernard Potter, of Los Angeles, for appellant.

Raphael Dechter and Wendell Mackay, both of Los Angeles, for respondent.

DESMOND, Justice pro tem.

Plaintiff recovered judgment in the sum of $1,652.48 which the trial court found to be the balance due on certain promissory notes which had been transferred by one Mitchell to the plaintiff, the judgment also carrying costs.

The defendant appeals, not questioning the correctness of the amount which the court found was unpaid, but contending that no part of it is due or owing, claiming specifically that there is insufficient evidence to justify the decision, or particularly one of the findings numbered XIII, which is hereinafter set forth.

The defendant, a veterinarian by profession, was the owner of an oil well in the Alamitos Heights field. His superintendent, Howard Murchie, an oil man of many years' experience, purchased in December, 1927, some 2½-inch upset tubing from Alfred W. Mitchell, doing business as Coast Supply Company. Mitchell had a 5-acre lot on which he kept pipe, tubing, and other supplies. The tubing was kept in piles and the particular lot in question was selected by Murchie. It appeared at the trial that various kinds of tubing are used in oil operations, among them "Reading," "D B X," and seamless steel tubing. "Reading" is an iron tubing, but, according to the testimony, the difference between iron and steel would not be discernible unless the tubing were cleaned and wiped off. The bill of exceptions before us does not indicate that Murchie appeared as a witness at the trial. Mitchell testified that Murchie selected the tubing after he examined it in the pile where it was placed on the Mitchell lot and accepted it, about a month before Dr. Clark called at the Coast Supply office and made settlement for the tubing by giving his promissory notes. It appears that no trouble was experienced with any of the tubing until October or November of 1928, almost a year after its purchase. At that time the tubing was "pulled" from the well and, according to defendant's testimony, it was found then that the tubing that had been delivered was of two kinds, "Reading" and seamless steel. During the year 1929 the tubing was pulled approximately a dozen times. Whenever the tubing was pulled, it was found that joints of "Reading" had split, but the seamless steel tubing was intact. Finally, all the "Reading" tubing was replaced with seamless steel, no further trouble developing thereafter. Defendant set up a counterclaim by way of an affirmative defense claiming reimbursement in the sum of $526.51 for the replacement of the "Reading" joints and $1,000 for lost production resulting from delay and inability to pump the well while the pulling operations were under way. Dr. Clark testified that when he signed the notes he said to Mr. Mitchell: "That tubing is supposed to be real good used tubing, isn't it, steel seamless tubing?" And that Mitchell answered, "Yes." Further conversation according to Dr. Clark was as follows: "You know I don't know anything about this oil business, and my superintendent tells me it is good stuff, and I am asking you if it is good stuff." To which Mitchell replied: "It is absolutely as good stuff as I ever saw; steel seamless tubing." Mr. Mitchell, on the other hand, said on the witness stand: "Dr. Clark wanted to give notes for it. Not a word was said about seamless tubing to my recollection. Not a word was said about tubing." Mitchell also testified that "the average length of life for tubing, in wells in the Alamitos Heights is six months to twelve months, some of them longer"; saying also that there would be less wear on the tubing by friction of the rods in a straight hole than in a crooked well. It also appeared from testimony of one of the plaintiff's witnesses, B. H. Graham, a dealer in oil well supplies for twelve or fourteen years, that the average life of new tubing in the Alamitos Heights field is approximately a year. This witness testified that "Reading" tubing is not used any more in the present day deep wells, "unless there were certain water conditions that would warrant them using it." This "because they have seamless tubing now that we didn't have four or five years ago." There was evidence that "Reading" tubing is used in preference to steel where subterranean acid conditions prevail, and that it commands a price about 20 per cent. higher than steel tubing. As will be seen from the above-quoted portion of Dr. Clark's testimony, the tubing purchased by his superintendent Murchie from Mitchell was not new, but used tubing. In regard to it Mitchell testified as follows, according to the bill of exceptions: "If we got a string of tubing we thought was good we put it in a good pile and sold it. I didn't know whether that was Reading or steel tubing when it was sold. Maybe I would not know, maybe I would, but I don't remember now. Mr. Murchie is an old time oil man, the same as myself." He also testified: "Reading has lettering on the side, D B X has it on the collar, and seamless has it on the side. It is easy to distinguish it if you wash it off and look for it."

Finding XIII to which appellant excepts reads as follows: "That all and singular the allegations of the first and separate affirmative and distinct defense and counterclaim are untrue, and the court specifically finds that there was no valid agreement extending the time of payment of the promissory notes as alleged in said answer; that court further specifically finds that no representations were made at the time of the purchase of the tubing in the counterclaim set forth of any kind whatsoever and that said tubing was purchased through the superintendent of the defendant, who was duly authorized by said defendant to make said purchase; that said tubing was examined by said superintendent of defendant and defendant accepted and used said tubing after an inspection and acceptance by the defendant through his superintendent."

This finding effectively disposes of the defendant's counterclaim and on the facts disclosed by the transcript some of which are recited above, properly so, in our opinion. Defendant had abundant opportunity to examine the tubing, for it was used in his well, placed there joint by joint by his superintendent. If there were any question in the mind of the superintendent as to whether any particular joint were iron or steel it could have been answered very easily by washing the pipe. It appears quite definitely that Mr. Murchie either knew that some of the tubing was "Reading" and was satisfied to use it, or that he considered the character of the tubing of so little consequence that he didn't even have the joints cleaned to determine whether they were iron or steel. It may be noted also that at least some of the iron joints lasted for almost a year and further that, according to Mr. Mitchell, "Dr. Clark never complained about the character of the tubing until a week ago when we had this suit, when I read the complaint. That was the first time I ever knew there was any complaint about the tubing."

In support of this appeal, defendant cites section 1767 of the Civil Code as it was in effect at the date of this transaction, reading thus: "One who sells or agrees to sell personal property, knowing that the buyer relies upon his advice or judgment, thereby warrants to the buyer that neither the seller, nor any agent employed by him in the transaction, knows the existence of any fact concerning the thing sold which would, to his knowledge, destroy the buyer's inducement to buy."

A mere reading of this section demonstrates that it is inapplicable to the present situation for there was no evidence that at the time the tubing was purchased the buyer relied upon Mr. Mitchell's advice or judgment; as a matter of fact, he undoubtedly relied upon the advice and judgment of his own superintendent.

[1, 2] The allegation of the express warranty as to the character of the tubing set up in the affirmative defense was effectively refuted in the opinion of the trial court by the tes-

timony of the witness Mitchell, directly conflicting with Dr. Clark's testimony on that subject. This is a finding upon a question of fact which under the Constitution we have no power, and under the circumstances of this case, no inclination to disturb. There is no testimony in this case as to any representation or undertaking by the seller of the tubing at the time Murchie, the superintendent, purchased it. We know nothing about that transaction beyond the fact that he bought a certain amount of pipe from a pile which he examined and accepted as satisfactory for his own purpose. There is no testimony even of any statement being made as to the use to which it was to be put. Let us here consider the law as expounded in the syllabus of Jackson v. Porter Land & Water Co., 151 Cal. 32, 90 P. 122: "When personal property is tendered or delivered to a purchaser in fulfillment of a contract for the purchase thereof, the duty devolves upon him to make an examination of it for the purpose of determining whether it fills the contract, and if from such examination he finds it does not, he must promptly reject it. This duty of inspection for the purpose of determining whether the property complies with the contract must be exercised within a reasonable time, and what is a reasonable time depends upon the circumstances of each particular case. In the present case, the use by the purchaser for a period of almost two months of an engine which did not have the capacity contracted for, he during all of that period knowing of its want of capacity, and not objecting to it on that ground, operated as an election to accept the engine, and precluded him from claiming that it was not of the character provided for in the contract."

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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132 Cal.App. 773

## KASPARIAN (KASPARIAN et al., Interveners) v. KASPARIAN et al.

Civ. 1221.

District Court of Appeal, Fourth District, California.

June 23, 1933.

**1. Executors and administrators ⟹269.**

Probate court's order authorizing executrix to compromise widow's suit against estate and another for sum paid solely to widow, pursuant to stipulation, *held* not to release estate's claim against executrix' codefendant, though obscure sentence so provided.

**2. Judgment ⟹386(7).**

Fraud in having judgment entered adjudicating that realty was not community property, where stipulation in widow's suit against executrix and decedent's father authorized only judgment for defendants, *held* "extrinsic fraud" as to decedent's minor children, not parties to suit, who could set aside judgment on motion within reasonable time, regardless of limitation in statute (Code Civ. Proc. § 473).

> "Intrinsic fraud" is something that occurs in the course of an adversary proceeding, such as the production of perjured testimony or forged documents where adversary party has opportunity to make truth appear, whereas "extrinsic fraud" is where successful party prevents by fraud and deception unsuccessful party from fully exhibiting his case, as by keeping him away from court by false promise of a compromise, or where defendant never had knowledge of the suit, so that there was no real contest in the trial or hearing of the case.
>
> [Ed. Note.—For other definitions of "Extrinsic or Collateral Fraud" and "Intrinsic Fraud," see Words & Phrases.]

**3. Judgment ⟹375.**

Judgment that realty was not community property *held* properly set aside on motion of decedent's minor children, not parties to widow's suit against executrix and decedent's father, where stipulation authorized only judgment for defendants, and probate court authorizing executrix to settle litigation was not advised of minors' pending suit to have property declared community property.

**4. Appeal and error ⟹1011(1).**

Trial court's decision on conflicting evidence is conclusive.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Satenig Kasparian against Garabed M. Kasparian, also known as G. M. Kasparian, and another, where, after entry of judgment, in excess of stipulation for judgment for defendants, Nevart Kasparian and Grace Kasparian, minors, by Satenig Kasparian, guardian ad litem, intervened and moved to set aside such judgment. From an order setting aside such judgment, defendants appeal.

Affirmed.

Farnsworth, Burke & Maddox, of Visalia, and K. Ohanian, of Fresno (James K. Abercrombie, of Visalia, of counsel), for appellant Garabed M. Kasparian.

Karl A. Machetanz, of Exeter, for appellant Lilly Andrews.

Harris & Hayhurst, K. Kuyumjian, and Rue C. Gibson, all of Fresno, for respondents.

MARKS, Justice.

M. G. Kasparian was the husband of Satenig Kasparian and the father of Nevart Kasparian and Grace Kasparian, the interveners, and a third child, Deran, who does not appear in this action, all minors. He was the son of Garabed M. Kasparian and the brother of Lilly Andrews, the appellants. He died testate on November 1, 1930, naming Lilly Andrews as the executrix of his will, which was admitted to probate on December 8, 1930. By this will he recognized that plaintiff would succeed to one-half of the community property and bequeathed her $1. He bequeathed all the remaining community property to his three children and his separate property to his sister, Lilly Andrews.

After the will was admitted to probate in Tulare county, two inventories were returned showing one parcel of real property of the value of $2,000 in the city of Fresno, and personal property of the value of $1,108.47. During the course of the administration of the estate, the plaintiff commenced two actions in the superior court of Tulare county, one against the Missouri State Life Insurance Company, Lilly Andrews, as executrix, and Garabed M. Kasparian, in which she sought to recover an undivided one-half interest in all moneys due under a life insurance policy upon the life of M. G. Kasparian, upon the theory that the premiums on the policy had been paid out of the community funds of herself and her deceased husband. The second action was against Garabed M. Kasparian and Lilly Andrews as executrix. Four causes of action were stated. In the first it was alleged that a parcel of real property in Tulare county was the community property of herself and her deceased husband with the record title standing in the name of the latter; that her husband had represented to her that it was necessary to secure a loan, using this property as security in a mortgage or deed of trust; that he presented an instrument to her which he represented was either a mortgage or deed of trust and which she signed without reading, relying solely upon his representations; that in fact it was a grant deed purporting to convey the property to Garabed M. Kasparian; that she did not discover the fraud until on or after November 20, 1930; that this conveyance was without consideration. The other causes of action alleged that her deceased husband had purchased three parcels of real property with community funds and that each parcel had been deeded to Garabed M. Kasparian without her knowledge and without his paying any consideration for any of them. The plaintiff sought a decree of court establishing the fact that the four parcels of land were community property; that the first deed be set aside and that Garabed M. Kasparian be required to reconvey the property described in the first cause of action to the executrix of her husband's estate and to the plaintiff; that the other parcels of real estate be adjudged to be community property of deceased and the plaintiff and that Garabed M. Kasparian be required to reconvey a one-half interest therein to the estate and the remaining one-half to the plaintiff; that Garabed M. Kasparian be required to account for all the rents, issues, and profits he had received from the four parcels of real property.

The defendants appeared separately in the action. Garabed M. Kasparian denied all of the material allegations of the complaint and alleged that he had actually furnished all of the money to purchase all of the real property in question, and that it was at all times his separate estate. Lilly Andrews as executrix alleged that she had no knowledge or belief as to the material allegations of the complaint concerning the title to the various parcels of real estate, and denied all of such allegations. She alleged upon information and belief that the real estate had all been purchased with money which belonged to Garabed M. Kasparian, and that the deceased and plaintiff had never had any right, title, or interest in any of it.

The two actions were commenced on January 2, 1931, and negotiations followed for their settlement which resulted in the filing of two written stipulations signed by the attorneys for the respective parties. The stipulation filed in the case against the insurance company bears the numbers of both actions, and reads as follows: "It is hereby stipulated by and between the attorneys for the respective parties hereto, that the first entitled action (the insurance case) shall be and is hereby settled by the entry of a judgment and decree herein which shall provide as follows: First: Plaintiff shall have and recover judgment for nineteen thousand dollars ($19,000.00) payable on the entry of the judgment. Second: In all other respects judgment in this action, and in the action to recover a certain interest in certain real estate, and which action is numbered 22090 on the records of the above named superior court shall be rendered in favor of the defendants and each of them. Third: Each party to the above entitled litigation and the action concerning the real estate shall bear his or her own costs. Fourth: The respective parties to said actions agree to sign, execute and deliver any and all papers, documents, releases, deeds, and conveyances and other instruments necessary to effectuate the purposes of this agreement in all respects. Dated: March 9th, 1931."

The following stipulation was filed in the other action: "It is hereby stipulated and agreed by and between the plaintiff above named and the defendants above named, that judgment in the above entitled action may be entered in favor of the said defendants, and against said plaintiff. Each party to pay his own costs. Dated: March 13, 1931."

Lilly Andrews filed her petition for authority to compromise the two actions brought by Satenig Kasparian against Garabed M. Kasparian and herself as executrix, praying for leave to compromise the cases in accordance with the stipulations already referred to. This petition was heard the same day in the probate court, and an order was signed authorizing the settlement.

[1] Counsel for Lilly Andrews calls our attention to the fact that it is stated in the petition to compromise that "Satenig Kasparian, the widow of said M. G. Kasparian, deceased, received for herself and as representative for the estate of M. G. Kasparian, deceased, the sum of nineteen thousand ($19,000.00) dollars in cash as a compromise." He also refers to an obscure sentence in the long order authorizing the compromise "wherein the said plaintiff, Satenig Kasparian, received the sum of nineteen thousand ($19,000.00) dollars cash in settlement of any and all claims which she might have, or the estate of M. G. Kasparian, deceased, might have, against any of the property of G. M. Kasparian, also known as Garabed M. Kasparian, be and the same is hereby approved." He now urges that the payment of $19,000 to Satenig Kasparian was in full settlement of not only her claim against Garabed M. Kasparian, but also in full settlement of any claim of the estate in and to the property involved in the action. If the clause just quoted was ever particularly called to the attention of the probate judge, we are of the opinion that, in so far as it attempted to authorize a release of any claim which the estate had against Garabed M. Kasparian was beyond the power of the probate court to make in such a proceeding. It should be observed that the money was paid in its entirety to Satenig Kasparian. No part of it was paid to the estate. We know of no rule of law in California permitting a probate court to authorize an executrix to divest the estate of any interest in real property in any such proceeding and without any consideration therefor flowing to the estate. The last paragraph of the order anthorizing the compromise rather conclusively rebuts the contention of the executrix. This paragraph is as follows: "It is further ordered and decreed that the act of said Lilly Andrews as executrix of the last will and testament of M. G. Kasparian deceased, in entering into and agreeing to said compromise and settlement of both of said actions Nos. 22089 and 22090 respectively be, and the same is hereby approved and confirmed, and that all of the acts and proceedings of said executrix as set forth in her said petition are hereby approved and confirmed; and said executrix and her said attorneys are hereby authorized to consent in accordance with the said stipulations in said actions that said judgment be made and entered in said action No. 22090 in accordance with the stipulation therein." This clearly shows that the probate judge intended to authorize the compromise set forth in the stipulations and no other. This stipulation provided that judgment should be entered against the plaintiff and in favor of the defendants. It did not purport to attempt to authorize any settlement of any controversy between Garabed M. Kasparian and the estate of M. G. Kasparian. We are of the opinion that the order authorized a compromise of the claim of Satenig Kasparian only.

On May 18, 1931, a judgment was entered in the suit brought by Satenig Kasparian which affected the title to the real property in question. This judgment recited that the plaintiff was neither present nor represented by counsel. It set forth the second stipulation which we have quoted. and based the judgment upon its terms. The judgment, however, went far beyond the language of this stipulation, and decreed that the plaintiff had no interest in the property; that the property had not been purchased with any of the community funds of M. G. Kasparian, deceased, and plaintiff, but was purchased with the separate funds of Garabed M. Kasparian, who owned it free of any claim of the plaintiff and the estate upon it. It effectually established title in Garabed M. Kasparian and divested the estate of any interest in the property.

On November 17, 1931, the interveners by their guardian ad litem served and filed in the respondent court a notice of motion to set aside and vacate this judgment upon the following grounds: "(1) That said judgment was taken against movants through their inadvertence, surprise and excusable neglect. (2) That said judgment was obtained through the fraud and collusion of said defendant Lilly Andrews, executrix of the last will of M. G. Kasparian, deceased, and G. M. Kasparian. (3) That said G. M. Kasparian and Lilly Andrews, as executrix of the last will and testament of M. G. Kasparian, deceased, conspired and colluded together for the purpose of having said judgment entered and for the purpose of defrauding and depriving these movants of their interests in the real property described in said judgment. (4) That said judgment was and is void on the ground that the same was entered and based upon a stipulation incorporated in said judgment and that the said judgment so far as it affects the movants and their interests in the real property described in said judgment is not in accordance with, but goes beyond the terms of said stipulation. (5) That said Lilly Andrews, as executrix of the last will and testament of M. G. Kasparian, deceased, never obtained any authority from the probate court in the matter of the estate of M. G. Kasparian, deceased, to enter into said or any stipulation upon which said judgment was based. (6) That these movants at the time of the commencement of said action were, and ever since have been, minors; and said minors have not nor has either of them during any of said time had any guardian legally appointed by deed, will or otherwise; and said minors were not nor were either of them during any of said time represented in said action by any guardian ad litem. (7) That neither of said movants, to-wit, said minors, were ever served with summons or appeared in said action; that they were not nor were either of them present when said stipulation was signed or when said judgment was entered, and neither of them at any time had any knowledge of the making of said or any stipulation and/or the making of said or any judgment based thereon. (8) That the said Satenig Kasparian, the plaintiff in said action, was ignorant of the fact that said stipulation had been signed or made by her attorneys in said action and that said attorneys had never received any authority from said Satenig Kasparian or from any one else to make or enter into said stipulation or to allow or to permit or consent to the entry of said judgment in accordance with said stipulation or in accordance with the terms of said judgment as entered. (9) That said judgment is void in that it purports to determine and adjudicate that the estate of M. G. Kasparian, deceased, and those interested therein, including Lilly Andrews, as executrix of said estate and these movants, have no right, title or interest in and to the real property described in said judgment, and that portion of said judgment is not in accordance with said stipulation and is not within or supported by any of the issues tendered by any of the pleadings in said action."

This motion to vacate the judgment was made on December 7, 1931, and was granted on February 4, 1932, in so far as the judgment related to the executrix and to the minors. Attached to the notice of motion is a copy of a deed from Satenig Kasparian to Garabed M. Kasparian and Vartoohi Kasparian, his wife, quitclaiming all the interest of the grantor in the insurance policy and the real property; also the supporting affidavit of Satenig Kasparian and a complaint in intervention by the interveners in this action, by Satenig Kasparian their guardian ad litem. In the order of February 4, 1932, "it was further ordered that the motion of said minors to intervene in said action be and the same is hereby granted."

While appellants have filed separate briefs, they urge the same grounds for a reversal of the order. First, "that the action of the trial court was not properly invoked. In other words, respondents should have attacked this judgment by an independent action in equity and not by mere motion, and the trial court had no jurisdiction to hear or decide such motion. Second, that even admitting the procedure followed to have been proper, said order was without any support or justification in the evidence." We will consider these contentions in the order stated.

[2] Appellants urge that the fraud, if any, was first intrinsic; and, second, that, as the motion was made more than six months after the entry of the judgment sought to be set aside, the trial judge had no authority to vacate it under the provisions of section 473 of the Code of Civil Procedure.

Extrinsic fraud has been defined in the case of McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 45, 40 A. L. R. 1110, as follows: "In each of the three former cases [People v. Mooney, 178 Cal. 525, 174 P. 325; Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L. R. A. (N. S.) 579] the fraud which was held to be or defined as intrinsic fraud was such as occurred in the course of an adversary proceeding; such as the production of perjured testimony or forged documents during a trial wherein the adversary party had the opportunity to make the truth appear. In the case of United States v. Throckmorton [98 U. S. 61, 25 L. Ed. 93], supra, the Supreme Court of the United States, after instancing situations in which the fraud practiced upon the adversary party or the court would be intrinsic fraud, points out the line of demarcation between these instances and those wherein by reason of something done by the successful party to a suit there was in fact no adversary trial or decision of the issue in the case, as 'where the unsuccessful party has been prevented from fully exhibiting his case by fraud or deception practiced upon him by his opponent, as by keeping him away from court by a false promise of a compromise; or where the defendant never had knowledge of the suit, * * * these and similar cases which show that there has never been a real contest in the trial or hearing of the case'; such are, in the view of that tribunal, instances of extrinsic fraud. In the recent case of Simonton v. Los Angeles Trust & Savings Bank, 192 Cal. 651, 221 P. 368, it was held by this court that the fraudulent concealment or omission through mistake of an executrix to account for personal property belonging to the estate of the decedent with the result that such property was appropriated by such executrix for her own personal use and benefit constituted extrinsic fraud, and this court in that case cited numerous other cases in this and other courts supporting the principle illustrated in the Throckmorton Case. It seems to us that the facts of this case bring it by clear analogy within the doctrines thus laid down defining cases of extrinsic fraud. In the case in hand there was no adversary proceeding attending or embracing the action of the court in the divorce action at the time of the application for and entry of the final decree." We think that under this definition the fraud here disclosed must be held to be extrinsic. It did not occur in the course of an adversary proceeding at which the plaintiff was either present or represented. At the time the judgment in question was entered, neither the plaintiff nor her attorneys were present, and the minors were not present nor represented either by a general guardian or guardian ad litem. In fact there is no showing that they had either at that time, and, in the absence of such showing, we are authorized to assume that they had neither. The judgment which purported to have been entered upon and in accordance with the terms of a written stipulation went far beyond the terms authorized by it. Under these circumstances the definition which we have quoted applies to the facts before us. The fraud was extrinsic, and, being such, the trial court had authority to set aside and vacate the judgment within a reasonable time regardless of the limitation contained in section 473 of the Code of Civil Procedure. McGuinness v. Superior Court, supra.

The case of Sharp v. Eagle Lake Lumber Co., 60 Cal. App. 386, 212 P. 933, also supports this position. It holds that a motion to vacate and set aside a judgment is a direct and not a collateral attack upon it. It is also authority for the conclusion that, where the summons in an action has been served upon the vice president of a defunct corporation and a judgment thereafter entered, a stockholder of the defunct corporation may move to set aside the judgment after the expiration of six months from its rendition even though it should be held that the limitations of section 473 of the Code of Civil Procedure should apply.

If we assume the provisions of section 473 of the Code of Civil Procedure apply here, the case of In re Mercereau, 126 Cal. App. 590, 14 P.(2d) 1019, is authority for our holding that the motion of the minors to vacate the judgment was made in time; it being made within one year from the entry of the questioned judgment. In the Mercereau Case the petitioners sought to have land registered under the Land Title Law adopted by the people on November 3, 1914. William C. La Berge was named a defendant, and was served by mail. The decree was entered April 25, 1929. On April 11, 1930, Ora E. La Berge, wife of William, moved the court to vacate the decree in so far as it affected her interest in the land. Her motion was granted, and this court affirmed the order. A hearing was denied in the Supreme Court. The record indicated that Mrs. La Berge claimed an interest in the property; that she was not named as a defendant and was not notified and did not know of the pendency of the proceeding. This case is authority for the rule that, when a person claims an interest in real property, is not named as a defendant, and is not served with process, and does not know of the pendency of the action, such person may move, within one year under the provision of section 473 of the Code of Civil Procedure, to vacate a judgment which purports to defeat the claim of interest in such property.

The foregoing case is authority for our holding that, as the minors who are intervening here were not parties to the action and were not served with any summons, and as the judgment deprived them through the estate of their deceased father of any interest in the real property in question and any right to claim such interest, they could move to set aside the judgment at any time within one year from its rendition, under the limitation contained in section 473 of the Code of Civil Procedure.

Nevart Kasparian and Grace Kasparian, by their guardian ad litem, filed an action in the superior court of Tulare county against Garabed M. Kasparian, Vartoohi Kasparian, his wife, and Lilly Andrews as executrix. The complaint contained allegations similar to those set forth in the complaint of their mother. Summons in this action was served on Garabed M. Kasparian in Fresno county on April 23, 1931, and on Lilly Andrews in the same county on May 5, 1931.

[3, 4] We have studied the record carefully, and have concluded that it furnishes ample evidence supporting the order of the trial court vacating and setting aside a portion of the judgment. The affidavit of Satenig Kasparian sets forth all of the facts which we have outlined, together with those set forth in the complaint in intervention which stated facts sufficient to constitute a cause of action. In addition it was made to appear that appellants were both served with the copy of the summons and complaint in the action by the minors to have the property in question declared the community property of their parents, M. G. Kasparian, deceased, and Satenig Kasparian. This fact was not disclosed to the probate court at the time it made the order authorizing the compromise. The evidence offered by interveners supporting the order was contradicted. This created a conflict which was addressed

to the trial judge. His decision on conflicting evidence is final in this court.

The order appealed from is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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133 Cal.App. 88

## CREBS et al. v. UPLIFTERS COUNTRY HOME et al.

Civ. 9014.

District Court of Appeal, First District, Division 2, California.

June 29, 1933.

Rehearing Denied July 29, 1933.

**Hearing Denied by Supreme Court Aug. 28, 1933.**

**1. Clubs** ⟹13½.

Evidence in minority stockholders' action to set aside incorporated social club's transfer of assets to defendant corporation *held* not to show inadequate consideration for merger agreement.

**2. Corporations** ⟹182.

Majority stockholders owe minority stockholders duty to exercise good faith, care, and diligence to make corporation's property produce largest possible amount, protect minority stockholders' interests, and secure and deliver to them their just proportion of income and proceeds of property.

**3. Clubs** ⟹13½.

Evidence in minority stockholders' action to set aside incorporated social club's transfer of assets to defendant corporation *held* to show that codefendant directors and majority stockholders did not benefit themselves at minority stockholders' expense.

**4. Trial** ⟹139(1).

Court may grant motion for nonsuit when evidence on plaintiff's direct or cross-examination so conclusively establishes defense that court might properly grant new trial after verdict for plaintiff.

Appeal from Superior Court, Los Angeles County; W. H. Dehy, Judge.

Action by Stewart L. Crebs and others against the Uplifters Country Home, a corporation, and others. From a judgment of nonsuit, plaintiffs appeal.

Affirmed.

Hunsaker & Cosgrove and William A. Barnhill, all of Los Angeles, for appellants.

Loeb, Walker & Loeb and Le Roy M. Edwards, all of Los Angeles, for respondents.

STURTEVANT, Justice.

The plaintiffs, minority stockholders, commenced an action in behalf of themselves and all other interested persons against the defendant corporation and the directors thereof to obtain a judgment setting aside a written transfer and to obtain an accounting. At the end of the plaintiffs' case the trial court ordered a nonsuit. From the judgment entered thereon, the plaintiffs have appealed.

In their complaint the plaintiffs did not plead actual fraud and on the trial they did not introduce evidence proving or tending to prove actual fraud. However, it was the theory of their case that the transaction complained of constituted constructive fraud.

In 1920 a number of men residing in Los Angeles were invited to attend an outing given by the Family Club of San Francisco. They were so pleased with the entertainment, accommodations, surroundings, etc., that they commenced to discuss the formation of a club of their own. The result of those discussions led to the formation of a club named "The Uplifters." Soon after the club was organized it became advisable to consider the matter of incorporating. At that time the provisions of the federal statutes were such that admission fees to a club were taxed. For the purpose of avoiding the taxation burdens two separate corporations were formed. The club was formed as a nonstock, nonprofit, social organization under the name of "The Uplifters." Members of the club formed at the same time a stock corporation under the name of "Uplifters Country Home." At the time the latter corporation was formed the articles provided for a capital stock of $150,000 divided into 600 shares of the par value of $250 each. The first subscribers, those named in the articles of incorporation, were all members of the club. The directors of the two corporations were identical or nearly identical at the time of the formation of the two corporations and from time to time thereafter. Shares in the stock corporation were sold only to members of the club. Soon after the stock corporation was formed, it purchased a tract of real estate in Rustic canyon near the city of Santa Monica, in Los Angeles county, and commenced to improve it by building thereon and making other improvements. It built and furnished a clubhouse and many other buildings; it laid out and equipped a polo field, and in short did many things to make the property a country place of recreation. Many members of the club, acting as individuals and for their individual use, constructed buildings on the property so owned by the Uplifters Country Home.

In June, 1921, the Uplifters Country Home and the Uplifters executed a lease for the term of fifty years. By its provisions Uplifters Country Home leased to the Uplifters all of the real estate it then owned together with the improvements thereon. It also agreed to buy additional lands and to erect such other improvements as the lessee might desire in a sum not to exceed $250,000. It agreed not to lease, or purchase, or acquire any interest in any other real property except on the written permission of the lessee. Any additional property purchased it agreed to lease to the lessee without any additional charge. The expenditures on any of said property were to be made under the supervision of the lessee and for such things as the lessee might request. The consideration for said lease was $10 per annum and a covenant that the lessee would pay all taxes, liens, assessments, and claims assessed against the property leased or thereafter acquired by the lessor. That item is stated as amounting to $18,000 annually. Both parties agreed that the lessor would not sell any of its stock except to members of the lessee. The lessor further agreed that the members of the lessee might remove any buildings they had built on the lessor's land. Having acquired some additional lands on the 13th day of April, 1927, the same lessor leased to the same lessee for the term of ten years all of the lands so acquired. The covenants contained in the lease are similar to those recited in the first lease. The plaintiffs pleaded one lease and the defendants pleaded the other. The genuineness and due execution of each was admitted by the pleadings. Rosenthal v. Merced Bank, 110 Cal. 198, 203, 42 P. 640. On the 26th day of January, 1929, the Uplifters Country Home and the Uplifters executed a written contract which is the object of attack by the plaintiffs in this case. By the terms of that instrument the Uplifters sold and assigned to Uplifters Country Home all of its interests in both of the leases. It also sold and assigned to that company all of its personal property, accounts, and other assets. The purchaser assumed the debts of the seller. Both parties assert the instrument was an agreement whereby the Uplifters was merged in the Uplifters Country Home.

In their complaint the plaintiffs did not plead the contract in hæc verba, but they alleged that it was neither executed for an adequate consideration nor any consideration whatever. That allegation was denied by the defendants. On the opening of the trial the plaintiffs made an extended statement showing in detail the facts on which they based their allegations. The defendants made an extended reply. The two statements showed that the parties did not disagree as to the probative facts but did disagree as to the ultimate facts and the conclusions of law to be drawn therefrom. Thereupon the plaintiffs called the officers of the defendant corporation and other witnesses and introduced evidence in minute detail which they claimed supported their allegations. They produced the ex-secretary and one of defendants' attorneys. They introduced the books, copies of accounts, minutes, and correspondence of the defendant corporation and its officers. Few objections were made and none was sustained so far as counsel have noted in their briefs. In presenting their case the plaintiffs claimed the right to introduce proof on every issue made by the pleadings. They proceeded accordingly. When the plaintiff rested, every single material fact had apparently been examined into. Thereupon the defendants made a motion for a nonsuit, which was granted, and, as recited above, the plaintiffs have appealed from the judgment entered thereon.

[1, 2] It is first contended that the consideration for the merger agreement was inadequate. The point involves the accounts as of the date of the merger agreement. The plaintiffs introduced balance sheets dated August 31, 1928. They take their figures from those sheets. The Uplifters Country Home so kept its books as to show a charge against the Uplifters for depreciation in the sum of $50,034.88. The plaintiffs have not quoted any facts and have not cited any authorities showing that said charge was a legal charge against the Uplifters. They intimate that the "Saddle Club" was indebted to the Uplifters Country Home. Be that as it may, the accounts of the Saddle Club were included in those of the Uplifters as shown by the balance sheet. That sheet showed a debt, cash advanced to the Uplifters by the Uplifters Country Home, $84,506.54. It also showed accounts payable, $15,347.59. The sum of those two items is $99,854.13. But, as shown above, that computation is of the date of August 31, 1928. In payment of said amount the Uplifters assigned its personal property and accounts receivable. As shown by the same sheet those items were of the value of $53,133.72. It also transferred to the Uplifters Country Home a membership list showing monthly payments in dues of $4,605, or the total sum of $55,260 annually. Furthermore, it assigned the two leases which it held on the lands owned by the Uplifters Country Home. Those lands and improvements the plaintiffs claim were of the value of $1,500,000. The value of the leasehold, it was testified, was from $50,000 to $75,000 per annum. All of the foregoing facts had been developed without conflict when the plaintiffs rested. No witness testified how the accounts stood as of the date of the merger. Mr. Paine, president of Uplifters Country Home, issued a financial statement as of date September 30, 1929, in which he stated many facts regarding the relations of the two corporations. Among others, he stated: "This would reduce the actual indebtedness from the social club to the corporation as of October 1, 1928, to $29,735.96. It is stated by Mr. Murphy that the assets of the social club other than its lease were of the actual value of approximately $50,000. This sum more than offsets

the liabilities that were canceled." Adding together the values of the things transferred and comparing the total of that sum with the total amount of the sums paid therefor, it may not be said that the consideration was inadequate. If the balance leaned in favor of either side, it was in favor of the minority stockholders. The plaintiffs quote the rule as follows: "* * * A majority of the holders of stock owe to the minority the duty to exercise good faith, care, and diligence to make the property of the corporation in their charge produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and deliver to them their just proportion of the income and of the proceeds of the property." Union Pac. R. Co. v. Frank (C. C. A.) 226 F. 906. 920. The rule as stated is clearly the law. But the record before us shows the defendants performed every one of those duties and violated no one of them.

[3] But, the plaintiffs argue, there are other facts on which they rely. They say: "Before we consider the effect of the agreement —what it accomplished—we wish to make it clear that we make no point whatever that these five directors were interested directors within the settled rule. Necessarily they were, under the mechanics of the by-law of the land corporation we have discussed above, and in such a way that appellants cannot complain on that score. Under that by-law, which was, and is, binding on appellants, every act of the directors of the land corporation was necessarily, at least, theoretically, the act of interested directors, and to this appellants as stockholders impliedly consent. *But we do invoke the rule—thereafter discussed—that these directors, even though interested in such a way as to occasion no complaint of their acts as such, are forbidden to use their position to benefit themselves and the majority, of whom they are a part, to the detriment of the minority stockholders.*" (Italics by plaintiffs.) They then quote as follows: "Where the majority of a company propose to benefit themselves at the expense of the minority, the court may interfere to protect the minority." Menier v. Hooper's Telegraph Works, 9 Ch. App. Cas. 350. In what we said in discussing the last point, it is at once apparent that the defendants did not "benefit themselves" at the expense of the minority. As the record stands, it would appear the minority got more than it was entitled to.

Preceding the annual meeting of October 27, 1928, the matter of the merger was discussed among some of the stockholders. That discussion was given the widest publicity. When the meeting convened, more than two-thirds of the stockholders gave their consent to the merger after the subject had been fully discussed. At that same meeting a new board of directors was chosen for the purpose of adopting and formulating a plan. The meeting then adjourned to reconvene on the last Saturday in January, 1929. On that date the agreement was presented, approved, and signed by authority of the board of directors and on the same date it was presented to an adjourned meeting of stockholders and was ratified by a vote of more than a majority of them. Some dissenting voices having been heard, the matter was brought up at the stockholders' meeting in October, 1929, and was again ratified by stockholders representing 1,298 shares voting in the affirmative out of a number holding 1,431 shares out of a total authorized issue of 1,692 shares. Stockholders representing 147 shares only voted in the negative. The defendants claim these ratifications constitute defenses. If one corporation was suing the other, the contention would be sound. San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co., 112 Cal. 53, 44 P. 333, 33 L. R. A. 788. But in the instant case the plaintiffs stand as minority stockholders claiming that the contract was fraudulent. As we understand them, it is their contention that the so-called ratifications were but the consents of the stockholders, without which the instrument would not have constituted a contract. Section 361a, Civ. Code, Stats. 1903, p. 396. Continuing, they claim that although a purported contract is ratified by the majority stockholders, nevertheless the minority may come into a court of equity and ask for a cancellation if they can show that the purported contract had the result of dividing the assets, more or less, between the majority stockholders to the exclusion of the minority. Colgate v. United States Leather Co., 73 N. J. Eq. 72, 67 A. 657, 663, is an authority to the contrary. It was reversed on other grounds. We have not had called to our attention any other authority that is directly in point. For these reasons we do not feel called upon to decide the question.

It is said the contract of merger was written in secrecy. That statement rests on the fact that the attorneys who wrote it did not, prior to the meeting of the board of directors at which it was adopted, advise Mr. Lawler that they were writing the instrument. Such fact did not prove nor tend to prove any issue made by the pleadings.

[4] It is intimated that the accounts receivable which were assigned by the Uplifters were not collectible. However, there was no evidence what accounts were receivable or were assigned by the Uplifters. Accounts held in August, 1928, may have been paid prior to January 26, 1929. As to whether they were paid or were not paid, as to whether they were disputed or undisputed, and as to whether the debtors were solvent or insolvent, no evidence was introduced. The plaintiffs contend the evidence which they had introduced was such that the mo-

tion for a nonsuit should have been denied. 9 Cal. Jur. 551. In view of the facts to which we have referred we think the plaintiffs are mistaken and that their case is governed by that portion of the text that appears in 9 California Jurisprudence, page 559. It is there said: "In accordance with the foregoing rules, a court may grant a motion for nonsuit whenever the evidence brought out upon the direct or cross-examination of the plaintiff so conclusively establishes a defense as that the court might properly grant a new trial in case of a verdict in his favor upon like evidence." Conceding for the purposes of this decision that in the instant case the defendants were bound to show that the contract was just, fair, and reasonable, it is apparent from what we have said that the plaintiffs' evidence relieved the defendants of that burden—the plaintiffs made the showing for the defendants.

After an examination of the entire cause, including the evidence, this court is wholly unable to form the opinion that the order granting a nonsuit has resulted in a miscarriage of justice.

The order appealed from is affirmed.

I concur: NOURSE, P. J.

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## CARDOZA et al. v. WHITE et al.*

Civ. 4878.

District Court of Appeal, Third District, California.

July 1, 1933.

Rehearing Denied July 31, 1933.

Hearing Granted by Supreme Court Aug. 28, 1933.

**1. Mortgages 🔑32(3), 137.**

Where grantor conveyed land to creditor for sole purpose of securing loan of money, deed was "mortgage" and conveyed no title to fee in land (Civ. Code, § 2924).

[Ed. Note.—For other definitions of "Mortgage," see Words & Phrases.]

**2. Mortgages 🔑137.**

In California, mortgage on real property does not vest in mortgagee any estate in land either before or after breach of conditions, but creates mere security operating on property as lien or incumbrance.

**3. Mortgages 🔑137.**

Where mortgagor and daughter paid mortgage indebtedness and mortgagee at mortgagor's request conveyed property to mortgagor's daughter, mortgagee's deed to daughter was mere release of mortgage, and title to land remained in mortgagor, daughter acquiring neither legal nor equitable title.

**4. Mortgages 🔑137.**

Mere request of mortgagor that mortgagee transfer title to mortgaged property to third party conveys no fee in land.

**5. Adverse possession 🔑41.**

One claiming under deed from mortgagee acquired no title to land by adverse possession where she held deed only three years and paid taxes only three years.

**6. Adverse possession 🔑13.**

Title by "adverse possession" is acquired by actual, open, and notorious occupancy of land, by conduct hostile to real owner's title, by open and notorious claim of title, by continuous occupancy, accompanied by acts and claim of title adverse to real owner for five years, and payment of taxes during five years.

[Ed. Note.—For other definitions of "Adverse Possession," see Words & Phrases.]

**7. Judgment 🔑572(2).**

Judgment entered against assignee of judgment for failure to amend complaint after demurrer sustained in suit to declare void deed to judgment debtor's daughter, did not render question of validity of such deed res judicata in suit to quiet title.

**8. Quieting title 🔑10(1).**

In suit to quiet title, plaintiff must recover on strength of his own title and not on weakness of defendant's claim.

**9. Judgment 🔑589(1).**

Right to levy execution on judgment, which existed when suit to set aside deed to judgment debtor's daughter was instituted, was remedy conferred by statute, not affected by suit to cancel deed in which judgment was entered against judgment creditor (Code Civ. Proc. §§ 687, 688).

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Lucy Cardoza and another against W. T. White, as sheriff of the county of Merced, state of California, and others. From a judgment for plaintiffs, defendants appeal.

Reversed.

Ernest S. Leslie and E. H. Christian, both of Oakland, for appellants.

Whitehurst & Logan, of Patterson, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendants have appealed from a judgment quieting title to real property and enjoining the sheriff from selling the lots under execution sale to satisfy a judgment

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*For subsequent opinion see 2 P.2d 639.

which was assigned to the defendant Christian.

Antonio B. Nunes owned lots 5 and 6 of Miller & Lux subdivision of section 18, and a part of section 7, township 10 south, range 10, east, M. D. M., in Merced county. He is the father of the plaintiff Lucy Cardoza. J. H. Callaghan was the manager of the First National Bank of Livermore, which was afterwards consolidated with the American Trust Bank. Nunes borrowed $2,600 from the bank. To secure this loan he executed a deed to these lots to Callaghan on September 27, 1924. He delivered this deed with the statement that it was to be held by the grantee to secure the loan and with a request that it be conveyed to his daughter, Mrs. Cardoza, in the event of his death. Mr. Callaghan testified in that regard: "His request to me was, should anything happen to himself, that this property was Mrs. Cardoza's." This deed was, in effect, a mere mortgage between the parties thereto. Nunes did not die. The condition upon which the property was to be conveyed to his daughter therefore never occurred. On May 12, 1926, Nunes and his daughter went to the grantee and paid the balance of the indebtedness to the bank. Mrs. Cardoza contributed $900 of the indebtedness which was then paid. At that time Nunes requested Callaghan to deed the property to his daughter. This was done. Callaghan testified in that regard: "When the bank was paid in full, I had no further interest in it whatsoever, and Mr. Nunes requested that I turn it over immediately to Mrs. Cardoza."

In the meantime Frank Rodrigues obtained a judgment in Alameda county of $1,222.86 against Nunes in a suit on a promissory note. This judgment was rendered July 10, 1925. Upon this judgment an execution was subsequently issued against Nunes, which was returned unsatisfied. A garnishment was later served on the bank to satisfy the judgment. The sum of $300 was thus recovered from the bank, which was credited to the judgment, leaving an unpaid balance of $992.23. On February 18, 1927, this unsatisfied judgment against Nunes was assigned to the defendant Christian, who promptly secured the issuance of an execution, which was placed in the hands of the sheriff of Merced county, where the real property which is involved in this suit is situated. This execution was returned unsatisfied. The defendant Christian then instituted supplemental proceedings against Nunes, in the course of which he discovered the situation with relation to the conveyance to Lucy Cardoza and title to the lots which are involved in this suit.

December 3, 1928, Christian, the assignee of the judgment creditor Rodrigues, brought suit in the superior court of Merced county against Antonio Nunes and his daughter Lucy Cardoza, to set aside the deed of conveyance from Callaghan to Cardoza. A demurrer to this complaint was sustained. Christian failed to amend his complaint and judgment was rendered against him in that action to the effect that he take nothing by his suit. No appeal was taken from that judgment, which thereupon became final.

An alias execution was then procured by Christian in the suit in which Rodrigues secured the $1,222.86 judgment against Nunes, pursuant to sections 687 and 688 of the Code of Civil Procedure, which was placed in the hands of the sheriff of Merced county with directions to levy upon the real property and sell it to satisfy the judgment. An abstract of the proceedings was recorded in Merced county. The sheriff proceeded to give the required notice and sell the land in the manner provided by law.

This suit to quiet title was then instituted. Issues were joined. Findings of the court were adopted favorable to the plaintiffs, in which it was found that the plaintiff Lucy Cardoza is the owner in fee of the land in question. A judgment was rendered accordingly. The defendants were enjoined from proceeding to sell the land under execution and from otherwise interfering with the owner's title and right to the possession. From this judgment the defendants have appealed.

The court adopted findings in this case to the effect that: "Plaintiff, Lucy Cardoza, is and at all times since the 12th day of May, 1926 [at which date Callaghan, at the request of Nunes, conveyed the property to her], has been the owner" of the land in dispute. The court further found: "Nunes conveyed said premises to H. J. Callaghan on or about September 27, 1924, and said H. J. Callaghan and Rose Callaghan, his wife, conveyed same to said plaintiff on or about May 12, 1926."

[1-3] The finding that Lucy Cardoza is and at all times since the 12th day of May, 1926, has been the owner of the land, is not supported by the evidence. The undisputed record is just the contrary. The evidence conclusively shows that there is a lapse of the chain of title from Nunes to his daughter. It appears without dispute that Nunes conveyed the land to Callaghan for the sole purpose of securing a loan of money. The deed to Callaghan was therefore a mere mortgage and conveyed no title to the fee in the land. Section 2924, Civ. Code; 17 Cal. Jur. 800, § 97; McGuigan v. Millar, 117 Cal. App. 739, 4 P.(2d) 607; 19 R. C. L. 261, § 29. No title to land passes to a mortgagee by the mere execution of a mortgage. The common-law doctrine of mortgages does not prevail in California, the courts having uniformly held that the equitable doctrine with respect to mortgages is the true one to apply. In California a mortgage on real property is not regarded as a conveyance vesting in the mortgagee any estate in the land either before or after the

breach of conditions of the instrument. On the contrary, a mortgage is intended by the parties and is deemed by law to create a mere security operating upon the property as a lien or encumbrance. 17 Cal. Jur. 705, § 12. Since Callaghan held no title to the property except that of a mere mortgagee, he could not convey a fee to Lucy Cardoza. He could convey no greater title than that which he possessed. It follows that since the indebtedness which was secured by the mortgage was fully paid, Callaghan's deed to Lucy Cardoza amounted to nothing more than a release of the mortgage, and the title to the land still remains in Nunes.

[4] The respondent contends that Lucy Cardoza nevertheless holds the equitable title to the land by adverse title or otherwise, because she paid $900 toward the indebtedness of her father, to secure which the deed was made to Callaghan, and that her father personally requested the execution of the conveyance to her. This does not follow. Since Callaghan held a mere mortgage, his conveyance to Lucy Cardoza would at most amount to no more than an assignment of his mortgage to secure her payment of the sum contributed by her toward the payment of the indebtedness. The mere request of a mortgagor that a mortgagee transfer his title to the mortgaged property to a third party conveys no fee in the land.

[5, 6] It may not be said Lucy Cardoza acquired title to the land by adverse possession. She held the deed to the land only three years. The evidence is undisputed that she paid taxes on the property for only three years. To support a claim of title by adverse possession five elements must concur: (1) Actual, open, and notorious occupancy of the land by the claimant; (2) acts and conduct on her part hostile to the real owner's title; (3) open and notorious claim of title; (4) continuous and uninterrupted occupancy, accompanied by acts and a claim of title adverse to that of the real owner for the statutory period of five years; and (5) payment of all taxes levied or assessed against the land during the statutory period of five years. 1 Cal. Jur. 522, § 22; 1 R. C. L. 700, § 13; Scott v. Warden, 111 Cal. App. 587, 296 P. 95.

[7-9] Nor can it be said the judgment which was entered against the appellant Christian, in Merced county, December 3, 1928, for failure to amend his complaint in the suit which he brought to declare void the deed to Lucy Cardoza, renders the question of the validity of that deed res judicata in the present proceeding. In a suit to quiet title to real property it is a cardinal doctrine that the plaintiff must recover judgment upon the strength of his own title and not upon the weakness of defendant's claim. 22 Cal. Jur. 167, § 42. Moreover, it is apparent that the lien upon the land, which was acquired prior to the alleged conveyance to plaintiff by the securing of the personal judgment against Nunes in the suit upon the promissory note and the subsequent levying of the writ of execution upon the land for satisfaction of the judgment, is entirely independent of the default judgment and furnishes a separate and distinct remedy for the satisfaction of the assigned judgment. The right to levy an execution upon a valid subsisting and unsatisfied judgment which existed at the time the subsequent suit was instituted was a remedy conferred by statute, which was not involved in or affected by the suit for cancellation of the deed. That default judgment was therefore not res judicata of the issues which are involved in this case.

There is no escape from the inevitable conclusion that the deed from Nunes to Callaghan was a mere mortgage, and that the subsequent deed from Callaghan to Cardoza conveyed no title to the fee in the land. There is a clear lapse in the title to Cardoza. The undisputed record conclusively shows she holds neither the legal nor the equitable title to the land. It follows that the findings of court and the judgment to the effect that Lucy Cardoza is the owner in fee of the land in question is not supported by the evidence.

The judgment is reversed.

We concur: **PULLEN, P. J.; PLUMMER, J.**

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133 Cal.App. 114

## PEOPLE v. ARNEST et al.

Cr. 1261.

District Court of Appeal, Third District, California.

June 30, 1933.

**1. Indictment and Information ⚷161(7).**

In prosecution for burglary and theft of property from railroad car on moving train, permitting amendment of information to show counties through which train was traveling *held* not error (Pen. Code §§ 783, 1008).

Permitting the amendment to the information was not error, since the amendment merely clarified the language used and more specifically identified the offense, so that defendants, if convicted, might not again be prosecuted for the same crime.

**2. Criminal law ⚷1144(3).**

Order refusing to set aside information on ground defendants had not been legally committed was presumed correct on appeal, in absence of record showing complaint filed before justice or testimony taken thereunder.

**3. Criminal law ⟹207(1).**

Offense committed in car of railroad train in course of trip is, for purpose of holding preliminary examination, within jurisdiction of justice of every township through which car passed (Pen. Code § 783).

**4. Criminal law ⟹1186(4).**

In prosecution for theft, instruction using word "possession" instead of "premises" or "presence," in statement that goods need not be removed from owner's possession, *held* harmless (Const. art. 6, § 4½).

**5. Criminal law ⟹829(3).**

Omission of word "feloniously" in defining larceny *held* not error, where that word was used in another part of instruction.

**6. Indictment and information ⟹114.**

Information must charge that person convicted has served term for prior offense, to lay basis for imposition of additional sentence (Pen. Code § 666).

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Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Chester Arnest and another were convicted of grand theft and second degree burglary, and they appeal.

Affirmed in part, and reversed in part.

K. D. Robinson and A. K. Robinson, both of Auburn, for appellants.

U. S. Webb, Atty. Gen. and J. Chas. Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendants were convicted of grand theft and of burglary in the second degree, upon an information in two counts charging them with the two offenses, in the following language, to wit: "That on or about the 30th day of August, 1932, in the county of Placer, state of California, they did then and there wilfully, unlawfully and feloniously steal and take the following described property, to-wit: 9 cases of cigarettes, of the reasonable and fair market value of $576.00, which said cases of cigarettes were then and there in the possession of the Southern Pacific Company, a corporation, as bailee, in a certain railroad car, Southern Pacific No. 25362, which car was in train No. 486, prosecuting its trip through the counties of Placer and Nevada, state of California, and which said cases of cigarettes were at the said time the personal property of another, and not the property of the defendants, with the felonious intent then and there to commit the crime of grand theft."

Count 2 of the information, in its charging part, reads as follows: "That on or about the 30th day of August, 1932, in the county of Placer, state of California, they did then and there wilfully, unlawfully and feloniously enter a certain railroad car, to-wit: Southern Pacific No. 25362, which said railroad car was then and there in train No. 486, and prosecuting its trip through the counties of Placer and Nevada, state of California, with the intent then and there to commit the crime of grand theft."

The defendant Worth was further charged with a prior offense, as follows: "That the defendant Alfred L. Worth, before the commission of the offenses charged in this information, was, in the superior court of the state of California, in and for the county of Tuolumne, convicted of the crime of petty theft."

Upon arraignment, the defendants demurred to the information on the ground that it did not conform to the requirements of sections 950, 951, and 952 of the Penal Code; that the court had no jurisdiction of the offense charged; that the facts stated do not constitute a public offense; and that more than one offense is charged other than as provided in section 954 of the Penal Code. At the same time the defendants moved to set aside the information on the following ground: That before the filing thereof, the defendants, nor either of them, had been legally committed by a magistrate. The demurrers were overruled, and the motion denied, whereupon the defendants entered a plea of not guilty.

[1] It appears that during the course of the trial the district attorney was permitted to amend the information by inserting the words "which said railroad car was then and there in train No. 486, and prosecuting its trip through the counties of Placer and Nevada, state of California."

The original information is not made a part of the record, but there appears to be no contention on the part of the respondent that the original information did not allege that the car was in a train prosecuting its trip through the counties referred to.

By section 783 of the Penal Code it is provided that, where an offense is committed in this state on a railroad train or car prosecuting its trip, the jurisdiction is in any county through which the train or car passes in the course of its trip, or in the county where the trip terminates. Under this section, it is legally correct to state that the offense was committed in the county of Placer, under the circumstances disclosed by the record in this case, and it shows that it was committed upon a car which was a part of the train prosecuting its trip through the counties of Placer and Nevada, on its way to Sparks, in the state of Nevada. Under such circumstances, as provided in section 1008 of the Penal Code, the amendment only clarified the language used, and more specifically identified the offense so that the defendants, if convicted,

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⟹For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

might not again be prosecuted for the same crimes. This question was before the court in the case of People v. Dougherty, 7 Cal. 395, and it is there said: "The extra territorial jurisdiction thus conferred [referring to section 89, page 434, Compiled Laws] upon the Courts of the various counties situated upon the navigable waters of the State, is special in its character, and in derogation of the common law rule upon this subject; and whenever it is invoked, the facts and circumstances should be set out fully in the indictment. In this respect, the Court may be considered as exercising a special and limited jurisdiction, and the facts which give jurisdiction must be clearly alleged and satisfactorily proved. There is great reason for this rule, for if these allegations can be dispensed with, then the defendant might be indicted, tried, and convicted, in every county through which a vessel might pass in making her voyage, and one conviction or acquittal would be no bar to another prosecution, as it would be impossible to determine that they were for one and the same offence."

At the time of the rendition of this decision, there was no provision in the Penal Code authorizing district attorneys to submit, and the court to allow, amendments as provided for in section 1008, supra. As now amended, that section, so far as material here, reads: "The court may order its amendment for any defect or insufficiency, at any stage of the proceedings; and the trial shall continue as if it had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable continuance, not longer than the ends of justice require, may be granted."

It thus clearly appears from the case relied upon by the appellants from which we have just quoted that the amendment to the information was not to the prejudice of the defendants, but is an amendment which operates in their favor, for the simple reason that it estops further prosecution for the offenses charged in other counties through which the train passed in prosecuting its trip through the state of California.

The record further shows that no continuance was asked for; that the defendants stated they were content to rest upon their original plea, and the trial proceeded as though the information had originally read as it stood amended. Amendments to informations have been so frequently allowed where it appears that no prejudice has been suffered by the defendants that it seems to us unnecessary to incumber the record with citation of the cases where such amendments have been allowed.

One case, however, which permitted the addition of an allegation supplying a jurisdictional fact, may be referred to. In People v. Bonfanti, 40 Cal. App. 614, 181 P. 80 the information charged an assault with intent to commit rape, but failed to state that the victim was not the wife of the defendant. The proof establishing such fact, the amendment was allowed. The nature of the offense was not changed. Just as here, the nature of the offense, nor any of the conditions relating thereto, were unchanged by the amendment. The court had jurisdiction, the testimony established the fact of jurisdiction in showing that the burglary and larceny took place under such conditions as to give the court jurisdiction, and all that remained, assuming that the original information was defective, was the adding thereto such words as would prevent any other prosecution upon the charges contained in the information. The defendants were not faced with any different charge, nor did it necessitate on their part any additional effort to meet the allegations of the information. They were charged with burglarizing and committing larceny of a certain railroad car, etc. The only allegation in substance contained in the amendment to the information showed that the car was in motion or prosecuting a trip through the counties mentioned. We may also refer to the case of Johnson v. Johnson, 30 Colo. 402, 70 P. 692, where the Supreme Court of Colorado held that, where the testimony showed jurisdiction, the pleadings might very properly be amended to conform to the proof, and that they had found no well-considered case to the contrary. The facts of the case are as follows: The car upon which the burglary was committed and also in which the larceny was committed was in a train, as we have stated, being moved from Roseville, Cal., to Sparks, Nev., passing through Placer and Nevada counties. A watchman or railroad detective was stationed on a car two car lengths in the rear of the one burglarized. When the train stopped at Emigrant Gap, the seals on the burglarized car were then intact, or appeared to be intact, and the doors were closed. A short time after the train left Emigrant Gap, the railroad detective observed packages being thrown from the car in question. He immediately dismounted from the train, concealed himself in the weeds and grass along the right of way, and in a short time one of the defendants appeared and picked up one of the packages. Thereupon he was arrested by the detective. The detective waited until the second defendant came along carrying a sack and a rope ladder, whereupon he was also arrested.

The record shows that nine packages of cigarettes were recovered of those thrown from the train, although the testimony also shows that the eleven packages of cigarettes were thrown out of the car. The defendants were then arrested and taken to Auburn, where their preliminary examination was held. The testimony developed that the place where the packages of cigarettes were found was in the county of Nevada, and distant from the boundary line between the counties of Placer and Nevada about 2,900 feet.

[2] We may now consider the motion to set aside the information on the ground that the defendants had not been legally committed. A complete answer to the alleged error on the part of the court in denying this motion is in the entire want of the record to exhibit either the complaint filed before the justice of the peace in Auburn and the testimony there taken. All that the record shows is simply the motion.

In the case of People v. Williams, 84 Cal. 616, 24 P. 145, a somewhat similar question was presented as to the jurisdiction of the police judge conducting the preliminary examination. The court there said: "We must presume, in the absence of anything showing the contrary, in favor of the action of the court below, that some duly-qualified magistrate had, previous to the trial in the superior court, properly committed the defendant for such trial, but who he was does not appear; for it will not be taken for granted that the facts set up in the defendant's motion are true, without any proof as to the matter." This case was affirmed in People v. Hinshaw, 194 Cal. 1, 227 P. 156, where it is again held that proof must be made of whatever is set up in the motion, and that the motion itself does not constitute sufficient grounds setting aside the information.

For all that appears in the record, the facts giving the justice of the peace at Auburn jurisdiction appeared in the complaint and in the testimony, and, nothing appearing in the record to the contrary, we must presume that the trial court was justified by the showing made before it to deny the appellants' motion.

[3] Under section 783, supra, jurisdiction of the offenses shown in the record lay in both the counties of Placer and Nevada. The train on its way eastward passed through the township where the city of Auburn is situate. The offense, as shown by the record, was a continuing offense. It was, in view of the section of the Penal Code which we are considering, committed in every county of the state through which the car was being transported, and therefore it was committed within the territorial limits of every township through which it passed, giving jurisdiction to the justice of the peace of such township to hold a preliminary examination.

The appellants make the further objection that under the provisions of section 849 of the Penal Code which reads: "When an arrest is made without a warrant by a peace-officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made," etc.; and that the arresting officer in this case should have taken the appellant before some magistrate in the county of Nevada.

So far as the record is concerned, it does not appear that this objection was raised, or any advantage taken of the provisions of this section prior to the beginning of the trial in the superior court. From what we have stated, it is evident that the justice of the peace at Auburn had jurisdiction to hear the preliminary examination of the defendants charged with the offenses alleged in the information. That the arresting officer may have committed a wrong against the appellants does not affect the jurisdiction of the justice of the peace at Auburn. If any injury was suffered by reason of the failure of the arresting officer to comply with section 849, supra, it is left undisclosed by the record, which is, as we have stated, entirely silent concerning proceedings had upon the preliminary examination of the appellants.

In addition to the testimony which we have stated with regard to the railroad detective seeing the packages of cigarettes thrown from the car, and the return of the defendants to pick up the cigarettes, we may refer to the testimony of the witness J. R. Martin. After testifying that the "railroad officer" came to the work car where he was with the two prisoners, and placing them in his charge while the officer went back with a hand car to pick up the packages of cigarettes, the following conversation took place between him and the defendant Worth, in the presence of the defendant Arnest: "The defendant Worth said to me: 'What kind of cigarettes do you smoke?' I said, 'Chesterfield's.' He said, 'They found nine cases of cigarettes. I threw out eleven cases. I don't think you will have to change the brand. After we start to Auburn, you go down and get the cigarettes.' The defendant Worth then asked Arnest if the officer caught him with the packages or cartons, it was, in his possession. Arnest says, 'Yes.' He says, 'You can't swear that he didn't.' Arnest says, 'No.' Worth says, 'You know what that means; that means five years if they prove that.'" The witness further testified that that was the extent of the conversation; that the defendants were engaged in further conversation between themselves, but he did not hear it. This witness was an employee of the department of public works, division of highways.

As we read appellants' brief, no contention appears to be made that the testimony is insufficient to show the burglarizing of the car in question and the larceny of the cigarettes.

[4] It is further objected that the court erred in giving two instructions to the jury, the first of which reads as follows: "The jury is instructed that in order to constitute the crime of theft, the goods taken must be taken or severed from the possession or custody of the owner or the bailee, and be in the possession of the thief, although it be but for a moment; that they need not be retained in possession of the thief, nor removed from the

owner's possession. Any removal, however slight, of the entire article, is sufficient to constitute the crime of theft." This instruction is not correctly worded. The word "possession" following the word "owner's" should have read "premises" or "presence." In this case the cigarettes were not removed from the owner's premises as they lay upon the railroad right of way where they were admittedly thrown by the defendants. Under the testimony which we have stated, and against which no objection is made by the appellants as not being sufficient to show both the burglary and the theft, we think that section 4½ of article 6 of the Constitution applies. The jury was not misled. They had heard the testimony as to the cigarettes being thrown from the car in which they were being transported. That established the theft. The mere fact that the cigarettes were not removed from the premises belonging to the railroad company was an unnecessary element in the commission of the crime, and we cannot very readily conceive how the jury understood the instructions as meaning other than that the defendants, in the complete commission of the offense, were not required to take the cigarettes entirely off of the railroad right of way.

[5] It is further contended that the court erred in its instructions as to what constituted larceny, in that it omitted the word "feloniously." The whole instruction should be read together, which shows that the court charged the jury that they must be convinced to a moral certainty, and beyond a reasonable doubt, that the defendant Chester Arnest "did, on the 30th day of August, 1932, feloniously steal the personal property of another, as alleged in the information"; and then define "grand" and "petty theft" as given in the statute, which, of course, was neither misleading nor erroneous.

[6] The judgment in this case, however, is erroneous and unwarranted in one particular in so far as it adjudges the defendant Alfred L. Worth with a prior conviction, etc. The information, as we have stated, simply charges the defendant Worth with having been convicted of the crime of petty theft.

Section 666 of the Penal Code reads: "Every person who, having been convicted of petit larceny or petit theft and having served a term therefor in any penal institution, commits any crime after such conviction, is punishable therefor as follows." The defendant Worth simply pleaded guilty to the information, couched in the language which we have set forth. This of course is not sufficient compliance with the statute in order to lay a basis for the imposition of an additional sentence or an added length of time for which the defendant may be sentenced. The information must charge that the person convicted has served a term therefor, and, if it fails to do so, it fails to charge the facts necessary to constitute a judgment carrying a heavier sentence. This is definitely established by the decision in the case of People v. Dawson, 210 Cal. 366, 292 P. 267. This being true, that portion of the judgment relating to the prior conviction of the defendant Worth, and seeking to lay the basis for an addition to the sentence which may be imposed upon him, is reversed. In all other particulars the judgments and orders denying appellants' motion for a new trial are affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

132 Cal.App. 665

## HUTSON v. GERSON et al.

Civ. 7624.

District Court of Appeal, Second District, Division 1, California.

June 20, 1933.

**1. Insurance 🔑665(2).**

Finding that taxicab which struck plaintiff was covered by liability insurance *held* justified under evidence in action against cab company and insurer.

**2. Appeal and error 🔑1050(1).**

In action for injuries to one struck by taxicab, admission of evidence that witness jumped on running board and asked driver why he did not stop to give assistance, *held* not to require reversal.

**3. Pleading 🔑377.**

Matters alleged in complaint and not denied in answer need not be proved (Code Civ. Proc. §§ 437, 462).

**4. Pleading 🔑17.**

Evasive answer to allegations of complaint is unavailing.

**5. Automobiles 🔑242(6).**

Employee operating automobile is presumed to have been acting within scope of employment at time of accident where ownership of car and agency were admitted.

**6. Appeal and error 🔑1170(9).**

In action against taxicab company and insurer, instructions authorizing recovery from insurer for injuries if automobile which struck plaintiff was covered, *held* not to require reversal where jury also returned verdict against codefendants (Const. art. 6, § 4½).

**7. Trial 🔑260(1).**

Refusal of instruction requested does not constitute reversible error where other instructions were given covering same points.

Appeal from Superior Court, Los Angeles County; W. A. Anderson, Judge.

Action by Ellen Hutson against Joseph Gerson and others. Judgment for plaintiff, and defendants appeal.

Modified as to defendant California Highway Indemnity Exchange, and affirmed as to other defendants.

Bryce P. Gibbs and George P. Kinkle, both of Los Angeles, for appellants.

Clarence A. Jones, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

A jury awarded to the plaintiff judgment in the sum of $6,000 against all the defendants. They appeal from that judgment, and from an order of the trial court by which they were denied a new trial.

The plaintiff, as she was crossing Central avenue at or near the northerly line of Jefferson street, in the city of Los Angeles, between 7 and 8 p. m. of November 22, 1928, was struck, thrown to the ground, and injured by a taxicab. This vehicle was traveling south on Central avenue, and bore the license number 243516. It will be noted that the defendants comprise six individuals, namely, Gerson, Livingston, Calder, DeVoy, Van Elm, and S. G. Stephens; the California Highway Indemnity Exchange, a corporation; and S. G. Stephens sued also as doing business under the firm name and style of Crown Cab Company. For convenience the California Highway Indemnity Exchange will be hereinafter referred to as the exchange. The same attorneys who have at all times represented the exchange have at all times represented the other defendants, two identical answers being filed, one for the exchange and one for the other defendants as a group. Introduced in evidence was a policy, No. 5513, of the exchange dated December 15, 1927, in which defendants Gerson, DeVoy, and Livingston appear as the assured parties, described as doing business as the Crown Cab Company. Attached to this policy were many "endorsements," so-called, covering under the terms of the policy certain taxicabs in addition to the one described in the original. One of the indorsements, effective February 16, 1928, attached to and made part of policy No. 5513, included the taxicab involved in this case, the same being No. 135 in the fleet of taxis of the Crown Cab Company, covered by this insurance. In an indorsement effective May 31, 1928, the "name of the assured covered by the above mentioned policy is amended to read Jean A. Calder, and Joseph Gerson, d. b. a. (doing business as) Crown Cab Co." June 18, 1928, another indorsement amended the name "to read Crown Cab Co., H. J. Van Elm, President in lieu of Jean A. Calder and Joseph Gerson d. b. a. Crown Cab Co." On September 21, 1928, another indorsement changed the name of the assured "to S. G. Stephens doing business as the Crown Cab Co., instead of as stated in the policy." The latest indorsement, effective May 23, 1929, eliminated from coverage of the policy thirteen taxicabs, not including cab No. 135. Nor was this cab eliminated by any other indorsement. The original policy No. 5513 carries a cancellation notice dated August 14, 1929, terminating liability on August 13, 1929, at the request of insured "to be replaced by policy No. 6034."

[1] Attached to policy No. 5513 is an indorsement dated December 8, 1927, containing the following language: "This policy is a continuing liability notwithstanding any action or recovery thereon," etc. We believe on the facts recited the jury was justified in finding that cab 135 of the Crown Cab Company was covered by this policy of insurance on the date of plaintiff's injury, November 22, 1929. A special agreement attached to the policy limited the exchange's liability to $5,000 for injury to or death of any one person, and $10,000 in case more than one person were killed or injured; also provided that "in addition to said limited sums the Exchange will pay the expense of litigation and all costs taxed against the subscriber in any legal proceedings defended by the Exchange, together with any interest accruing after entry of judgment upon such part of said judgment as shall not be in excess of the limits of the Exchange's liability herein expressed."

The only evidence offered by the defendant at the time of the trial was that of a physician who, at the request of counsel for the defendants, had examined the plaintiff a few weeks after the accident. A physician appointed by the court also testified. All the witnesses who testified as to the occurrences of November 22, 1927, were produced by the plaintiff. Among these was one named Nobles, who testified that immediately after the taxicab struck the plaintiff he jumped on the running board of the cab and asked the driver why he did not stop to try to give assistance, saying, "What do you mean to do? You had better go back and see how much damage you have done; what you have done to that woman." To the admission of this testimony defendant objected and now assigns the adverse ruling of the court upon that objection as error, on the ground that a proper foundation was not laid for the introduction in evidence of a conversation between this witness and the driver of the cab. It is also contended that the trial court erred in denying motion for a nonsuit and in giving two instructions which appellant claims were not justified by the evidence and as to one that it did not correctly state the law. The court's refusal to give a certain instruction requested by the defendant is also assigned as error.

[2] As to the first contention, objection to the portion of Nobles' testimony above referred to, counsel for respondent comments in his brief upon the fact that the conversation was all on the side of Nobles, for his remarks were the only ones reported to the jury. If the driver replied to Nobles, no one knows from the record in this case what he said. Perhaps he made no reply. At any rate there is no evidence that he said anything whatever to fix the blame for this accident on himself or any of the defendants. This, then, was evidence as to an immaterial matter, having nothing to do with the circumstances or cause of the accident, and therefore its admission does not warrant a reversal of the judgment.

[3-5] In arguing the point that a nonsuit should have been granted, appellants claim that there was in this case no proof of ownership of the cab and no proof that the driver was acting as agent for the owner or owners at the time of the accident. The driver of the cab was not a witness nor was he named as a defendant unless as A. Doe, a fictitious defendant never served. However, paragraph IV of plaintiff's complaint alleged that at the time plaintiff was injured the defendants named as composing the Crown Cab Company were using and operating the cab through their agent, servant, and employee. To these allegations the defendants have replied as follows: "Answering paragraph IV of said complaint, these answering defendants admit that the Crown Cab Company is a fictitious name, deny that said company is composed of the defendants named in plaintiff's complaint, or that said parties are copartners doing business under said fictitious name."

It will be seen that there is here no denial that the Crown Cab Company, or the individuals named as defendants, owned the cab in question or that at the time of plaintiff's injury it was being operated by the agent of that company or said individuals.

For more than fifty years section 437 of the Code of Civil Procedure has provided that "the answer of the defendant shall contain: 1. A general or specific denial of the material allegations of the complaint controverted by the defendant." (Code amendments 1873–74, p. 300.) When this section was amended in 1927 (St. 1927, p. 529), although a new method of entering a denial was provided, there was no change in the language above quoted and it remains the rule that a denial must be made. If not made, the allegations will be taken as true under section 462 of the Code of Civil Procedure. An evasive answer to the allegations can avail the defendant nothing (21 Cal. Jur., p. 153), and under the pleadings here the plaintiff was under no obligation to prove ownership or agency, both being admitted inferentially by the answer. As respondent points out in his brief, S. G. Stephens swore to the answer and answered for himself and his codefendants, including all the individuals named in the complaint. As to the responsibility of the owners for the act of their agent, we may say that where no testimony is adduced from which a jury may determine whether or not the agent was acting at the time of an accident within the general scope of his employment the presumption to the effect that he was so acting governs. That such presumption arises where the ownership and agency of the car is admitted appears from the decision in Wagnitz v. Scharetg, 89 Cal. App. 511, 517, 265 P. 318. That such a presumption is evidence appears from the decision in Grantham v. Ordway, 40 Cal. App. 758, 760, 182 P. 73. On this subject see, also, 1928 Cal. Jur. Perm. Supp. §§ 118, 119. In view of the foregoing we conclude that the learned judge of the trial court committed no error when he denied defendants' motion for a nonsuit.

In passing upon appellants' contention that two of plaintiff's requested instructions were erroneous because they permitted the jury to find a verdict of more than $5,000 against all defendants, whereas by the terms of the insurance policy liability was limited to $5,000 in the case of injury to one person, we find the point well taken so far as the defendant, the exchange, is concerned. However, the fault is remedied by a request made by respondent in her brief that the judgment be modified by reducing the amount from $6,000 to $5,000 as to said defendant.

[6] One of the instructions complained of reads as follows: "You are instructed that if you find from the evidence, oral and documentary, given and on file in this case that cab number 135 bearing license number 243516 was the automobile that struck the plaintiff in this action and that the policy issued by the California Highway Indemnity Exchange on file in this action covered damages to any person caused by the negligent operation and control of said automobile without contributory negligence on part of the plaintiff, then it will be your duty to bring in a verdict against the defendant, California Highway Indemnity Exchange, for damages against the defendant California Highway Indemnity Exchange in such sum as you see fit in view of the evidence that would compensate plaintiff for her pain and suffering necessarily resulting therefrom."

Standing alone, this instruction is open to serious objection. We note, however, as we read all the instructions in this case, that the jury received very complete and repeated instructions on the subjects of negligence, contributory negligence, and burden of proof. We note also that the verdict in this case is not against the exchange solely but lies against all the defendants. We must conclude, therefore, that the jury found negligence on the part of the driver of the cab acting as agent for the owner or owners, and no contributory negligence on the part of plaintiff. The jury knew from the facts in the case that the exchange was not an owner, but an insurer, and that under the terms of the policy liability of the insurer arose when injury occurred by reason of negligence on the part of the driver of the taxicab. We do not think the instruction in question misled the jury or that by reason of its being given the verdict against the exchange should be set aside, because if the driver was justly chargeable with the injury then the insurer should meet the liability that it assumed when the policy was written. Since, in our opinion, having reviewed all the evidence in this case, no miscarriage of justice resulted from the giving of this instruction, a new trial should not be ordered because of it under section 4½, article 6, of the Constitution.

[7] The remaining contention of the appellant is that the court erred in refusing to give an instruction bearing on agency and conditions under which an employer's liability arises. Since other instructions were given covering the same points in different language, we hold that this refusal does not constitute reversible error.

The judgment appealed from is affirmed as to all defendants except California Highway Indemnity Exchange, a corporation, and as to said last-named defendant is modified by reducing the amount thereof from $6,000 to $5,000.

We concur: HOUSER, Acting P. J.; YORK, J.

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133 Cal.App. 1

## PEOPLE v. VON ECKARTSBERG.

Cr. 83.

District Court of Appeal, Fourth District, California.

June 24, 1933.

**1. Criminal law 🔑1023(10).**
Attempted appeal from judgment of conviction *held* ineffective where no judgment was rendered on verdict.

**2. Criminal law 🔑977(3).**
Accused waived pronouncement of judgment by making application for probation.

**3. Criminal law 🔑1023(12).**
Where accused waived pronouncement of judgment by making application for probation, order granting probation was not "order made after judgment" and was therefore not "appealable order."

[Ed. Note.—For other definitions of "Appealable Order," see Words & Phrases.]

**4. Criminal law 🔑1023(13).**
Order denying motion for new trial after verdict of conviction where no judgment was rendered, was "appealable order" (Pen. Code, § 1237).

**5. Automobiles 🔑355(13).**
Evidence *held* to sustain conviction of manslaughter, on theory that accused was driving car on wrong side of street at time of collision of accused's automobile with another automobile approaching from opposite direction.

**6. Criminal law 🔑1172(2).**
In prosecution for manslaughter, based on automobile collision resulting when accused was committing unlawful act, not a felony, instruction that court took judicial notice that on day of accident, sun set at 5:20 p. m., though superfluous, *held* harmless.

**7. Criminal law 🔑808½.**
In manslaughter prosecution, based on theory that accused drove automobile on wrong side of street resulting in collision, reading to jury statute prohibiting, with certain exceptions, operation of automobiles in center lane of highway divided into three lanes, *held* not misleading, though street where accident occurred was divided into six lanes (St. 1923, p. 557, § 123, as amended by St. 1931, p. 2125, § 42).

**8. Automobiles 🔑344.**
That accused at time of collision was operating automobile within legal speed limit would not be conclusive on question whether speed was excessive.

**9. Automobiles 🔑357.**
Giving instructions relating to speed of accused's automobile in prosecution for manslaughter based on automobile collision, *held* not error under evidence, though no witness testified that speed exceeded legal limit.

**10. Automobiles 🔑357.**
Giving instruction that contributory negligence is no defense to manslaughter prosecution if evidence shows consequences of collision were directly traceable to violation of law by accused not amounting to felony, or to accused's negligent, willful, reckless, and wanton misconduct, *held* not error under evidence.

**11. Criminal law 🔑761(16).**
In prosecution for manslaughter based on automobile collision, instruction that un-

less defendant acted knowingly and willfully, he would not be guilty, and that defendant could urge that although he might have been guilty of technical violation of law, he was innocent of any guilty purpose, *held* under evidence, not erroneous as presupposing admission of guilt.

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Appeal from Superior Court, Orange County; James L. Allen, Judge.

Rolf Von Eckartsberg was convicted of manslaughter, and from an order denying his motion for new trial he appeals.

Affirmed.

Stanley Visel, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

[1-3] The defendant was charged by an information filed in the superior court of Orange county with the crime of manslaughter in that on or about October 21, 1932, he did willfully, unlawfully, and feloniously, while in the commission of an unlawful act, not amounting to a felony, kill three designated human beings. Upon arraignment, the defendant entered a plea of not guilty and was tried before a jury which returned a verdict convicting him of the offense specified in the information. Thereafter, he presented to the court a motion for a new trial which motion was by the court denied. He thereupon made application to the court to be placed on probation which application was granted upon conditions specified in the court's order granting the application. Defendant then perfected this appeal from the order of the trial court denying his motion for a new trial. The notice of appeal states that the appeal is taken from the court's order denying defendant's motion for a new trial and "from the judgment rendered in this cause on the 20th day of January, 1933." The attempted appeal from a judgment rendered herein is entirely ineffective for the simple reason that no judgment was rendered. On January 20, 1933, the court made an order which is entitled "Probation Order" by which it granted the defendant's application for probation upon certain specified conditions. Presumably, the notice of appeal, so far as it mentions a judgment, refers to the aforesaid order. However, defendant waived pronouncement of judgment by making application for probation. People v. De Voe, 123 Cal. App. 233, 11 P.(2d) 26. The order granting probation was not, therefore, an order made after judgment and for this reason it is not an appealable order. People v. Patello, 125 Cal. App. 480, 13 P.(2d) 1068; People v. Noone (Cal. App.) 22 P.(2d) 284. The appeal from the court's order denying the motion for a new trial is, however, entitled to consideration since section 1237 of the Penal Code specifically permits an appeal from such an order. In considering the appeal from the court's order denying a new trial, a brief statement of the facts disclosed by the record will be conducive to a clearer understanding of the matters here presented.

The death of the three persons named in the information was caused by a collision between two automobiles which occurred at about 7:45 p. m. of October 21, 1932, on North Main street in the city of Santa Ana, Cal. North Main street at the point where the collision occurred is a paved street which is approximately 56 feet in width. It is divided into four traffic lanes each of which is 10 feet wide and two parking lanes, each of which is 8 feet wide. The lanes into which the street was divided were separated by black colored lines. The line which marked the center of the street was somewhat heavier than the other lines. The street extends in a general northerly southerly direction. The two automobiles which were involved in the collision were a Ford coupé and a Packard coupé. The former was being driven by Edwin Johnson and the latter by the defendant. Seated with Johnson on the front seat of the Ford was Dorothy Hill and in the rumble seat of the car two young men were seated. The defendant and two other men occupied the same seat in the inclosed part of the Packard automobile. The weight of the Packard was approximately 5,800 pounds and that of the Ford approximately 2,500 pounds.

The Ford was proceeding in a southerly direction and immediately prior to the collision it was being operated in the traffic lane immediately west of the center line of the street. It was moving at a speed of approximately 30 to 35 miles per hour. The Packard automobile was proceeding in a northerly direction at a speed between 35 and 45 miles per hour and in the traffic lane immediately east of the center line of the street. The legal speed limit at the place where the accident occurred was 45 miles per hour. The evidence indicated that the left front part of the Packard collided with the left front part of the Ford. The Ford automobile was turned over by the impact of the collision and lay on its side in the second traffic lane west of the center line of the street. It pointed in a general southeasterly direction. The Packard automobile was pointed in a northerly direction. Its right rear wheel rested about 18 inches east of the center line of the street. With the exception of the right rear wheel the Packard automobile was almost entirely to the west of the center line of the street. Oil, broken glass, and other débris were discovered in the street after the collision. The greater part of the oil, glass, and débris was west of the center line of the street. The distance between the front parts of the two automobiles after they came to rest following the collision was approximately 8 feet.

Appellant advances two contentions upon this appeal from the court's order denying his motion for a new trial. These contentions are first, that the verdict is not supported by the evidence produced at the trial, and, second, that the court misdirected the jury as to the law.

With respect to the first contention it is pointed out that there was no direct evidence tending to prove that appellant had committed an unlawful act. Careful consideration of the evidence indicates that there were three possible violations of traffic laws which appellant may have committed. These are, driving at a rate of speed in excess of that permitted by law, reckless driving, and driving on the wrong side of the street. It must be conceded that if the record contains any evidence tending to show that appellant was guilty of any one of the aforesaid violations of law this court may not declare that the trial court abused its discretion in refusing a new trial.

[4] Without considering whether the record contains any evidence tending to show that appellant operated his automobile at an excessive rate of speed or that he was guilty of reckless driving, we entertain the opinion that there was circumstantial evidence which tended to show that at the time the collision occurred appellant was operating the Packard automobile on the west side—his wrong side—of the street. The two circumstances which point strongly to this conclusion are first, the position of the two automobiles after the occurrence of the collision, and, second, the location of the oil, shattered glass, and other débris in the street. No useful purpose could be subserved by indulging in a prolonged analysis of the evidence by which these two circumstances were unmistakably developed. Perhaps even less benefit would be derived by a discussion of the value and weight of circumstantial evidence. Its limitations and its value are well recognized. We cannot say that we are impelled to declare that the court erred in refusing to appellant a new trial because a necessary element of the offense with which he was charged rested entirely upon circumstantial evidence.

[5-11] Appellant's second contention which is that the court misdirected the jury merits consideration. It may be conceded that one or two of the instructions of which he complains should not have been given. An example of this character of instruction is afforded by the instruction wherein the court advised the jury that it took judicial notice of the fact that on the day on which the accident occurred the sun set at 5:20 p. m. This instruction was undoubtedly superfluous. Nevertheless, appellant has entirely failed to indicate that he was in the slightest degree prejudiced by the giving of it. Therefore, if it may be said that the court erred in giving the instruction, it was obviously harmless. Complaint is voiced that the court read to the jury the whole of section 123 of the California Vehicle Act (as amended by St. 1931, p. 2125, § 42), one subdivision of which prohibits, with certain specified exceptions, the operation of a motor vehicle in the center lane of a highway divided into three lanes. It is pointed out that the street on which the collision herein involved occurred was divided into six lanes and it is declared that the reading of that portion of the aforesaid section was therefore misleading. When, however, the whole instruction is examined, it is at once apparent that no one could have been misled by the inapplicability of that part of the aforesaid section which refers to highways divided into three lanes. Several instructions were given by the court dealing generally with the question of speed. It is urged that the giving of such instructions constituted prejudicial error since no witness testified that appellant drove his automobile at a rate of speed in excess of that permitted by law which was 45 miles per hour. It may be conceded that no evidence showing that appellant operated his automobile at a greater rate of speed than the legal speed limit was presented during the trial. However, the fact that appellant at the time of the collision was operating his automobile within the legal speed limit is not conclusive of the question. Circumstances sometimes make even a legal speed limit excessive. When it is remembered that appellant, immediately prior to the collision, was driving his automobile very near the center of the street at a speed which one witness testified was as fast as 45 miles per hour when he must have observed that another automobile was approaching him which was being driven to the west of, but also very near to the center line of the street, we think that it may not fairly be declared that the question of speed is entirely out of the case. Although the instructions relative to speed were unduly repetitious, we find ourselves unable to declare, first, that no instruction relating to the subject should have been given and, second, that appellant was prejudiced by the instructions which were given. Certain instructions were given which advised the jury that contributory negligence on the part of another person would not serve as a defense to appellant if the evidence showed that the injurious consequences of the collision were directly traceable to a violation of law by him which did not amount to a felony or that they were caused by his negligent, willful, reckless, and wanton misconduct. These instructions are criticized because it is said that thereby they injected into the case an entirely new theory

totally lacking in evidentiary support. It may again be conceded that the court's instructions relative to contributory negligence were unnecessarily repetitious. Nevertheless, we cannot agree that the giving of them constituted so serious an error of law that we must declare that by reason thereof the court abused its discretion in denying appellant's motion for a new trial. There was evidence from which the jury might have inferred that the driver of the Ford automobile was negligent. It was not, therefore, error for the court to advise the jury that contributory negligence is not a defense in a proceeding of this character if the evidence showed that the injurious consequences of the collision were directly traceable to and caused by appellant's violation of law or by his reckless and wanton misconduct. Appellant further complains of the following instruction: "I have indicated that unless defendant acted 'knowingly' and 'wilfully' he is not guilty as charged, and in this connection it is to be noted that the defendant may urge that although he may have been guilty of a technical violation of the law, he was innocent of any guilty purpose in connection therewith."

It is urged that this instruction is fatally defective in that it presumes an admission of guilt by appellant and an attempt to excuse his guilt by a plea of lack of intent to violate the law. It is confidently asserted that no admission by appellant of even a technical violation of law was ever made or considered. It must, however, be observed that appellant testified that just prior to the collision some one in the automobile pushed his arm and that the crash occurred immediately thereafter; that he was rendered unconscious and remembered nothing further. He also testified on cross-examination that the three automobiles which he observed approaching him from the north "were on the other side of the road" and more particularly that the automobile with which he collided was on its right side of the street and that he could not state whether or not the Packard automobile swerved after his arm was pushed. The striking or pushing of appellant's arm by some other passenger in the Packard automobile was mentioned in the testimony of one other witness. We entertain the opinion that the aforementioned evidence justified the giving of the instruction under discussion.

With respect to the various instructions criticized by appellant, it may properly be observed that an examination of the entire record has produced the conviction that no miscarriage of justice resulted from the giving of them.

The order denying appellant's motion for a new trial is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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## COMMERCIAL UNION ASSUR. COMPANY, Limited, et al., v. PACIFIC GAS & ELECTRIC CO. et al.*

Civ. 8675.

District Court of Appeal, First District, Division 2, California.

July 6, 1933.

Rehearing Denied Aug. 5, 1933.

Hearing Granted by Supreme Court Aug. 31, 1933.

1. **Appeal and error** ⚿989.

Appellate court may only examine evidence to determine whether there is substantial evidence to support verdict.

2. **Negligence** ⚿12.

Instruction that owner of goods in warehouse was not negligent as respected liability to insurance companies paying damage to other goods in warehouse on account of fire, if employees moving goods during fire had reasonable grounds for believing property was in danger of destruction, *held* not erroneous.

3. **Negligence** ⚿12.

Instruction, in action by insurers of warehouse and goods therein to recover against owner of goods therein who removed property during fire, that insurers to recover must show defendant's endeavor to save property was negligent, and that, if defendant had not endeavored to save property, building and contents would not have been destroyed, *held* not erroneous.

4. **Appeal and error** ⚿1058(1).

Exclusion of evidence *held* harmless, where such evidence was properly tendered and received at other stages of trial.

5. **Evidence** ⚿548.

In action by insurers of warehouse and goods therein to recover against owner of property in warehouse for negligence in removing goods during fire, testimony of fire chief at time goods were removed that fire was under control *held* properly excluded, where fire chief at such time was absent.

6. **Evidence** ⚿553(2).

Hypothetical question asked expert witness on cross-examination need not state all facts as they existed and on which direct examination of witness was based.

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Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Commercial Union Assurance Corporation, Limited, and others against the Pacific Gas & Electric Company and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 31 P.2d 793.

Long & Levit, Percy V. Long, and Bert W. Levit, all of San Francisco, for appellants.

Clinton F. Stanley, Thomas J. Straub, and W. H. Spaulding, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiffs are twenty-four fire insurance companies who sued the defendant for loss by fire of a warehouse building and goods stored therein upon which the plaintiffs had satisfied claims for loss. The cause was tried to a jury, which returned a verdict for the defendant. From the judgment following the verdict, the plaintiffs have appealed upon typewritten transcripts.

On May 5, 1931, the warehouse and all its contents were totally destroyed by a fire of unknown origin. Stored therein at the time were 155 reels of copper wire owned by the defendant. All the property destroyed other than that owned by the defendant was insured by one or more of the plaintiff companies. The basis of their action is that for the purpose of saving its own property the defendant broke into the warehouse at a time when the plaintiffs claim that the fire was under control and confined to a small area, and that such entry caused the fire to flare up and pass beyond control. The defense is that, when the employees of the defendant entered the warehouse, the fire, which had been smouldering for approximately three hours, showed definite signs of being beyond control, and that these employees were then convinced that the fire was then incapable of being controlled, and that the property of the defendant would be destroyed unless removed from the warehouse.

The warehouse was located at the town of Irvington in Alameda county. The fire was discovered at the warehouse at about 4 a. m. The town of Irvington had no fire department, and calls were made on the adjoining towns of Centerville, Niles, and Mission San Jose. These responded with fire trucks and chemical tanks. The chief of the Centerville department, who was in charge of the operations, located the fire in a small area in the northeast portion of the warehouse where sacks of beet pulp were stored and in the wooden frame of the skylight immediately above the beet pulp. Firemen entered the building on the east side and opened the skylight for the purpose of throwing water upon the framework and upon the beet pulp underneath. The flame in this portion of the building was put out, but the fire continued to smoulder, filling the warehouse with smoke for a period of approximately two hours thereafter and until the entry of the defendant's employees as hereafter stated. During the course of the operations, the fire chief discovered that the water supply was insufficient, and ordered the laying of a pipe line to tap an additional water supply about a quarter of a mile away from the warehouse. While he was in charge of this work, the employees of the defendant discovered that the fire had broken out underneath the floor of the warehouse and was running into the northwest corner of the building, where defendant's cable was stored. They then asked permission of the owner of the warehouse to enter and remove their property. Some fifteen or thirty minutes after the fire was discovered burning underneath the floor defendant's employees made entry and then discovered it had moved from the beet pulp in the northeasterly corner of the building to the northwest corner, where their cable was stored, so that they were unable to remove the cable through the door by which they had entered. A portion of the wall of the warehouse was therefore removed and four of the 155 reels were rolled through this opening. Other reels had fallen through the burning floor, causing sparks to fly about the workmen, and this, together with the heat from the burning floor, prevented them from making further recovery of defendant's property.

There is no dispute as to the essential facts involved. Some of the witnesses differed in their opinion as to the question whether the fire was under control or could be controlled by the facilities at hand, but upon the main fact that the fire had extended from the beet pulp and was destroying the floor of the warehouse before defendants entered there is no substantial dispute. In plaintiffs' behalf their witnesses adopted the theory that, when defendant's employees opened the door on the northwest corner of the warehouse, they caused a draft through the building which fanned to flame the smouldering fire in the beet pulp, thus causing the total destruction of the building. On defendant's behalf, witnesses testified that the fire was completely out of control at the time they entered the building; that it had proceeded along the floor and underneath the building to such an extent that no further effort could save the building and the destruction of its contents. This opinion is based more or less upon the admitted fact that at all times there was an opening on the east wall of the building close to the place where the beet pulp was stored, an open skylight directly above the beet pulp, and an opening under the eaves three or four inches high all around the building. It was also undisputed that smoke was pouring out of all these openings from 4:00 a. m. until about 7:30 a. m., when defendant's employees entered the building.

[1] Disregarding the opinions and theories of the various witnesses and confining the case strictly to the undisputed evidence, the single question that was presented to the jury was whether the defendant, in its efforts to protect its own property, believed, and had reasonable grounds for believing,

that its property was in danger of destruction unless removed and whether the acts of defendant's employees in this connection were reasonable and proper under the circumstances. On the issue of law involved, the briefs are singularly void in the citation of authority and long in the repetition of the testimony of witnesses. It should be unnecessary to say that this court cannot review this testimony for the purpose of passing on the credibility of the witnesses heard by the jury. Our only interest is to determine whether there is substantial evidence to support the verdict. The appellants do not claim that there is not substantial evidence for that purpose, and in view of the record this claim could not be made.

On the main issue, the rule is stated in 45 Corpus Juris, p. 712, that: "Where an emergency arises involving danger to one's property, he is justified in attempting to save the same, and if he acts with reasonable prudence in the endeavor to rescue or protect his property he is not liable for resulting injury to property of another." Owen v. Cook, 9 N. D. 134, 81 N. W. 285, 47 L. R. A. 646, is cited in support of the statement. That was a case where the defendants started a back fire to save their homes from destruction by an approaching prairie fire. The plaintiff claimed that the back fire spread beyond the main fire and caused the destruction of his property. The Supreme Court of North Dakota held that the acts of the defendants were not negligent, but that they had the right to take such steps for the protection of their own property as were reasonable and proper under the circumstances. Valentine v. Ry. Co., 155 Mich. 151, 118 N. W. 970, is cited by the appellants. In that case certain forest products of the plaintiff and freight cars of the defendant were on fire. The plaintiff owned other forest products which it claimed were safe from fire. The defendant moved one of its burning cars along its track where these products were located, and they were destroyed by a fire coming from this burning car of the defendant. The defendant did not justify its removal of the burning car for the purpose of saving its own property, but relied upon the defense that the property of the plaintiff would have been destroyed in any event. The real point of the Valentine Case is that upon the issues so formed it was a simple question for the jury to determine whether defendant's act in moving its burning car was reasonable and prudent and whether the defendant had sustained the burden of proof of its issue—that plaintiff's property would have been destroyed notwithstanding the acts of the defendant complained of. Latta v. New Orleans, etc., Ry. Co., 131 La. 272, 59 So. 250, Ann. Cas. 1914A, 988, also cited by appellants, is not helpful. There the court held that, in determining the liability of one who destroys the property of another to save his own, consideration should be given to the relative values and of the comparative ability of the sufferers to bear the loss. This is a doctrine to which we need not subscribe, as the case is to be controlled by other issues.

[2] Appellants complain of the following instruction: "If you find that defendant's employees believed and had reasonable grounds for believing that defendant's copper wire and reels were in danger of destruction if left in the warehouse here in question, then I instruct you that defendant's employees had the right to enter said warehouse and use all reasonable means to remove said wire and reels therefrom, and if you find that defendant's employees acted as ordinarily reasonable and careful men would act under such circumstances in endeavoring to remove said wire and reels from the warehouse, then I instruct you that the defendant was not negligent." It is argued that the instruction is erroneous because it excused respondent if the entry of the warehouse had been made after respondent's employees believed, and had reasonable grounds for believing that respondent's property was in danger of destruction unless removed. It is also argued that there is error in the instruction because it failed to note the provisions of the Penal Code preventing obstruction of firemen in their attempt to extinguish fires. We do not believe that the instruction is susceptible to either attack. We must bear in mind that the action is one for negligence and not one based upon acts of premeditation and formed intention. The jury was instructed that negligence is the omission to do something which an ordinary careful and prudent person would have done under the same or similar circumstances, or doing something which such a person would not have done in the same situation; that in determining whether one exercises ordinary care the jury should consider all the facts proved and all the surrounding circumstances and say whether the conduct of the defendant was that of a person of ordinary prudence and discretion under such circumstances. Having cast their case in negligence, the appellants committed to the jury the duty of determining whether under all the facts and surrounding circumstances the conduct of defendant's employees was that of persons of ordinary prudence and discretion, and this is all that the instruction complained of advises the jury to do. Manifestly, if respondent's employees did not believe that respondent's property was in danger of destruction, they had no right to enter the warehouse, because to do so under such circumstances would have been a trespass. The instruction does not nullify the provisions of Penal Code, § 385, as claimed by appellants. The giving of the chief's orders to keep the warehouse closed and the revocation of those orders was a question which

was sharply disputed in the evidence. If the jury believed the testimony of respondent's witnesses on this point, and then found that in entering the warehouse respondent's employees "acted as ordinary reasonable and careful men would act under the circumstances," the jury would have found that the respondent was not negligent in that respect, and that was all that was covered by this instruction. If the appellants had desired an instruction on the Penal Code section, they should have requested it.

[3] Criticism is made of the instruction reading: "In order to find a verdict for plaintiffs you must find two separate facts; first, that defendant, in its endeavors to save its property was negligent and careless, and second you must also find that if defendant had not so endeavored to save its property then the building and its contents would not have been destroyed but would have been saved." It is argued that this instruction casts too great a burden upon the appellants; that the jury should have been instructed that it was necessary to find nothing more than that "the building might have been saved" if respondent's employees had not made the entry complained of. It is said that such an instruction would have permitted the jury to speculate, and thus to return a verdict for the appellants, if it believed that it was possible that the building might have been saved but for respondent's act. Houren v. Chicago, M. & St. P. Ry. Co., 236 Ill. 620, 86 N. E. 611, 20 L. R. A. (N. S.) 1110, 127 Am. St. Rep. 309, is cited to the point. That was a case where a railroad train had been left standing across a public highway; thereby preventing the fire department from approaching a fire burning on property on the other side of the track. Plaintiff was allowed recovery against the railroad company on the theory that the property might have been saved if the fire department had not been delayed by the standing train. We had occasion to consider a similar question in Hanlon D. & S. Co. v. S. P. Co., 92 Cal. App. 230, 234, 268 P. 385, where other cases to the same point are cited. The rule of these cases is that the unexplained blockading of the fire department and interference in its endeavors to control the fire makes a prima facie case of negligence in favor of the plaintiff whose property was destroyed by the fire. It is not the rule that damages may be awarded upon mere conjecture or surmise or that plaintiffs' burden of proving the actual damages sustained by the acts complained of is in anywise lessened.

Criticism is also made of the instruction covering the issue raised by respondent of contributory negligence on the part of the owner of the warehouse in whose behalf appellants sued. We are inclined to hold that the evidence offered in support of this plea was insufficient to charge contributory negligence, but we cannot perceive how this instruction could have prejudiced appellants. The evidence for the respondent is so clear and convincing that judgment should have gone for the respondent notwithstanding this plea.

[4, 5] Criticism is made of the rulings of the trial court in excluding testimony of witnesses as to what the fire chief told them relative to keeping the building closed. The rulings were made excluding testimony which would have been mere hearsay, but the appellants were not harmed because all the evidence which they sought to produce through these witnesses was properly tendered and received at other stages of the trial. Appellants complain of the ruling excluding the testimony of the fire chief as to his opinion whether the fire was under control "during the time that the pipe was being laid." The answer was properly excluded because the chief was shown to have been absent from the place of the fire during a large part of the time when this pipe was being laid. Another member of the fire department was asked if in his opinion the fire was under control. The court sustained the objection as to the form of the question, stating that the witness could tell what effect, if any, the opening of the wall by the respondent had upon the extension of the fire. There was no error in the ruling.

[6] In the cross-examination of an expert witness, called by the respondent, the appellants were unduly limited. The hypothetical question asked this witness did not state all the facts as they existed and upon which the direct examination of this witness was based. For this reason the trial court sustained respondent's objection to the question and limited appellants' cross-examination in that manner except for the sole purpose of determining the qualifications of the witness. The ruling would have been correct if the question had been asked on the direct examination of the witness, but no such limit is imposed upon cross-examination of an expert witness. Jones on Evidence, Civil Cases (3d Ed.) § 389.

Finally, it is argued that the trial court committed prejudicial error in the conduct of the trial of the case. Numerous instances are cited where the trial court interrupted counsel for the appellants and stated its understanding and interpretation of the testimony of the witnesses. It is not necessary to reprint the instances giving rise to these objections. Manifestly, the trial court gave appellants' counsel an uncomfortable experience in the trial of his case, and on numerous occasions unduly interfered with the orderly and judicious conduct of the trial. Appellants had a novel and difficult case to present to the jury, but one which the trial court apparently felt was without merit from the beginning of the trial. But the appellants elected to try their case to the jury, and this is a right which should not be curtailed by comments from the bench. We have read the record with extreme care because of the delicacy of the question presented, and, though we cannot approve the conduct of the trial, nevertheless we are unable to find where the acts complained of were of such a prejudicial nature as would justify a reversal of the judgment. Notwithstanding the handicaps placed in their paths, the appellants proved all that they sought to prove in support of the theory upon which their complaint was founded, and our judgment is that this proof was insufficient to support a verdict for the appellants if such a verdict had been rendered. For these reasons we cannot say that a "miscarriage of justice," within the meaning of section 4½ of article 6 of the Constitution, has resulted from the errors complained of.

The judgment is affirmed.

I concur: STURTEVANT, J.

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133 Cal.App. 23

## BOLD v. BOARD OF MEDICAL EXAMINERS.

Civ. 7871.

District Court of Appeal, Second District, Division 2, California.
June 26, 1933.

**1. Limitation of actions 🔑61.**

Proceeding before board of medical examiners to revoke physician's license to practice medicine for procuring criminal abortion *held* not "civil action" or "special proceeding of civil nature" subject to statute of limitations since board is not a "court" though exercising power judicial in nature (Code Civ. Proc. §§ 312, 363, and § 339, subd. 1).

[Ed. Note.—For other definitions of "Civil Action—Case—Suit—etc.," "Court (of Justice)" and "Special Proceeding," see Words & Phrases.]

**2. Physicians and surgeons 🔑11(3).**

Board of medical examiners exceeds its jurisdiction if it acts without competent evidence, and writ of certiorari may be used to determine whether board acted without competent evidence.

**3. Physicians and surgeons 🔑11(3).**

Evidence in proceeding before board of medical examiners justified board's action in revoking physician's license to practice medicine, for procuring criminal abortion.

**4. Physicians and surgeons 🔑11(3).**

In proceedings to review board of medical examiners' order revoking physician's license for procuring criminal abortion, excluding question to witness whether she had noticed physician's hands after anesthetic was administered and before she left table *held* not prejudicial.

**5. Physicians and surgeons 🔑11(3).**

That board of medical examiners in proceeding to revoke physician's license for procuring criminal abortion ordered license revoked on former charge did not deprive it of jurisdiction to revoke license on second charge, since board had jurisdiction of both charges.

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Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Petition by Francis James Bold for a writ of certiorari to review an order of the Board of Medical Examiners of the State of California. From a judgment affirming the action of the Board in revoking petitioner's license to practice medicine, petitioner appeals.

Affirmed.

W. T. Kendrick, Sr., and W. T. Kendrick, Jr., both of Los Angeles (Caryl Warner, of Los Angeles, of counsel), for appellant.

Richard M. Lyman, Jr., of San Francisco, and Otto J. Emme, of Los Angeles (Bayard R. Rountree, of Los Angeles, of counsel), for respondent.

ARCHBALD, Justice pro tem.

After a hearing before the board of medical examiners, appellant's license to practice medicine in the state of California was revoked. Thereafter a petition for a writ of certiorari to review the proceedings before said board was filed in the superior court of Los Angeles county, which court, upon the hearing of the issues raised by the petition, answer, and return made to the writ, rendered judgment affirming the action of said board and denying relief to petitioner. From such judgment, petitioner has appealed.

It is contended: (1) That the proceedings before the board were barred by the statute of limitations; (2) that the board had no jurisdiction to revoke such license, for the reason that the evidence taken fails to show that appellant procured an abortion upon a pregnant woman, as alleged; (3) that the board acted without having all "proper" evidence offered; and (4) that said board divested itself of jurisdiction over appellant by previously revoking the latter's license in a separate proceeding.

[1] (1) Appellant urges that the proceedings were barred by section 339 of the Code of Civil Procedure, subdivision 1, in that the complaint before the board was filed March 28, 1930, and the alleged abortion is charged

to have been performed March 30, 1927. He contends that the hearing before the board was a special proceeding of a civil nature, and an action within the meaning of section 363 of the Code of Civil Procedure. With such contention we cannot agree. The proceeding before the board is not a civil action (section 312, Code Civ. Proc.) which includes "a special proceeding of a civil nature" (section 363, Code Civ. Proc.), to the commencement of which the statute of limitations relates. Such provision in our opinion relates only to actions or special proceedings in courts, and not hearings before boards. In re Lowenthal, 78 Cal. 427, 21 P. 7; Ex parte Tyler, 107 Cal. 78, 40 P. 33. Respondent board is not a "court" (Suckow v. Alderson, 182 Cal. 247, 249, 187 P. 965), even though it exercises a power judicial in its nature. The purpose of the act under which the proceeding was instituted is to keep unqualified and undesirable individuals, or those guilty of unprofessional conduct, out of the medical profession, and the staleness of the charge would not necessarily make it reflect less upon the character of the person charged. In our opinion the effect of the staleness of such charge, if any, on such character, is a matter exclusively within the jurisdiction of the board, there being no statutory bar applicable. Assuming, without deciding, that it is within the province of the Legislature to say that unprofessional conduct, engaged in for a stated time prior to the bringing of a charge, shall not be considered by the board, it has not done so and we cannot.

[2, 3] (2) If a quasi judicial body such as the board of medical examiners acts without competent evidence, it exceeds its jurisdiction, and the writ of certiorari or review may be used to determine whether or not it has so acted. Osborne v. Baughman, 85 Cal. App. 224, 259 P. 70. The complaint filed with respondent for the revocation of his license charged unprofessional conduct on the part of appellant in that he did "procure, * * * attempt, agree and/or offer to procure a criminal abortion upon a pregnant woman, to-wit, Margaret de la Cuesta." Mrs. de la Cuesta testified that she was married, living and having marital relations with her husband; that she had passed her last monthly period and for at least a week "couldn't eat anything," was "very sick to my stomach," and "was dreadfully sick all over," but otherwise in normal health, and that from her own knowledge of her condition she believed she was pregnant. Two visits were made to appellant by Mrs. de la Cuesta. At the first, the arrangement was made to have the operation performed. At the second, she passed through the reception room, into the operating room; and without going into the details of what was said and done, we are of the opinion that, considering all that was said on the first visit, together with the lack of conversation on the second, as well as the acts and circumstances surrounding the operation, there is ample evidence in the record to justify the action of respondent board.

[4] (3) The witness Edna Cook was asked as to a question put to her at the hearing in the superior court, to which objection was made and sustained. The question was in effect whether the witness noticed appellant's hands at any time after the anesthetic was administered and before she left the table, and it appears that she had answered, "I did not; I did not take any particular notice of them." Later on she was asked the same question by appellant, to which she replied, "Yes, I saw them." Counsel for appellant then renewed his request for permission to ask as to the testimony given in the trial court in response to the same question. After some colloquy, the president of the board asked the witness: "Now did you see his hands?" to which she replied, "Yes. Q. Did you take any particular notice of his hands? A. I did not take any particular notice of them but I saw them." We fail to see where any prejudice could have resulted to appellant by reason of the ruling complained of.

[5] (4) It appears that during the same hearing evidence was taken tending to show that appellant performed a similar operation upon another woman. The board first acted upon such complaint by deciding that appellant's license should be revoked, and afterwards a vote was taken upon the charge here involved. Appellant contends that having already revoked his license the board lost jurisdiction to act on the evidence taken before it so acted, notwithstanding the fact that an appeal is still pending on such order, so far as the record discloses. We see no merit in the contention. Respondent had jurisdiction of both charges and jurisdiction to decide both charges and such decisions could not be made simultaneously but had to be made successively.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

132 Cal.App. 763

## OXNARD SCHOOL DIST. v. PENN et al. (BECKETT, Intervener).

Civ. 4890.

District Court of Appeal, Third District, California.

June 23, 1933.

**Assignments** ⚷50(1).

School contractor's order to school board's secretary, directing delivery, to lumber company, of warrant for balance due contractor and expressing readiness to indorse warrant over to lumber company, *held* good as equitable assignment, as against contractor's subsequent judgment creditor, though assignment was not for specific sum and board took no action thereon (Code Civ. Proc. § 710).

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Appeal from Superior Court, Ventura County; Marshall F. McComb, Judge.

Action by the Oxnard School District against G. E. Penn and others to determine to whom the balance of a fund in possession of plaintiff should be paid, in which Jarrett Beckett intervened, and the People's Lumber Company filed a cross-complaint. Plaintiff deposited the money in court, and, from a judgment awarding a certain amount to the Woodhead Lumber Company and the balance to the cross-complainant, intervener appeals. Affirmed.

Jarrett Beckett, of Long Beach, and E. W. Howell, of Ventura, for appellant.

Blackstock & Rogers, of Ventura, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was begun by the Oxnard school district for the purpose of determining to whom the balance of a fund in its possession should be paid. The money on hand was deposited in court.

So far as this appeal is concerned, there is a controversy only between Jarrett Beckett, as appellant, and People's Lumber Company, a corporation, as respondent, and for purposes of convenience, Beckett will be referred to as the appellant, and the People's Lumber Company, a corporation, as respondent.

In April, 1929, G. E. Penn, a contractor, entered into a contract with the Oxnard school district of Ventura county, for the construction of a school building for the agreed price of $63,206.90. The contractor's bond was written by the Southern Surety Company under an arrangement with the People's Lumber Company whereby the latter agreed to save the surety harmless from any claims said lumber company might have for materials furnished in connection with the work. The contract was finished in September, 1929; notice of completion was filed on October 14 or 15, 1929. At that date all of the contract price had been paid save and except a balance of $15,871.72. On October 30, 1929, the defendant Woodhead Lumber Company, a judgment creditor of the contractor, filed with the auditor of Ventura county an affidavit and transcript of judgment showing a judgment against the contractor for the sum of $716.85. On October 31, 1929, G. E. Penn, the contractor, signed and delivered to R. B. Haydock, secretary to the board of the Oxnard school district, an order requesting the delivery of the warrant for the balance, due on account of the erection of the school building to the People's Lumber Company. The record shows that thereafter an order was given to the Bank of Italy of like import, this order being dated October 30, 1929; but it satisfactorily appears from the testimony set forth in the record that this order was signed at a later date than the one given to the People's Lumber Company, as, at the time of giving the order to the Bank of Italy, the president of the bank was informed of a previous order given to the People's Lumber Company, and that the People's Lumber Company had the sole right to the fund coming to the contractor after the payment of certain claims for labor. The judgment of the Woodhead Lumber Company having been filed as provided by law, at a date prior to the order given by Penn to the People's Lumber Company, the court awarded judgment to the Woodhead Lumber Company for the amount of its claim, and gave the People's Lumber Company judgment for the balance due on the contract price for the erection of the school building in the sum of $6,368.98.

On April 7, 1930, the appellant having obtained a judgment against Penn in the sum of $7,085.30, filed a transcript and affidavit under the provisions of section 710, Code of Civil Procedure, with the auditor of Ventura county. This suit having been begun by the Oxnard school district to determine to whom the fund should be paid, the appellant filed a complaint in intervention.

The court found that the order hereinafter set forth, given by G. E. Penn to the respondent, constituted an equitable assignment of the balance due, and awarded judgment accordingly. The right of the parties to the fund involved in this action depends upon whether the transaction set forth constituted an equitable assignment as found by the court. The instrument signed by G. E. Penn is in the following words and figures:

"October 31, 1929.

"Mr. R. B. Haydock, Oxnard, Cal.

"Dear Sir—When you secure a properly executed warrant for settlement of the balance due me on the Woodrow Wilson school job, deliver said warrant to the Peoples Lumber Co., Ventura, and I will endorse the same over to said Peoples Lumber Co. in payment for materials furnished.

"[Signed] G. E. Penn."

The testimony of R. B. Haydock, the superintendent of schools of Ventura county, who also acted as secretary for the clerk of the school board, is as follows: "I recall the order, 'Peoples Lumber Company exhibit 1.' Mr. Penn came into my office on October 31, 1929, with Mr. Cleale, and said he would like to write out an order for delivery of the balance due him on the contract to the Peoples Lumber Company. Mr. Cleale sat down at a desk and wrote the order out, and Mr. Penn signed it. The amount due the contractor at that time, under the contract, was the 25 per cent which is held back under the terms of the contract for 35 days after completion of the work. There were several stop notices filed in the auditor's office against the balance due. The order made out by Penn in favor of the Bank of Italy, and dated October 30, 1929, was received from the bank around November 16, 1929, through the mail. I acknowledged it on the 19th." The witness further testified that no official action was taken by the board in relation to the assignment.

The record further shows that the contractor made no further claim to the balance due on the contract after the delivery of the assignment to the People's Lumber Company. The record indicates that the Bank of Italy abandoned all claim to the fund.

The contractor, Penn, testified in relation to the order given the Bank of Italy as follows: "Lagomarsino, president of the bank, came to me with the order already written and said, 'Sign that, will you.' I said, 'Well, now, I don't know about this. The money that is left belongs to the Peoples Lumber Company. I will sign it but you will have to fight it out with the Peoples Lumber Company' "—which, standing uncontradicted, shows that the Bank of Italy was advised that the fund had already been assigned to the People's Lumber Company, and that it acquired nothing by the transaction just set forth.

Upon this appeal it is contended that no equitable assignment is shown, principally by reason of the fact that the school board did not take any action in relation to the assignment, and that, the assignment being for the balance of the fund, instead of for a specific sum, cannot be given effect, and that it remained for the contractor to sign the warrant which he had directed to be delivered to the People's Lumber Company.

While a number of cases dealing with equitable assignments have to do with instances where the whole of the fund has been assigned, and language used which indicates that it is necessary that the assignment cover the whole fund, and that there be a specific mention of the amount of money assigned, such, however, does not appear to be the prevailing rule in this state.

In Baumgarten v. California Pacific Title & Trust Co., 16 P.(2d) 332, 335 (hearing denied by the Supreme Court), the District Court of Appeal for the First District, in a rather elaborate opinion dealing with a partial assignment of a fund, announced the rule in this state as follows: "The above order, being one for the payment to respondent of a part only of the whole fund due the drawer, and never having been accepted by the drawee, cannot be said to constitute a legal assignment, pro tanto, of the obligation due the Blackmore Investment Company or of any part thereof. [Citing a number of cases.] However, it has been repeatedly held that where an order, such as the one at bar, is given for a valuable and adequate consideration, and with the intent to effect an assignment, it will as between the payee and the drawer operate as an equitable assignment taking precedence over subsequent assignments and judgment liens. Wheatley v. Strobe & Wilcoxson, 12 Cal. 92, 73 Am. Dec. 522; Pierce v. Robinson, Adm'r, 13 Cal. 116; Pope v. Huth, 14 Cal. 403; Curtner v. Lyndon, 128 Cal. 35, 60 P. 462; McIntyre v. Hauser, 131 Cal. 11, 63 P. 69; Fidelity Sav., etc., Ass'n v. Rodgers, supra [180 Cal. 683, 182 P. 426]; Dunlap v. Commercial Nat. Bank, 50 Cal. App. 476, 195 P. 688."

In Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522, the want of acceptance of the order by the drawee was held only to affect the form of the action that could be maintained by the payee, and, in doing so, used the following language: "The want of a written acceptance does not affect the right of Howel to the money due, but only the mode of enforcing it. With the acceptance he could have sustained an action upon the order; without it he must recover upon the original demand by force of the assignment. Under the old common law practice, the action could only be maintained in the name of the assignor for the benefit of the assignee, but under our system it may be brought in the name of the assignee as the party beneficially interested. Courts of law, equally with Courts of equity, gave effect to assignments, like the one under consideration, by controlling the proceeds of the judgments recovered for the benefit of the assignee." (Citing cases.)

In Goldman v. Murray, 164 Cal. 419, 129 P. 462, 463, the court had before it the question of an equitable assignment of a part of a debt and ruled as follows: "In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place." And then the distinction between the right of action where there has been an acceptance and a nonacceptance is clearly set forth: "The holder of the bill or order cannot sue the drawee-at-law in his own name, as he would thus divide the cause of action and leave a balance due the creditor. He cannot sue in the creditor's name, except by his consent, as, at best, he is only entitled to a part of the debt due him. But it has been held in numerous cases, and we think should now be regarded as law, that a nonnegotiable order for part of a fund operates as an equitable assignment pro tanto. Clearly this is the case when it has been accepted, or assented to by the drawee. And when it has not been accepted, our own view is this: That a nonnegotiable order for part of a fund does operate as an equitable assignment pro tanto as between the drawer and payee, because obviously so intended."

See, also, 3 California Jurisprudence, 274, where the text, supported by numerous authorities, is as follows: "While the rule is well settled that a creditor cannot split his claim against a debtor, and by assignment of a portion thereof impose upon the debtor, without his consent, the legal obligation to pay the same, courts of equity, however, have long been accustomed to recognize and enforce the rights of partial assignees of choses in action although the debtor has not consented to the assignment. In such a case the partial assignee has the right to bring all the parties before the court and have his rights under the assignment determined. And so, as between the parties to the assignment a nonnegotiable order for part of a particular fund or debt operates as an equitable assignment pro tanto, and the consent of the debtor is not necessary to the validity of such an assignment."

See, also, Title Insurance & Trust Co., a corporation, v. Williamson, 18 Cal. App. 324, 123 P. 245, 247, where the question of an equitable assignment was involved, and the rules of law set forth as we have stated herein, and further holding that no particular form of words are necessary to constitute an equitable assignment if the intent of the parties to that effect is clearly shown.

In Los Angeles City School District v. Tucker, 99 Cal. App. 390, 278 P. 507, 508, this court had before it for consideration an order held to constitute an equitable assignment in view of the intention of the parties shown by the record, and in considering the question, held that the form of the order was immaterial if the intention of the parties was satisfactorily shown by the record. The notice or order in the case just referred to is strikingly similar to the order in the instant case, as will be readily seen as we consider its terms, which are as follows:

"Los Angeles, Cal., May 20th, 1925.

"Mr. C. F. Lenz, Auditor L. A. Board of Education.

"Dear Sir: I hereby authorize you to deliver my warrant for the sum of $574.50, which is the 35-day payment for alterations to the old building at the Normandie Avenue School House, to Patten & Davies Lumber Co., this money being due them for material supplied by them for above mentioned work; said payment being due June 5th, 1925; when said warrant is ready for delivery I will endorse same to Patten & Davies at your office. Please notify me.

"Lewis Tucker, Contractor."

In view of the holding had by this court in the Tucker Case, supra, we find no escape from the conclusion that the assignment in the instant case must be held sufficient to transfer the fund to the respondent, People's Lumber Company, a corporation.

Other minor questions are presented for consideration upon appeal, but, in view of what we have stated, it is evident that the judgment must be affirmed. And it is so ordered.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

133 Cal.App. 112

## ORTON v. DAIGLER et al.

Civ. 7969.

District Court of Appeal, Second District, Division 2, California.

June 30, 1933.

**1. Eminent domain 🔑82.**

Leasehold is "property," use, or right of possession and subject of ownership, for which tenant for term of years is guaranteed compensation before his title can be divested under eminent domain.

[Ed. Note.—For other definitions of "Property," see Words & Phrases.]

**2. Appeal and error 🔑1008(1).**

Whether sublessee under five-year lease in possession of premises condemned was entitled to damages for condemnation *held* for trial court.

**3. Eminent domain 🔑243(1).**

Sufficiency of evidence justifying judicial allowances to parties damaged by condemnation could be questioned only upon appeal from decree of condemnation.

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Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by John R. Orton against E. L. Daigler and another. From an order sustaining demurrer to plaintiff's amended complaint, plaintiff appeals.

Affirmed.

See, also, 120 Cal. App. 448, 8 P.(2d) 161.

E. H. Delorey and Boyd C. Barrington, both of Los Angeles, for appellant.

James E. Mahon, of Los Angeles, for respondents.

CRAIG, Justice.

A demurrer to the amended complaint in an action arising from an award of compensation to the sublessee of certain real property having been sustained without leave to amend, the plaintiff appealed.

[1-3] After the entry of an interlocutory decree in condemnation, the owner in fee of the realty in controversy commenced a suit to enjoin the payment of damages to a tenant in possession under a five-year lease from said owner's lessee. It is asserted by the appellant that no appeal was taken from the decree in the original proceedings, but that a determination of the respective rights of the parties is here desired that the real party in interest may receive just compensation. A demurrer to the complaint praying injunction was sustained, whereupon the plaintiff by an amended complaint demanded the amount of award allowed his sublessee, to which pleading a demurrer was sustained without leave to amend. It is not denied that the respondent Daigler's term had not expired, nor that he was in actual occupancy of the premises when the interlocutory decree was entered. The validity of said sublease is not questioned, but it is argued, in effect, that the owner was the sole party who could have suffered from deprivation of property rights in said premises through condemnation. A leasehold is property, the subject of ownership, for which a tenant for a term of years is guaranteed compensation before his title can be divested under the power of eminent domain. City of Pasadena v. Porter, 201 Cal. 381, 257 P. 526, 53 A. R. L. 679. It is a use or right of possession with which the owner has parted for a consideration flowing from his lessee. We are unable to say as a matter of law that it was error to allow any amount of damages to the tenant in possession; and it was solely a question of fact for the trial court to determine upon the question of proper apportionment. The sufficiency of evidence to justify such judicial allowances could have been questioned only upon appeal from the decree then rendered.

The judgment is affirmed.

We concur: WORKS, P. J.; PARKER, Justice pro tem.

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133 Cal.App. 159

## LACOE v. WOLFE et al.

Civ. 970.

District Court of Appeal, Fourth District, California.

July 3, 1933.

Hearing Denied by Supreme Court Aug. 31, 1933.

**1. Corporations 🔑133.**

Person entitled to stock in corporation can sue corporation for damages for refusal to transfer stock to him or can sue in equity to compel registration of transfer of stock.

**2. Corporations 🔑133.**

Person seeking damages for refusal to transfer stock on corporation's books has claim against corporation since act or omission complained of is act of corporation done through its agent.

**3. Corporations 🔑133.**

Secretary of corporation is not personally liable for failure to transfer stock on corporation's books, in absence of statutory provision.

**4. Corporations 🔑320(7).**

In stockholder's action for damages against secretary and directors of corporation on ground they conspired to prevent transfer of plaintiff's stock, damages and not conspiracy was gist of action, and alleged conspiracy did not remedy failure of complaint to state cause of action.

Complaint alleged that petitioner demanded transfer of stock on corporation's books; that defendants conspired to induce corporation through its secretary to refuse transfer of stock for purpose of defrauding plaintiff; that defendants conspired and directed secretary not to make such transfer; that corporation by reason thereof refused to make transfer; that refusal was wrongful; and that as result of such interference on part of defendants, plaintiff was deprived of his rights as owner and holder of stock, and that stock became worthless.

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Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by R. D. Lacoe against H. S. Wolfe and others. From an order sustaining a demurrer to plaintiff's complaint without leave to amend, and entering judgment for defendants, plaintiff appeals.

Affirmed.

Hillyer & Boldman, of San Diego, for appellant.

Gray, Cary, Ames & Driscoll, of San Diego, for respondents H. S. Wolfe and H. S. Wolfe as executor.

Wright & McKee and C. M. Monroe, all of San Diego, for respondent William A. Drennan.

BARNARD, Presiding Justice.

On February 8, 1928, the plaintiff purchased at a trustee's sale all of the stock of a certain corporation with the exception of five qualifying shares held by the directors thereof, said stock having been transferred to the trustee to secure a debt of the corporation. On July 25, 1928, the plaintiff demanded that the stock thus acquired be transferred to his name on the books of the company, which demand was refused, although the stock was finally transferred on April 12, 1929. This is an action for damages brought against the secretary and directors of this corporation on the theory that they had entered into a conspiracy to induce and prevent the secretary from transferring the stock in question to the plaintiff. After the filing of a second amended complaint, the matter came on for hearing upon the demurrer of one of the defendants and upon the motion of all the appearing defendants for judgment on the pleadings, as a result of which the demurrer was sustained without leave to amend and judgment was entered in favor of the defendants, from which judgment the plaintiff has appealed.

The only question before us is whether the amended complaint states a cause of action. This complaint, after alleging certain facts about the organization of the corporation, the amount of its stock, and the acquiring of practically all of the same by the plaintiff, alleges that the plaintiff demanded of the company that the stock be transferred; that the defendants conspired to induce the company, through its secretary, to refuse to transfer the stock for the purpose of defrauding the plaintiff as owner and holder of the stock; that in pursuance of such conspiracy the defendants directed, requested, and advised the company through its defendant secretary, not to make the transfer requested; that by the exercise of threats, persuasions, and promises the defendants induced the company through its said secretary to refuse to make said transfer; that said company by reason thereof refused to make such transfer; that such refusal was wrongful; that as a result of such interference on the part of defendants plaintiff was deprived of his rights as owner and holder of the stock; that said stock was worth $65,327.33 on July 25, 1928; that the market value thereof depreciated from said sum to nothing between that date and April 12, 1929; and that plaintiff was damaged in the sum of $90,327.33.

[1-3] It seems to be well settled that a person entitled to stock in a private corporation has a right of action for damages against the corporation for the refusal of its officers to transfer the stock to him upon the company books. Kimball v. Union Water Company, 44 Cal. 173, 13 Am. Rep. 157. It has also been held that a suit in equity is available to such a person and that, ordinarily, this is the most complete and most just remedy for compelling a corporation to register a transfer of stock. Spangenberg v. Western, etc., Co., 166 Cal. 284, 135 P. 1127. A party claiming to be entitled to such a transfer has the option to compel the same through a suit in equity or to press a claim for any damages suffered. If he seeks damages, his claim is against the corporation, since the act or omission complained of is the act of the corporation, done through its agent. While a corporation may be liable for such a refusal to act on the part of its secretary, if wrongful, in the absence of any statutory provision, the secretary is not personally liable for such an official act. 14 Cor. Jur. 766; Fletcher Cyclopedia Corporations, § 3821; Thompson on Corporations (3d Ed.) 6, p. 309, § 4438; Nicholson v. Morgan, 119 Misc. 309, 196 N. Y. S. 147; Cooley v. Curran, 54 Misc. 221, 104 N. Y. S. 424. While the appellant insists that the gist of his action is a conspiracy to prevent the secretary from acting, the fact that the act complained of was the act of the corporation is recognized in the many allegations of the complaint that the transfer was requested of and refused by the "company."

[4] At the times material hereto, the only statutory provision in this state for personal liability on the part of an officer of a corporation to the party aggrieved by the failure of such officer to transfer stock therein was section 324 of the Civil Code, which provided that such an officer, so refusing, should be liable to the party aggrieved in the sum of $400, to be recovered as liquidated damages. Not only was this the only statutory provision at that time but the provision that such an amount should be recovered as liquidated damages effectually limits the personal liability of such an officer for such a refusal to act. However, it appears that this action was not brought in time to permit a recovery under that section, and the appellant specifically disclaims any attempt or desire to recover thereunder.

Reliance is here placed entirely upon a right to recover against the secretary and the directors of the corporation on the ground of their having conspired to prevent the corporation from transferring the stock in question at the time demand was made therefor. The damage and not the conspiracy is the gist of such an action as this, and the rule is that a conspiracy will not support such an action unless something is done which, without the conspiracy, would give to the plaintiff a right of action. Bowman v. Wohlke, 166 Cal. 121, 135 P. 37, Ann. Cas. 1915B, 1011. It follows that the failure of the complaint to state a cause of action as against the secretary of the corporation is not remedied by the inclusion of allegations that the directors conspired with him to bring about the result complained of.

This case seems rather to illustrate the wisdom of the general rule. Having a remedy available, the appellant chose to wait until, as he alleges, the stock in question had become worthless. A similar decline in value occurs in connection with the stock of many corporations and may well be beyond the control of any secretary thereof or even of the board of directors. In the particular complaint before us, while it is alleged that the corporation, through its secretary, refused to transfer this stock as a result of a conspiracy, and that the market value of the stock declined during the period such refusal continued, there is no allegation of any facts tending to show that the defendants did anything or were responsible for anything which contributed to such a decline in value. Many cases may arise where a secretary is in doubt as to the rights of parties asking for transfers and where his duty to the corporation and to all concerned requires him to refuse to act at once, in order that proper steps may be taken to determine conflicting claims and to protect all parties. To subject a secretary to personal liability for thus performing his duty and to make him liable for all that may occur during the interim, whether arising from general business conditions or not, might often work a great injustice to the officer and at the same time allow a transfer claimant to profit by his own delay and his own failure to avail himself of proper and timely remedies open to him.

For the reasons given, the judgment is affirmed.

I concur: MARKS, J.

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133 Cal.App. 140

## DAILY TELEGRAM CO. OF LONG BEACH et al. v. LONG BEACH PRESS PUB. CO. et al.

Civ. 7530.

District Court of Appeal, Second District, Division 1, California.

July 1, 1933.

Hearing Denied by Supreme Court Aug. 28, 1933.

**1. Limitation of actions 🔑100(1).**

To avoid statutory bar in cases of fraud, plaintiff must show discovery of fraud within 3 years before beginning action, commission of fraud under circumstances excluding presumption of knowledge at time, and circumstances surrounding discovery so that court may determine whether discovery was made within prescribed period (Code Civ. Proc. § 338, subd. 4).

**2. Fraud 🔑22(1).**

Rule that, absent confidential relationship, reasonable prudence requires one to read or have read document before signing it, is subject to limitation that fraud used to procure signature relieves one from such requirement.

**3. Limitation of actions 🔑179(2).**

Assertion that fraud was not discovered sooner is insufficient to avoid statutory bar, since it must appear that fraud could not have been discovered by reasonable diligence (Code Civ. Proc. § 338, subd. 4).

**4. Limitation of actions 🔑179(2).**

Mere allegation that defendants concealed true facts is insufficient to avoid statutory bar against actions for fraud, absent allegation of affirmative acts in nature of artifice (Code Civ. Proc. § 338, subd. 4).

**5. Limitation of actions 🔑100(11).**

Parties cannot by seclusion from means of information claim exemption from statutory bar against actions for fraud (Code Civ. Proc. § 338, subd. 4).

**6. Limitation of actions 🔑179(2).**

Complaint for procuring signature to contract without promised stipulations for assumption of debts by new corporation and equal division of stock *held* insufficient to avoid statutory bar against actions for fraud where not showing that information leading to discovery of fraud was not available to plaintiff prior to running of statute (Code Civ. Proc. § 338, subd. 4).

Complaint alleged that fraud complained of was perpetrated subsequent to negotiations which began in August, 1924; and that fraud was not discovered until on or about September 26, 1926, though action was not begun until December 11, 1929; it also showed physical disability, reliance on assurances that contract presented for signature contained stipulated provisions and subsequent concealment of truth by defendants, but alleged no affirmative acts of artifice, and no facts showing that plaintiff-director could not have obtained information sooner than she did obtain it by examination of corporation's books, but showed engagement in other matters and absences from state.

HOUSER, J., dissenting.

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Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by the Daily Telegram Company of Long Beach and another against the Long Beach Press Publishing Company and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

**Hearing denied by Supreme Court; PRESTON, J., dissenting.**

W. A. Alderson, of Los Angeles, for appellants.

Linnell & Linnell, of Long Beach, for respondent Conklin.

Swaffield & Swaffield, Lawrence Hall, Knight & Goddard, and Kenneth Sperry, all of Long Beach, for other respondents.

HENDERSON, Justice pro tem.

This is an appeal from a judgment of dismissal entered after defendants' demurrer to the second amended complaint was sustained without leave to amend upon the ground that it does not state a cause of action, and that said cause of action is barred by the statute of limitations. The complaint, which is for damages based upon the alleged fraud of the defendants in procuring the execution of a contract, was filed more than three years after the accrual of the purported cause of action.

In brief, the salient facts recited by the amended complaint are in effect as follows: The appellant corporation, the Daily Telegram of Long Beach, and the respondent corporation, Long Beach Press Publishing Company, were publishing rival newspapers in the city of Long Beach. The appellant Belle McCord Roberts, the president and majority stockholder of the appellant corporation, owned all of its shares of stock except those owned by its secretary, the respondent S. S. Conklin, and the respondents otherwise individually named, owned all of the shares of the respondent corporation. During the month of August, 1924, the respondents, including said S. S. Conklin, presented a plan to the appellants for the consolidation of the two companies into a new corporation known as the Press-Telegram Company, together with the proposal that it should occupy a building then in the course of construction by the Long Beach Building Corporation, the shares of which would be divided among the respective parties in varying amounts. The appellants were finally persuaded to enter into negotiations for the purpose of effecting such an arrangement, and during the course thereof respondents prepared and presented to appellant Roberts an agreement in writing for her signature, which provided in effect that 63 per cent. of the stock of the proposed corporation should be issued to appellants and the balance thereof to the respondent corporation; that as the indebtedness of the appellant corporation exceeded the obligations of the respondent corporation by the sum of $103,910 the owners of the latter should purchase from the former 18 per cent. of the stock of the new corporation at a price of $140,000 to be paid for in part by the assumption of said indebtedness by the new corporation. The appellants refused to accept the terms offered by the contract, but with the counterproposal, however, that the same be redrafted to include certain changes whereby their indebtedness should be assumed by the respondent corporation and the shares of stock should be equally divided between the respondent and appellant corporations.

The respondents consented to the suggested changes and presented a second draft for the signature of said Belle McCord Roberts, both individually and as president of the appellant corporation. By reason of the loss of one eye, together with a nervous and sick condition which affected the sight of the remaining eye, and because she was physically unable at said time to read said contract, the appellant Roberts signed the contract without reading the same, in reliance upon the fraudulent representations of respondents that the changes as requested and demanded by her had been made.

It was further alleged that during the interval following the execution of the contract she was prevented from reading the contract by reason of her absence from the city of Long Beach, with the exception of certain brief intervals, and that although a director of the corporation, her position was purely nominal with only a restricted participation in the affairs of the corporation.

The alleged fraud was not discovered until on or about the 26th day of December, 1926, when information relative to a payment of money by the Press-Telegram Company to the Long Beach Building Company caused her to make an investigation of the books of the former. By reason of this examination she was moved to read the agreement between the parties and learned for the first time of the exclusion of the provisions demanded by her to be included in said contract prior to its execution by her. It is stated by counsel for respondents, and there is no denial made, that this action was commenced on the 11th day of December, 1929.

The appellants urge, among other things, as a ground for reversal that the trial court erred in determining that their cause of action was barred by the running of the three-year period of limitation prescribed by section 338 of the Code of Civil Procedure. Furthermore, they contend in this connection that the allegations of their complaint are sufficient to bring them within the terms of the exception expressed by subdivision 4 thereof, which provides that a cause of action, by which relief is sought upon the grounds of fraud and mistake, is "not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

[1] The requirements of a complaint necessary to invoke this exception are summarized by the recent case of Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 16 P.(2d) 268, 270, which quotes with approval from Galusha v. Fraser, 178 Cal. 653, 657, 174 P. 311, 312, as follows: "Where the plaintiff sues for relief on the ground of fraud, and seeks exemption from the three-year period of limitation for the reason that he did not discover the fraud until after it was perpetrated, he must not only show (1) that he did not discover the fraud until within the three years next before the action was begun, and (2) that the fraud was committed under such circumstances that he would not be presumed to have had knowledge of it at the time, but (3) he must also set forth the times and circumstances under which the facts constituting the fraud came to his knowledge, so that the court may determine from the allegations of the complaint whether the discovery was within that period." See, also, Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809; Original M. & M. Co. v. Casad, 210 Cal. 71, 290 P. 456.

The complaint, in addition to setting forth the physical inability of the appellant Roberts to read, specifically alleged, in order to excuse her nondiscovery of the fraud at the time of the execution of the contract, the following facts: "That before signing said new and second draft of said agreement said Belle McCord Roberts inquired of the defendants whether the changes agreed upon prior thereto and requested and made a condition of the execution of the contract had been made, that the defendant including the said S. S. Conklin informed and stated to said Belle McCord Roberts individually and as president of the plaintiff corporation that the changes had been made in said draft."

[2] We are of the opinion that the complaint adequately states the facts necessary to meet the first two requirements above stated. The circumstances alleged were sufficient to excuse the appellant Roberts from reading the instrument at the time of its execution. It is the well-established rule that in the absence of a confidential relationship between the parties, reasonable prudence requires one to read or to have read to him a document, which he proposes to execute (Hawkins v. Hawkins, 50 Cal. 558; Dale v. Dale, 87 Cal. App. 359, 262 P. 339; Freligh v. McGrew, 95 Cal. App. 251, 272 P. 791); but this rule is subject to the limitation that where actual fraud is used in procuring an instrument to be signed the party injured is relieved from reading it. The rule is thus stated in the case of Ferro v. Los Angeles First National, etc., Bank, 89 Cal. App. 43, on page 46, 264 P. 292, 293, as follows: "In Hanscom v. Drullard, 79 Cal. 237, 21 P. 736, 737, the court says: 'A man may perhaps be able to discover for himself what he ought to know if left to his own devices, but where he is induced by the artifice of another not to use his opportunities, it would seem hardly fair that the one using the trick or misrepresentation should remain protected.' "

In attempting to satisfy the third requirement of the rule above announced, the appellant Roberts alleged the following circumstances surrounding the discovery of the fraud: "That on or about the 26th day of December, 1926, she received information of the action of the board of directors of the said Press-Telegram Publishing Company in taking money out of its treasury and paying it to and in behalf of said Press-Telegram Building Company; that then for the first time she had an investigation made of the books, accounts and affairs of said Press-Telegram Publishing Company."

[3] In analyzing this allegation we find nothing to show that the information leading to the discovery was not available to the appellant Roberts prior to the running of the statute. For aught that appears she was not prevented, as a director of the corporation, from making an examination of its books at all times. In this connection her averment of indifference towards the affairs of the corporation raises the inference of lack of diligence on the part of the appellant Roberts to avail herself of the information at her disposal. The degree of care required under such circumstances is succinctly stated in the

case of People v. San Joaquin, etc., Association, 151 Cal. 797, at page 807, 91 P. 740, 745, which quotes from Truett v. Onderdonk, 120 Cal. 589, 53 P. 26, as follows: "It is not enough to assert merely that the discovery was not sooner made. It must appear that it could not have been made by the exercise of reasonable diligence. And that which reasonable diligence would have disclosed, plaintiff is presumed to have known; means of knowledge in such a case being the equivalent of the knowledge which it would have produced." We quote with approval the reason for the said rule from Consolidated R. & P. Co. v. Scarborough, supra, a case not dissimilar to the instant one, as follows: "Any other conclusion would permit a defrauded party, having at all times the means of knowledge at his disposal, to complain of such fraud long after the running of the period of limitations by the simple expedient of alleging that an investigation within three years of the commencement of suit uncovered the fraud. This would place a premium on dilatory tactics and would relieve a party of exercising that diligence required by the law."

[4] We are not unmindful of the fact that appellant also attempts to excuse an earlier discovery by alleging that defendants "kept secret and concealed" the true facts relating to the fraud during the interval following the execution of the agreement. It is the well-established rule, however, that in the absence of an allegation of affirmative acts in the nature of artifice to conceal the facts, a complaint is deficient in this respect. The rule has been expressed in the case of Phelps v. Grady, 168 Cal. 73, at page 78, 141 P. 926, 928, by quoting from Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807, as follows: "* * * Concealment * * * must be the result of positive acts. * * * Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."

The appellant Roberts further seeks to excuse a more timely discovery of the fraud by alleging that subsequent to the execution of the agreement she was engaged in other matters both within and without the state for protracted periods of time.

[5] The authorities cited in support of this allegation (Nichols v. Moore, 181 Cal. 131, 183 P. 531; Kane v. Cook, 8 Cal. 449) are apparently confined to instances where a plaintiff, fraudulently induced to purchase property from a distance, never had a reasonable opportunity to discover the fraud until subsequent to the period of limitation. The rule applicable to the factual situation presented by the instant case is expressed in the case of Phelps v. Grady, supra, at page 80 of 168 Cal., 141 P. 926, 928, as follows: "Says the Supreme Court of the United States [Broderick's Will, 21 Wall. 503, 22 L. Ed. 599]: 'Parties cannot thus, by seclusion from the means of information, claim exemption from the laws that control human affairs and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject.'"

[6] For these reasons we are of the opinion that appellants' cause of action is barred by the statute of limitations; and a consideration of other points raised by this appeal is deemed unnecessary.

The judgment is affirmed.

I concur: CONREY, P. J.

HOUSER, Justice.

I dissent. As nearly as I am able to determine the law, as attested by a host of precedent authorities emanating from the appellate tribunals of this state, the pleaded facts in the instant action make it "a borderline case." In such circumstances, I am unwilling to subscribe to a judgment by which, assuming the truthfulness of the facts alleged in the complaint, the defendants will be shielded in their asserted wrongdoing. If the pleading fairly shows that the plaintiffs actually have been defrauded by the defendants, and thus have been caused to suffer a financial loss, any doubtful question which arises on the construction of the statute, as to whether the action to recover such damages as appear to have been sustained was commenced within the time limited by the provisions of such statute, should be resolved in favor of the plaintiffs. As I read the authorities, they are to the effect that in circumstances such as are herein presented, the plaintiffs had no legal duty imposed upon them to make a discovery of the alleged facts at a date earlier than is shown by the allegations of the amended complaint discovery by plaintiffs actually occurred. Particularly am I moved to such conclusion by judicial language which appears peculiarly appropriate to the facts herein, contained in the opinion in the case of Tarke v. Bingham, 123 Cal. 163, 166, 55 P. 759, 760, as follows: "Where no duty is imposed by law upon a person to make inquiry, and where, under the circumstances, 'a prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission. Bank of Mendocino v. Baker, 82 Cal. 114, 22 P. 1037 [6 L. R. A. 833]; Prouty v. Devin, 118 Cal. 258, 50 P. 380. In this case, though means of information were open to the plaintiff, it does not appear that there was any duty devolving upon him to make use of them. Nothing had occurred to excite his suspicion, or to put him upon inquiry, and for these reasons, under the facts of this case, we think the finding of the court sufficient and sufficiently supported by the evidence."

133 Cal.App. 148

## CUNNINGHAM v. REYNOLDS et al.

Civ. 4934.

District Court of Appeal, Third District, California.
July 1, 1933.

**Appeal and error 🔑460(2).**

In claim and delivery action to recover sheep seized by defendant under Estray Law, plaintiff's appeal without stay bond stayed execution on judgment directing sheriff to sell sheep if sum determined as defendant's damages, costs, and expenses was not paid within 10 days (St. 1901, p. 603, as amended; Code Civ. Proc. §§ 942–945, 949).

> Plaintiff's appeal without a stay bond stayed execution on the judgment since purpose of stay bond is to protect respondent, and as he had possession of the subject-matter of the action he was not in jeopardy of losing what he already had.

Action by E. L. Cunningham against J. C. Reynolds and another. From the judgment, plaintiff appeals. On application for writ of supersedeas to stay further proceedings pending appeal.

Writ granted.

Hale McCowen, Jr., of Ukiah, for appellant.

H. G. Crawford, of Lakeport, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Petitioner herein was the owner of certain sheep which strayed upon the lands of respondent. Acting under the Estray Law, respondent thereupon seized the sheep upon his lands and has held the same pending the payment of such damages, expenses and costs as may have been incurred. A few days after the sheep were taken up, petitioner tendered to respondent the sum of $35 as payment for the damages, expenses, and costs incurred, but respondent declined to accept that sum and refused to deliver up the sheep to petitioner, and proceeded to record and publish notice as required by law for the sale thereof under the Estray Law (see St. 1901, p. 603, as amended). Thereupon, petitioner as plaintiff filed an action against respondent in claim and delivery. Respondent answered, and upon the trial of the issues raised, judgment was entered in favor of respondent for the sum of $1,026.05, being the amount found by the court as damages, costs and expenses incurred by respondent, and further directing if the sum were not paid within ten days after the entry of judgment, the sheriff proceed to sell said sheep at public auction as provided by law.

Plaintiff, upon the entry of judgment, gave notice of appeal and in time the transcript was settled and allowed. Thereafter, upon motion, the trial judge entered an order authorizing and directing the clerk of the court to issue a writ of enforcement of the judgment requiring the sale of the sheep referred to in the judgment.

Thereupon, upon petition to this court for an order to show cause why a writ of supersedeas should not issue, and pending a hearing thereon, an order was made by this court staying further proceedings.

It is contended by respondent and so held by the trial court, that no bond having been posted by appellant, the execution on the judgment is not stayed. On the other hand, petitioner maintains that the proceedings are stayed by the appeal without the filing of any bond. Whether a stay bond is required is the question here for determination.

The judgment under consideration directs that if plaintiff shall pay to defendant or deposit in court the required amount, the sheep shall be returned to plaintiff. It is further ordered, however, that in case plaintiff fails to pay to defendant or deposit in court the specified amount, said sheep shall be sold.

To sections 942, 943, 944, 945, and 949, Code of Civil Procedure, we must look for the solution of this question. Section 942, Code of Civil Procedure, deals with a judgment directing the payment of money. That is not the situation here. Section 944 relates to a judgment directing execution of a conveyance, etc. Section 945 is concerned with real property. This case cannot fall within the provisions of section 949, Code of Civil Procedure, which relates to perishable property, for the court has not predicated its order upon the ground that the property is perishable. Zappettini v. Buckles, 167 Cal. 27, 138 P. 696. This leaves for consideration, section 943, Code of Civil Procedure, which deals with the assignment or delivery of documents or personal property and is the section upon which respondent relies. An examination, however, of that section does not seem to bear out the construction that respondent attempts to find in it. Section

943, Code of Civil Procedure, reads in part as follows:

> "If the judgment or order appealed from direct the * * * delivery of * * * personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be * * * delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant * * * to the effect that the appellant will obey the order of the appellate court upon the appeal."

It will be noted that the section is dealing with the converse of the situation here involved. If the appellant here were in possession of the personal property in litigation, then he would be required to deliver that property into the custody of the officer designated by the court or enter into an undertaking that he would obey the order of the appellate court upon appeal.

Here appellant is not in possession of any of the property in question, and could not on demand or otherwise, being out of possession, deliver the property to any one. The purpose of the undertaking is to protect the respondent, and here respondent, having possession of the subject of the suit, is not in jeopardy of losing what he already has and can comply with any order of the court, so the requirement of a bond is unnecessary.

Somewhat analogous is an appeal by a pledgor from a judgment foreclosing a pledge of personal property and directing a sale of the pledged property, which stays all proceedings on the judgment without the necessity of a stay bond. Rohrbacker v. Superior Court, 144 Cal. 631, 78 P. 22.

The conclusion must therefore be that the case before the court does not fall within the provisions of the sections cited and that the writ should issue.

It is so ordered.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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133 Cal.App. 219

## HURLEY v. LAKE COUNTY et al.

Civ. 4838.

District Court of Appeal, Third District, California.

July 8, 1933.

Hearing Denied by Supreme Court Sept. 6, 1933.

**1. Appeal and error ⟹78(3), 870(5).**

Order denying motion to file amended complaint is "interlocutory order," hence not appealable, but may be reviewed on appeal from judgment (Code Civ. Proc. § 963).

[Ed. Note.—For other definitions of "Interlocutory Order," see Words & Phrases.]

**2. Appeal and error ⟹1201(1).**

Refusal to permit filing of amended complaint in accordance with suggestion in appellate court's opinion reversing judgment of dismissal, where complaint and proposed amendment showed that cause of action could be stated, *held* error.

**3. Appeal and error ⟹1201(1).**

Suggestion, in opinion of appellate court reversing judgment of dismissal, that complaint be amended, if facts warranted, constituted direction to both court and counsel, so that good reason was required to justify trial court in refusing request to amend.

**4. Pleading ⟹243.**

Refusing leave to file amended complaint is proper where court can see that complaint cannot be amended to state cause of action.

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Appeal from Superior Court, Lake County; M. H. Iversen, Judge.

Action by Abbie F. Hurley against Lake County and others. From a judgment dismissing the action, plaintiff appeals.

Reversed and remanded with directions.

See, also, 19 P.(2d) 26.

Francis L. Ashe, Wm. R. Lowery, and Sylvester Andriano, all of San Francisco, for appellant.

Burt W. Busch, Dist. Atty., of Lakeport, and Charles Kasch, of Ukiah, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff filed a complaint to recover for personal injuries; to this complaint a demurrer was interposed and by the court overruled. Defendants answered and in due time the cause was set for trial. Plaintiff failed to appear at the time of trial and judgment of dismissal was entered. Upon appeal the judgment of dismissal was set aside (Hurley v. Lake County, 113 Cal. App. 291, 298 P. 123, 125) on the ground of the insufficiency of the notice of the trial. In its opinion the appellate court, in considering the complaint, said: "While the clerk's transcript shows that the demurrer to the plaintiff's complaint was overruled, it appears from the case which we have cited [Benton v. City of Santa Monica, 106 Cal. App. 339, 289 P. 203] that the complaint is manifestly insufficient and should be amended if the facts warrant such action."

Thereafter, and in accordance with the suggestion in the opinion, a notice of motion was presented by plaintiff for leave to file her first amended complaint. The motion was by the court denied.

After such denial of the motion, no judgment having been entered in favor of defendants upon the original complaint, and no order sustaining the demurrer theretofore interposed having been made, plaintiff served a memorandum to set the cause for trial upon the original complaint. An order was made by the trial court setting the case for trial and fixing September 6th as the date therefor. On September 5th, the clerk of the court received a telegram from Mary I. Ashe, as follows: "San Francisco Calif via postal telegraph, Sept. 4, 1932. F. Merritt, County Clerk, Lake Co., Lakeport, Calif. My husband attorney F. L. Ashe counsel for Miss Abbie Hurley in action Hurley versus Lake County coming on trial tomorrow Sept sixth 1932 has become suddenly ill and is confined to bed by doctors orders must have continuance of above action please advise, am sending copy of this request to F. Merritt County Clerk of Lake County. Mary I. Ashe."

Plaintiff failing to appear either personally or by counsel at the trial, the court upon motion of defendants, dismissed the action under subdivision 3 of section 581 of the Code of Civil Procedure. From this judgment of dismissal plaintiff appeals.

[1-4] The first point argued for reversal is that the court abused its discretion in denying the motion for leave to file an amended complaint, and, secondly, that the court erred in denying the request of plaintiff for a continuance and in entering judgment for defendants.

Let us consider first the objection that the court abused its discretion in denying the motion for leave to amend. An order denying a motion to file an amended complaint being an interlocutory order is not appealable (section 963, Code Civ. Proc.; Harper v. Hildreth, 99 Cal. 265, 33 P. 1103; Cornic v. Stewart, 179 Cal. 242, 176 P. 164), but may be reviewed on appeal from the judgment itself. We believe the court erred in refusing to permit plaintiff to file her amended complaint. The suggestion by the appellate court that the complaint be amended if the facts so warranted was a direction to both court and counsel. Good reason must exist to justify a court in refusing a request to so amend. When a court can see that a complaint cannot be amended as to state a cause of action, the refusal is proper. People v. Mt. Shasta Mfg. Co., 107 Cal. 256, 40 P. 391. But from the complaint and the amendments here proposed it appears that a cause of action can be stated.

Respondents point out many alleged shortcomings in the proposed amended complaint, but we do not deem it necessary at this time to pass upon those issues. At the proper time that will be a matter for the attention of the trial court. It is sufficient at this time to know that sufficient facts may be alleged to state a cause of action.

Respondents claim that appellant did not use due diligence in presenting her motion to amend. We cannot agree with counsel in this. No duty rested upon appellant to obtain the entry of an adverse judgment in order that she might appeal therefrom.

Inasmuch as the judgment must be reversed and the cause remanded for a new trial we will not discuss the point urged by appellant that the court abused its discretion in dismissing the action under section 581 of the Code of Civil Procedure.

The judgment is reversed and the cause remanded with directions to the trial court to permit appellant if so advised, to file an amended complaint.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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133 Cal.App. 236

## BETZOLD v. ROSSI FLORAL CO. et al.

Civ. 827.

District Court of Appeal, Fourth District, California.

July 10, 1933.

Hearing Denied by Supreme Court Sept. 6, 1933.

1. **Automobiles** 🔑244(2).

Evidence *held* to show defendants were negligent in permitting truck to slide down into alley and crash into plaintiff's truck.

2. **Negligence** 🔑12.

One suddenly confronted with unexpected danger, without fault on his part, is required to use only such means for avoiding danger as would be used by person of ordinary prudence, and need not choose most judicious course of action.

3. **Automobiles** 🔑245(67).

In truck driver's action for injuries sustained when defendants' truck backed into alley and crashed into plaintiff's truck, whether plaintiff was contributorily negligent *held* for jury.

4. **Trial** 🔑260(8).

Refusing instruction defining contributory negligence *held* not error, where instructions given fully covered subject.

Jurors were instructed that, if plaintiff failed to use ordinary care which ordinary prudent person would have used under circumstances, and such negligence proximately contributed to accident, then they should find for defendant, and that defendant had burden of proving contributory negligence by plaintiff.

**5. Damages** ⟹132(8).

$3,000 to elderly truck driver for fractured arm *held* not excessive on ground that plaintiff aggravated original injury by visiting several physicians, where there was no evidence showing that he did not use ordinary care in selecting physician.

**6. Appeal and error** ⟹758(1).

Alleged error in refusing to give requested instruction could not be considered, where alleged error was not set forth in original statement of questions on appeal, nor referred to in briefs.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by J. J. Betzold against the Rossi Floral Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Ray W. Hays, of Fresno, for appellants.

Tarance S. Magee, of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for personal injuries received by the plaintiff in a slight collision between a motortruck operated by him and a delivery truck owned by the defendant corporation and operated by its employee, the individual defendant. The Rossi Floral Company conducts a floral shop in the business section of the city of Fresno. In the rear of its place of business there is a strip of private property which slopes sightly upward from the alley toward the building, upon which strip the company's delivery truck is habitually parked. On the occasion here in question the defendant Marsella started out to deliver some flowers and, releasing the brake, allowed the truck to roll backwards toward the alley. While it rolled only some six feet, when it arrived at a point either in the alley or about at the edge thereof, it collided with the plaintiff's truck. The collision was slight, causing no damage to either car, but the plaintiff's arm was caught between the two cars and rather seriously injured. The defendants have appealed from a judgment after a verdict in favor of the plaintiff.

It is first contended that "two separate and inconsistent causes of action were proved at the trial and it cannot be ascertained from the evidence upon which" theory the verdict was based. This contention is founded upon the fact that two witnesses gave conflicting versions of what occurred immediately prior to the happening of the accident. The respondent testified that he was driving north along the alley referred to at a speed of three or four miles an hour looking for a place to park; that, when his machine was about two car lengths away, he saw the appellants' car standing on the parking strip; that, when he arrived at a point nearly opposite that car, he saw it rolling backwards toward him at an increasing speed; that he turned his machine to the right, toward the approaching car, "because I figured the closer I could get, the least momentum it would have to back, to throw me over"; that he "hollered" at the top of his voice; that, when he saw he was "trapped," he reached over and turned off the switch on his car with the expectation of jumping out; that he put on his brakes and stopped his car; that in his excitement he tried to get out of his machine; and that "When I was—when I switched off here, I found out I was trapped, I moved with lightning speed to jump out before the machine would hit me. When I got here the machine was so close I only had about that much space to get out of there, and I accidentally —I just put my hands right out there. When I put them there it was done so quick in another instant my hand was caught here in the machine." However, another witness testified that the respondent drove up and stopped his car about four or five feet to the rear of the floral truck, and that he (the witness) went into an adjoining restaurant to make a delivery, and had returned before the floral truck moved backward and came in contact with the respondent's standing truck.

[1] The appellants maintain that two irreconcilable theories as to negligence upon their part thus appear, and that some of the jurors may have accepted one theory and some the other, and insist that this situation comes within the rule applied in the case of Atchison, T. & S. F. Ry. Co. v. Bratcher, 99 Okl. 74, 225 P. 941. The rule referred to was invoked in that case because separate individuals were joined as defendants, one of whom might be liable on the theory of respondeat superior and the other on the theory of the last clear chance, while neither was liable for the negligence of the other. That rule has no application in this case, where the only theory involved was that the appellants, as master and servant, were liable for negligently operating a motor vehicle in such a manner as to cause the respondent's injuries. While there is a conflict in the evidence as to whether the respondent's truck was stopped immediately prior to the collision or whether it had been standing at the point where the collision occurred for a few moments, no conflicting theories appear, and the basis of liability on the part of the appellants is the same in either case. There is ample evidence of negligence on the part of the

appellants, one of whom was the servant of the other.

It is next urged that the evidence discloses that the respondent was guilty of contributory negligence as a matter of law. It is argued that it conclusively appears that the respondent could have avoided the accident by proceeding straight ahead or turning to his left, and that he was guilty of a series of negligent acts in turning to his right, in getting out on the right-hand side of his car, and in putting out his arm toward the rear of the floral truck. Appellants state that it is evident that "the plaintiff became unduly excited and lost his head and that these two factors, coupled with his subsequent conduct, were entirely responsible for the accident."

[2] The general rule which applies is thus stated in Carnahan v. Motor Transit Company, 65 Cal. App. 402, 224 P. 143, 146:

"A person suddenly confronted with an unexpected danger, without any fault on his part, is only required to use such means for avoiding the danger as would be used by a person of ordinary prudence, and he is not held to that strict accountability which would require that the course chosen be the most judicious one."

[3] There is ample evidence in the record that the respondent was without fault up to the time he observed the other car rolling toward him and only a few feet away. He was an elderly man, and there is considerable evidence to indicate that, when he saw this car bearing down upon him, he was badly frightened, that he feared his car would be tipped over and he would be cut by various glass containers with which his car was loaded, and that he made a hurried and frantic attempt to get out of the car. Viewing all of the evidence in the light most favorable to the respondent, it cannot be said, as a matter of law, that he must be held responsible for having taken the wrong course in the emergency that presented itself. While the appellants' car moved only a few feet, its rate of speed and the suddenness of its movement may have been important factors, and the entire circumstances are such as to make the question of contributory negligence peculiarly one of fact rather than one of law.

[4] The next point raised is that the court erred in refusing an instruction offered by the appellants defining contributory negligence, and that no instruction explaining the meaning of that term was given. The court gave instructions containing full and complete definitions of negligence and of proximate cause, and also gave the following instructions:

"You are instructed that if you find the injuries received by the plaintiff, J. J. Betzold, were caused proximately by the negligence and carelessness of Charlie Marsella in driving the defendant, Rossi Floral Company's truck, while the said Charlie Marsella was acting in the scope of his employment, your verdict must be for the plaintiff and against the defendants unless you find that the plaintiff was guilty of negligence which itself was a proximate and contributing cause of the accident."

"The defendants have alleged that the plaintiff is guilty of contributory negligence which was the proximate cause of this accident; you are instructed that the burden of proving this contributory negligence is upon the defendants and the defendants must prove such negligence by a preponderance of the evidence."

"I instruct you that if you find from the evidence that the said plaintiff could by the exercise of ordinary care have avoided this accident, either by slowing down, stopping, or exercising that degree of care which an ordinary prudent person would have under ordinary circumstances, and that he failed to avail himself of this opportunity or did not use that degree of care and such omission, if any, upon his part proximately contributed to this accident, you are in duty bound to return a verdict in favor of the defendants.

"The mere fact that an act or omission on the part of the defendants, if any, contributed to this accident is not, in itself, sufficient to support a verdict in favor of the plaintiff. To render a verdict in favor of the plaintiff you must find that the defendants were guilty of negligence, and that such negligence was the proximate cause of the accident, and further that J. J. Betzold was without any fault that in the slightest degree contributed to this accident; otherwise your verdict must be for the defendants."

We think these instructions conveyed the requisite information to the jury as fully and completely as the more technical instructions offered by the appellants would have done.

[5] The last point urged is that the amount of the verdict, $3,000, is excessive. This contention is based, not upon the fact that the respondent's injuries were not serious and permanent, but upon the claim that the respondent, by his own actions, aggravated the original injury. It is stated that immediately after the accident the respondent was taken to the office of a physician; that, instead of arranging to have his arm set and treated, he became involved in an argument with this doctor and left; that, after searching for another doctor, he finally reached the county hospital, where his injuries were attended to and the bones in his arm set; and that, thereafter, he went from one doctor to another until it was ultimately found that the original broken bones had not been properly set. Another doctor testified that the respondent came to him; that he was suffering

from a badly comminuted fracture of both bones of the right forearm; that it was a surgical case requiring hospitalization; that he was without sufficient funds; and that he advised him to go to the county hospital. There is no evidence that the respondent did not use ordinary care in the selection of a physician (Boa v. S. F.-Oakland T. Rys., 182 Cal. 93, 187 P. 2), and our attention is directed to no evidence that sustains the contention here made.

[6] During the oral argument of this case, complaint was made of the refusal of the court to give another requested instruction. This point was neither set forth in the original statement of the questions involved on this appeal nor referred to in either of the briefs filed by the appellants, and the same need not be here considered. Witter v. Bank of Milpitas, 204 Cal. 570, 269 P. 614. Without going into detail, we may add that any possible error in the matter referred to was, in our opinion, not prejudicial.

The judgment is affirmed.

I concur: MARKS, J.

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133 Cal.App. 213

## LINDBERG et al. v. LINDER et ux.

Civ. 7671.

District Court of Appeal, Second District,
Division 1, California.
July 8, 1933.

**1. Action 🔑63.**

"Laches" is available as defense only where, in addition to lapse of time, prejudice to defendant or another appears, or lapse is such that prejudice will be presumed if remedy should be allowed.

[Ed. Note.—For other definitions of "Laches," see Words & Phrases.]

**2. Trespass 🔑35.**

Action for damages for unauthorized use of residence lot for storage purposes despite protests of owners *held* not barred by laches, though use continued for several years.

**3. Trespass 🔑46(1).**

Unauthorized use of residence lot for storage purposes during several years, despite protests of owners, *held* sufficient to show prima facie cause of action in trespass.

**4. Trespass 🔑46(3).**

Evidence that use of residence lot for storage purposes despite owners' protests had deprived owners of use of lot *held* sufficient to show that owners had been damaged by such use.

**5. Trial 🔑165.**

For purpose of deciding motion for nonsuit, court must assume that all relevant evidence favorable to plaintiff is true.

**6. Licenses 🔑43.**

Where license of owners is relied on as defense to action in trespass, license implies assent of licensors.

**7. Trespass 🔑50.**

That lot used for storage purposes despite owners' protests was residence lot *held* not to prevent recovery of damages for such use.

**8. Trespass 🔑67.**

Where evidence concerned unauthorized use of entire lot as well as of parts of it, and showed reasonable rental value of lot as whole, question of damages was for trial court.

**9. Limitation of actions 🔑55(6).**

Recovery may be had for period not exceeding statutory period for continuing trespass, since statute does not begin to run from date of original entry.

**10. Trespass 🔑46(3).**

Evidence supported judgment of $500 for unauthorized use of residence lot for storage purposes for nearly three years.

**11. Trespass 🔑50.**

Measure of damages in case of trespass is reasonable rental value of premises.

**12. Appeal and error 🔑782.**

Appeal from order denying motion for new trial will be dismissed, since no appeal lies from such order.

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Appeal from Superior Court, Los Angeles County; Thomas H. Selvage, Judge.

Action by Charles O. Lindberg and another against George Linder and another. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Max Lewis, of Los Angeles, for appellants.

Albert & Brown, of Long Beach, and Leon B. Brown, all of Los Angeles, for respondents.

DESMOND, Justice pro tem.

Plaintiffs were awarded judgment in the sum of $500 by reason of defendants storing lumber, machinery, and rubbish upon a lot which plaintiffs owned in San Pedro. Defendants appeal, specifying as error the trial court's refusal to grant a motion for a nonsuit and also its refusal to grant a new trial. The case comes before us on a bill of exceptions, from which it appears that defendants early in 1923 began to use the real property of the plaintiffs, a lot 150 feet by 74 feet on Seventh street, one of the principal thoroughfares of San Pedro, for the purpose of placing a variety of materials upon it. This lot was in close proximity to another lot used, with the permission of its owner, by the defendants for the same purpose. The two lots were separated by a street which was not improved, and so was not apparent. One of the witnesses produced by plaintiffs testified that he had bought a load of lumber from the defendants, and that it was delivered to him from the plaintiff's lot where a carload of it was stored. There was a denial by the defendants that they had used the plaintiffs' lot without permission; it being contended that such use as was made of the lot was with the consent and knowledge of the plaintiffs, before this suit was started in 1929. There was testimony however that plaintiffs had requested defendants, one or the other, occasionally to clear the land. It may be noted also that at one point Mrs. Linder, one of the defendants, testified that she had at no time received permission to use plaintiffs' land. A witness for plaintiffs testified also that Mrs. Linder admitted to him that plaintiff C. O. Lindberg had requested her several times to remove the materials from his lot. A realtor called as witness by defendants testified that plaintiffs' property was zoned for residential purposes, and that it had no value for industrial purposes. He did not testify as to the fair rental value of the land, if any, for residential purposes, but did say that a lot across the street from plaintiffs' property 50 feet by 125 feet on Seventh street, which is in an industrial zone, had a rental value of $120 per year. It will be noted that, while plaintiffs' property is only 74 feet deep, it has a frontage on Seventh street three times as long as the other lot just mentioned. A realtor produced by plaintiffs testified that the reasonable rental value of the Lindberg lot from 1923 to 1929 was from $25 to $30 per month. There was conflicting testimony as to what portion of plaintiffs' lot was used by defendants, one of plaintiffs' witnesses describing it as an area 100 feet square, Mrs. Linder, on the other hand, stating that only the extreme end of the lot was used. George Lindberg, one of the plaintiffs, testified that they had been deprived of the use of their lot by the use which defendants made of it.

Defendants' motion for nonsuit rested upon the following grounds: First, laches; second, failure of the evidence to prove a prima facie cause of trespass; third, no evidence to prove plaintiffs had been damaged; fourth, implied license established by the evidence; fifth, no damage could be shown to have resulted from the use for industrial purposes, the property being zoned for residences; sixth, no evidence showing what portion of the land was used, no testimony as to the reasonable rental value of 100 feet square.

[1, 2] Commenting on these contentions in order, we note, as to the first, occasional requests for clearing the premises and admittedly friendly relations continuing between the parties until the plaintiffs finally took affirmative action to assert their rights. The defense of laches is available only where, in addition to a mere lapse of time, there appear circumstances from which the defendant or some other person may be prejudiced, or there must be such lapse of time that it may reasonably be supposed that such prejudice will occur if the remedy is allowed. 10 Cal. Jur. pp. 522, 524, and cases cited. No such circumstances appear in this case.

[3] As to the second contention, namely, that the evidence produced by plaintiffs was insufficient to prove a prima facie cause of action in trespass, we believe this position is untenable, in view of the repeated objections made by the plaintiffs to the use of their land in a residential zone for the purpose of placing thereon steam rollers, cement mixers, junk, and other unsightly objects. Certainly, in view of the testimony of the defendants themselves, as well as of several witnesses for the plaintiffs, this use was not permissive or ex contractu but tortious, and clearly constituted a continuing trespass upon the real estate of the plaintiffs. See Hathway v. Ryan, 35 Cal. 188.

[4, 5] As to the third ground, that no evidence was introduced nor was any attempt made to prove that the plaintiffs had been in any way damaged by the defendants' use of the property it appears from the bill of exceptions that one of the plaintiffs testified that by reason of the use which defendants made of the premises he was deprived of the same, and for the purpose of deciding a motion for a nonsuit the court must assume that all the evidence in favor of the plaintiffs, if relevant, is true. 9 Cal. Jur. p. 551.

[6] The fourth ground upon which the motion for a nonsuit was based, namely, that the evidence showed that the defendants had an implied license to the use of plaintiffs' land, is not touched upon in appellants' brief. We shall dispose of it here by saying that in the case of express or implied license the assent of the licensor is essential (16 Cal. Jur. 278), and there is no assent indicated in the evidence reported in this bill of exceptions.

[7] The fifth ground relied upon in the motion for a nonsuit was that the plaintiffs' lot is located in a residential district, and "therefore no damages could be shown to have been suffered by the plaintiffs by reason of the use and occupation of said land by the defendants." No argument is advanced to support this contention, and we cannot think of any that would have that effect.

[8] With the first contention in the sixth ground, namely, "that there was no evidence

showing what portion of said land was wrongfully used by the defendants," we do not agree in view of the testimony reported in the bill of exceptions. As to the remaining contention, "that the testimony of plaintiffs' witnesses only went to the reasonable rental value of the entire lot and there was no testimony whatsoever as to what the reasonable rental of a one hundred foot square of said lot was," we refer again to the testimony that defendants' use of this lot deprived plaintiffs of the use of it, and reproduce here the testimony of plaintiffs' witness Peterson as it appears in the bill of exceptions: "I have seen the plaintiffs' lot many times in the last few years, probably as often as once a week on the average, and at all times noticed more or less rubbish, materials and equipment on the same. Said materials and equipment often covered a large part of the lot." It may be that the trial court made its award for use of practically all of plaintiffs' lot or possibly for use of part only. From the foregoing, we conclude that the trial court committed no error in denying the motion for nonsuit.

[9] Appellants assume in their brief that judgment in this case was based upon an action for use and occupation and question the propriety of applying the reasonable rental rule of admeasuring damages set up in such an action by section 3334 of the Civil Code, which section also fixes the period for which recovery may be had at five years. The exact ground of the objection is not made clear, but our attention is called to language of the bill of exceptions reading as follows: "Opening statement was made by counsel for plaintiff to the effect that this action is brought for the purpose of obtaining damages sustained by reason of the *trespass* upon the property of plaintiffs, as described in the complaint." (Italics ours.) Possibly appellants' position is that by subscribing to such statement respondents have precluded themselves from recovering a judgment in any amount because the statute of limitations bars an action for trespass after three years, and the testimony in this case showed user extending over a period of more than six years. This position is not tenable, however, for, if there were a trespass here, it was a continuing trespass, and in such case the statute does not begin to run from the date of original entry, but recovery may be had for a period of time not exceeding the statutory period immediately preceding filing of the action. See comment on this subject in 25 Cyc. 1138, quoted in Kafka v. Bozio, 191 Cal. 746, 751, 752, 218 P. 753, 29 A. L. R. 833.

If the opening statement above quoted bound the respondents to a cause based on trespass, then we must consider the evidence as applicable to a period of three years prior to the date upon which suit was filed, August 15, 1929. Testimony was to the effect that appellants used plaintiffs' lot until July 1, 1929. Recovery then might be had for actual use over a period of 2 years 10½ months. Evidence as to reasonable rental value of this lot and of the lot across the street ran from $10 to $30 per month, and there was testimony that plaintiffs had demanded $15 per month for the use of their lot.

[10, 11] If the learned trial judge adopted the last-mentioned figure as a proper measure of value, his finding of $500 as damages can give no just cause of complaint on an arithmetical basis, at least so far as appellants are concerned. That a reasonable rental value affords a proper measure of damages in a case of trespass appears in Salmond on Torts (7th Ed. 1928), p. 246: "When a trespass consists in some beneficial use wrongfully made of the plaintiff's land even if it causes no damage, the plaintiff is entitled to claim by way of damages a reasonable remuneration for the use as if it had been under agreement. * * * The same principle applies to the unlawful use of a way over another's land; even though no harm has been done to the land, a reasonable rent for such a way may be recovered as damages." See, also, Tome Institute v. Crothers, 87 Md. 569, 40 A. 261, 267, and 38 Cyc. 1129.

[12] Since in a civil action no appeal lies from an order by which a motion for a new trial is denied, the purported appeal from such order made in this case is dismissed. Having reviewed all the evidence reported in this bill of exceptions, we see no reason to disturb the findings of the trial court.

Judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

218 Cal. 501

## In re JOHNSON'S ESTATE.

## PETERSON et al. v. PETERSON.

S. F. 14717.

Supreme Court of California.

July 14, 1933.

1. **Executors and administrators 🔑506(2).**

Failure to require evidence on matters alleged in petition for partial distribution *held* not error, where records and files of estate including inventory and appraisement were introduced which, in absence of contest, supported allegations of verified petition.

2. **Executors and administrators 🔑299.**

Question of bond on partial distribution *held* within court's discretion under facts.

> Facts showed that legatees and administrator agreed in writing that partial distribution of estate would not interfere with general creditors and other claims, and, when petition was filed, administrator did not contest.

3. **Executors and administrators 🔑314(12).**

Administrator could not complain of partial distribution to legatees because of lack of report of inheritance tax appraiser, where existence of inheritance tax was negatived by finding that distribution could be made without injury to any one and administrator could have asked for modification of decree.

**4. Executors and administrators** ⚷314(12).

Administrator could not object to partial distribution to legatees on ground that remaining assets were insufficient to pay debts and expenses, where no proof to such effect was given by him at hearing.

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In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Mary Johnson, deceased. From a decree directing partial distribution to Anna L. Peterson and others, John I. Peterson, administrator with the will annexed, appeals.

Affirmed.

Daniel A. Ryan and Thomas C. Ryan, both of San Francisco (George F. Snyder, of San Francisco, of counsel), for appellant.

Marion Vecki, of San Francisco, for respondents.

PRESTON, Justice.

Appeal by administrator with the will annexed from decree of partial distribution.

Mary Johnson died testate March 12, 1922. Probate proceedings were held in abeyance for some ten years awaiting the termination of litigation growing out of the probate of the estate of her deceased husband. The last will and testament of said Mary Johnson bequeathed to petitioners and respondents here, in respective proportions, the sum of $6,000. On December 12, 1931, an inventory and appraisement was made showing that the entire property of the estate consisted of $1,319.23 in money, household furniture valued at $500, and 80 shares of capital stock of Oulton Land Company, valued at $150 per share ($12,000)—a total of $13,819.23. Said stock was not listed on any exchange, and could not readily be sold. In February, 1931, respondent cash legatees, and appellant administrator had executed a written agreement whereby, in consideration of said administrator waiving his right to appeal from the decree of distribution entered in the matter of the above-mentioned estate of the deceased husband of this decedent Mary Johnson, said respondent cash legatees agreed to accept in compromise and in lieu of their said $6,000 cash legacies 36 shares of said stock to be divided among them in respective proportions. Pursuant to this agreement, respondents, on December 29, 1931, duly filed their petition for such partial distribution, alleging that the estate was but little indebted, and that the 36 respective shares of stock might be allowed to them without loss to the creditors or injury to the estate or to any person interested therein.

When the matter was called for hearing, respondents introduced in evidence all the papers, pleadings, and files in the matter of said estate, including the above-mentioned inventory and appraisement, and also an order for allowance to one Daniel A. Ryan of the sum of $2,500 on account of extraordinary services rendered by him to the administrator, plus $375.60 for expenses incurred. Counsel for appellant administrator opposed the granting of the petition for partial distribution, stating that the estate was indebted to the extent of $2,600 for fees and expenses of administration and $1,500 for other debts. Counsel for respondents, in opposition to this statement, introduced the register of actions in said matter, containing all the papers and documents filed therein, and informed the court that there were no claims on file against the estate other than the said claim for extraordinary counsel fees.

The transcript before us then shows that appellant administrator offered no evidence whatsoever. In other words, he utterly failed to offer any proof to substantiate his statements with respect to the indebtedness of the estate. The court thereupon, and on February 3, 1932, made and entered its decree of partial distribution as prayed, ordering the aforesaid respective distribution of 36 shares of said stock to respondents.

In prosecuting this appeal from said order of partial distribution, appellant administrator asserts: First, that the court erred in not requiring evidence upon the matters alleged in the petition for distribution and in not requiring a bond from the distributees, and lastly that the record fails to show that a report of the inheritance tax appraiser was on file and there was no evidence that no inheritance tax was due or payable.

[1-4] The petition is verified. The records and files of the estate were introduced, and included the inventory and appraisement. In the absence of a contest, this furnishes support for the allegations of the petition. In fact, the terms of the written agreement for the division and distribution of the estate furnish additional proof. The question of a bond on partial distribution, under the facts here, was one of discretion, and we see no showing of an abuse thereof. The existence of an inheritance tax against the legacies of the distributees is negatived by the finding that the distribution can be made without injury to any one interested in the estate. Besides, the administrator could have asked for an order directing retention from the property to be distributed of enough thereof to meet this anticipated charge. Estate of Ross, 187

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Cal. 466, 202 P. 641; Estate of Hill, 94 Cal. App. 114, 270 P. 708. Furthermore, if the facts justify it, the administrator may now ask for a modification of the decree to care for this item, if it exists. The fact is that in his reply brief appellant abandons this claim and rests his objection upon the claim that the assets remaining are now insufficient to pay the debts and expenses of administration. But, as already pointed out, no proof to this effect was even attempted by him at the hearing.

The decree is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; IRA F. THOMPSON, J.; CURTIS, J.; LANGDON, J.

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132 Cal.App. 215

**John L. RUSSELL, Plaintiff and Appellant, v. Olen RUFFCORN, Max B. Ruffcorn, Ola Ruffcorn, Georgia Ruffcorn, and E. B. Evans, Defendants and Respondents.**

**Civ. 4731 (3).**

Supreme Court of California.

July 21, 1933.

In Bank.

Appeal from Superior Court, Los Angeles County; Elias V. Rosenkranz, Judge.

Edwin J. Miller and Wier Casady, both of Los Angeles, for appellant.

Lorrin Andrews and Farrand & Slosson, all of Los Angeles, Geo. W. Padgham, of Pasadena, and E. B. Evans, of Monrovia, for respondents.

PER CURIAM.

In denying the petition for a transfer of this cause to this court after decision by the District Court of Appeal [22 P.(2d) 597] we withhold approval of that portion of the opinion which declares that the revocation of the permit automatically released the impounded stock. However, under the facts and findings recited by the District Court of Appeal, there can be no doubt but that the plaintiff was equally intent with defendants in his determination to obtain the stock without regard to and in defiance of the order impounding the stock. Hence the doctrine of Domenigoni v. Imperial Live Stock & Mortgage Co., 189 Cal. 467, 209 P. 36, concludes the argument of petitioner here.

Petition for hearing denied.

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218 Cal. 403

**RHINOCK v. PRICE et al.**

**L. A. 12474.**

Supreme Court of California.

June 28, 1933.

**1. Pledges** ⚷34.

Finding that plaintiff was owner of automobile sought to be recovered and entitled to immediate possession *held* implied finding that dealer did not acquire possession without notice of plaintiff's ownership.

**2. Pledges** ⚷24.

Evidence in action to recover automobile plaintiff surrendered to dealer's salesman warranted trial court's conclusion that dealer loaning salesman money on automobile as security had notice salesman was not real owner.

**3. Principal and agent** ⚷177(6).

In action to recover automobile plaintiff surrendered to dealer's salesman, and on which dealer loaned salesman money, salesman's knowledge that plaintiff owned automobile *held* imputed to dealer, where salesman acted for dealer in attempt to effect automobile sales (Civ. Code, § 2332).

**4. Pledges** ⚷24.

In action to recover automobile plaintiff surrendered to dealer's salesman, dealer loaning salesman money on automobile and having actual or imputed knowledge of plaintiff's rights *held* not innocent incumbrancer, hence plaintiff was entitled to possession (Civ. Code, § 2332).

In Bank.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Emma L. Rhinock against M. H. Price and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Prior opinion, 18 P.(2d) 724.

Samuel W. Newman, of Los Angeles, for appellants.

McAdoo, Neblett, O'Connor & Clagett, McAdoo, Neblett & Clagett, McAdoo & Neblett, and Frank G. Swain, all of Los Angeles, for respondent.

CURTIS, Justice.

This action was instituted for the purpose of recovering the possession of a Lincoln automobile.

Plaintiff, at the commencement of said action, and for a long time prior thereto, was the owner of said automobile. During all the time herein mentioned E. L. Butler was the agent of the defendant Parisian Motors, Inc. (a corporation), as a salesman, under an agreement with said corporation that he was to receive one-half of the profits on all automobiles sold by him for said corporation. The Parisian Motors, Inc., had the agency for the Hispano Suiza automobile. The defendant H. Lew Zuckerman was the secretary-treasurer of said corporation. He has no personal interest in this action. The same may be said concerning the other defendants in said action, with the exception of the Parisian Motors, Inc. The plaintiff and the Parisian Motors, Inc., are therefore the only parties in interest herein, and when we refer to defendant or appellant we mean the Parisian Motors, Inc. As the agent and salesman of the Parisian Motors, Inc., Butler apparently approached the plaintiff in an endeavor to sell to her an Hispano Suiza car. At least, in January, 1929, Butler came to Zuckerman, at the office of the corporation, and stated that he had a good prospect to sell one of the Hispano Suiza automobiles, and that it would be necessary, in order to make said sale, for him to buy a Lincoln car that belonged to the daughter of the proposed purchaser, and that he might need $500 to close the deal. Zuckerman gave Butler two checks for $250 each, to be used on the purchase of said Lincoln car. A few days later Zuckerman gave Butler $100 and finally another $100, for the same purpose for which he had given him the $500. In the meantime Butler had the Lincoln car in his possession, evidently endeavoring to sell it for the plaintiff. On February 15th Butler wanted more money from Zuckerman, and offered to give the Lincoln car as security for the money advanced to him by Zuckerman and for any future loans or advancements. Zuckerman declined to loan Butler any more money unless the Lincoln car was turned over to him, together with the "pink slip" or certificate of ownership. At some time, whether before or at the time Zuckerman demanded the "pink slip," Butler represented to the plaintiff that he had sold the Lincoln car and required the "pink slip" to consummate the sale. Plaintiff accordingly indorsed and delivered to him the "pink slip." Butler then delivered to Zuckerman the possession of the Lincoln car and the "pink slip." Zuckerman gave to Butler an additional sum of $200, and agreed to advance to him further amounts, not exceeding the sum of $1,500, on the automobile. Zuckerman put the Lincoln car in his garage overnight, and a few days thereafter, possibly the next day, returned the car to Butler for the purpose of enabling the latter to sell it. Zuckerman made additional advancements to Butler; the total amount of money so advanced being $1,131. On March 22, 1929, while Butler was driving the Lincoln car, he met with an accident which caused his death. Zuckerman thereupon took possession of the car, and later, on demand of the plaintiff, refused to deliver it to her. Hence this action. The trial court rendered judgment in favor of the plaintiff for the possession of the car, and the defendants have appealed under the alternative method provided by section 953a of the Code of Civil Procedure.

As a ground for reversal of the judgment, appellant contends that the respondent was estopped from asserting any claim to said car prior or superior to that of the Parisian Motors, Inc. This contention is based upon the fact that the respondent had parted with the "pink slip," or indicia of ownership, together with the possession of the car, and, as against an innocent purchaser or pledgee, she was estopped from asserting her ownership of said car. In support of this contention, appellant relies upon the case of Rapp v. Fred W. Hauger Motors Co., 77 Cal. App. 417, 246 P. 1067, which holds that an owner of an automobile who has clothed another with the indicia of ownership of his automobile is estopped, as against an innocent purchaser or incumbrancer thereof, from asserting his ownership or right of possession to said automobile. The principle enunciated in that case would apply to the instant case if the Parisian Motors, Inc., at the time it acquired possession of said automobile, was an innocent incumbrancer thereof.

[1-4] The trial court made no specific finding as to whether the appellant was or was not an innocent incumbrancer of the Lincoln car at the time it acquired possession thereof. It made, however, a general finding that the plaintiff was at the time of the commencement of said action, and at all times thereafter, the owner of, and entitled to the immediate possession of, said car. This finding must be accepted as at least an implied finding that appellant did not acquire possession of said car without notice, either actual or imputed, of the plaintiff's ownership thereof. There is evidence in the record that might warrant the conclusion that the appellant through its secretary-treasurer, Zuckerman, had actual notice of respondent's ownership of said car, or at least had sufficient knowledge of facts to put it on inquiry as to Butler's claim of ownership. Zuckerman testified that Butler first came to him and told him that he had a good prospect to sell a Hispano Suiza car, provided he could buy the Lincoln car. Later he said that Butler told him he had purchased the car, and still later Butler asked for a loan to close the deal, and Zuckerman advanced money for that purpose, and later, when Butler asked for an additional loan, Zuckerman demanded the certificate of ownership and possession of the car as security. This additional loan was made upon the conditions imposed by Zuckerman. Zuckerman also testified that Butler told him that he must sell the Lincoln car in order to make the deal for the Hispano Suiza car. Why was it necessary for Butler, if he had pur-

chased the Lincoln car from the respondent, to sell it in order that the respondent might purchase a Hispano Suiza car from the appellant? The only reasonable inference to be drawn from this testimony was that the respondent still owned the Lincoln car, or at least had a substantial interest therein. If the trial court from this evidence drew the conclusion that appellant was put on notice that Butler was not the real owner of said car, we think it was warranted in arriving at such conclusion, and we feel bound by its determination of that matter. We think any reasonably prudent person, acting in entire good faith, with this knowledge in his possession, would have made inquiry of the true owner (whose name and address were on the certificate of ownership) before accepting the car as security for money loaned. But, even if the appellant had not actual knowledge sufficient to put it upon inquiry as to the true ownership of the Lincoln car, yet Butler had knowledge of all of the facts, and knew that the respondent had never parted with her ownership of the Lincoln car. Butler was the agent of the appellant in the sale of Hispano Suiza cars, and as such agent gained possession of the Lincoln car for the purpose of negotiating a sale of a Hispano Suiza car. The evidence does not definitely define the scope of Butler's authority, but it is undisputed that the knowledge gained by him was acquired while he was acting for appellant and in an endeavor to carry out the purpose of his employment. Under these circumstances, we think the knowledge of Butler must be imputed to his principal, the Parisian Motors, Inc. "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." Civ. Code, § 2332. This is a familiar and well-established principle, and has been frequently expressly followed by this court. Christie v. Sherwood, 113 Cal. 526, 530, 45 P. 820; McKenney v. Ellsworth, 165 Cal. 326, 329, 132 P. 75, 76; 12 Cal. Jur., p. 775. In the case of McKenney v. Ellsworth, supra, the rule was applied even when the agent was dealing with his principal in a transaction in his own behalf. In that case the court said: "Where an agent of a corporation is dealing with the corporation in a transaction in his own behalf, it will not be presumed that he will communicate to his principal facts affecting the transaction. [Citing authorities.] This is no doubt the general rule regarding the imputing to a principal of notice of facts known to an agent who is, in the particular transaction in question, acting in an interest adverse to that of his principal. But the rule is not without exceptions. If the agent is in fact acting for his principal in the transaction, even though he may have an opposing personal interest, 'it is his duty, notwithstanding his interest, to communicate to his company (principal) any facts in his possession, material to the transaction, and the law will therefore presume, in favor of third persons, that he made such communication.'" The appellant, the Parisian Motors, Inc., having either actual or imputed knowledge, or both, of respondent's rights in said Lincoln was not an innocent incumbrancer thereof. The rule therefore announced in Rapp v. Fred W. Hauger Motors Co., supra, does not govern this case, nor has it any applicability to the actual facts thereof.

There are other questions raised by respondent in support of the judgment, but, inasmuch as we are of the opinion that the appeal is without merit for the reasons hereinbefore stated, it is not necessary to discuss these further questions.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; IRA F. THOMPSON, J.; PRESTON, J.; LANGDON, J.; SHENK, J.

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218 Cal. 435

## SECURITY-FIRST NAT. BANK OF LOS ANGELES v. J. G. RUDDLE PROPERTIES, Inc., et al.

Sac. 4479.

Supreme Court of California.

June 29, 1933.

Rehearing Denied July 28, 1933.

**1. Alteration of instruments** ⚷29.

Finding that trust deed was not altered after execution *held* supported by substantial evidence.

**2. Appeal and error** ⚷1010(1).

Finding supported by substantial evidence is binding on appellate court.

**3. Licenses** ⚷39.

Presumption is that holders of corporate bonds secured by trust deed took them in usual course without notice that permit for issuance had not been obtained (St. 1917, p. 679, § 12).

**4. Licenses** ⚷39.

Corporation which failed to obtain permit for issuance of bonds secured by trust deed cannot set up its own wrong against innocent purchasers (St. 1917, p. 679, § 12).

**5. Mortgages** 🔑**512.**

Where trust indenture provided that on foreclosure all property should be sold together, unless "impracticable," mere unprofitableness of sale as unit did not require sale in smaller units.

> "Impracticable" means not practicable; incapable of being performed or accomplished by the means employed or at command.
>
> [Ed. Note.—For other definitions of "Impracticable," see Words & Phrases.]

**6. Mortgages** 🔑**578.**

Judgment ordering sale of all property together on foreclosure as provided by trust indenture will not be disturbed, where it does not appear that resale in small units would bring greater return than amount realized from sale already had.

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In Bank.

Appeal from Superior Court, Merced County; L. W. Fulkerth, Judge.

Action by the Security-First National Bank of Los Angeles against the J. G. Ruddle Properties, Inc., and others. From judgment rendered, named defendant and others appeal.

Modified and affirmed.

Prior opinions, 12 P.(2d) 468, 14 P.(2d) 850.

See, also, 211 Cal. 346, 295 P. 343.

James F. Peck, of San Francisco, Robert L. McWilliams, of San Francisco, Gibson, Dunn & Crutcher, of Los Angeles, Stephen W. Downey, of Sacramento, Edward Bickmore, of Merced, and C. H. White and C. F. Rafferty, both of San Francisco, for appellants.

Louis Ferrari, T. J. Bricca, and C. H. White, all of San Francisco, for appellant Carl E. Wagner.

O'Melveny, Tuller & Myers, Homer I. Mitchell, and Walter K. Tuller, all of Los Angeles, for respondent.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, Third Appellate District, and upon further consideration of the cause we adopt part of the opinion of Mr. Presiding Justice Preston, reading as follows:

The Security-First National Bank of Los Angeles, having succeeded to all the rights and authority of the Los Angeles Trust & Savings Bank and the Pacific-Southwest Trust & Savings Bank, was substituted as plaintiff in this action.

Plaintiff brought this action to foreclose a mortgage or deed of trust executed by defendant J. G. Ruddle Properties, Inc., to secure $300,000 in bonds.

Plaintiff was named as trustee in said instrument, and judgment was rendered in its favor as said trustee for the sum of $466,580.97, foreclosing the said mortgage and ordering the property described therein to be sold and the proceeds applied to the payment of said sum.

The judgment further provided that defendant Hunter, Dulin & Co. has a lien on said property, subject to plaintiff's mortgages, for $26,338.17, that defendant Carl E. Wagner has a lien on said property, subject to the lien of plaintiff and to the lien of Hunter, Dulin & Co., for $33,283.01; and that defendant T. H. Carlon has a lien on said property, subject to the lien of plaintiff and the liens of Hunter, Dulin & Co., and Wagner, for $29,163.55.

From this judgment defendants Ruddle Properties, Inc., Carlon, Lemas, Pareira, Bettencourt, Silva, Petta, and Wagner have appealed.

This mortgage or deed of trust was given to secure the payment of bonds to the amount of $300,000, 275 of said bonds being of the denomination of $1,000 each and 50 of said bonds being of the denomination of $500 each. Permit from the Corporation Commission was obtained for the sale of said bonds amounting to the sum of $225,000, but no permit was secured for the sale of the bonds amounting to the sum of $75,000.

The court found that all of said bonds were sold by appellant J. G. Ruddle Properties, Inc., to bona fide purchasers for value in good faith, before maturity, without notice of any defect or infirmity in said bonds, or any of them. The Hunter, Dulin Company acted as agent for J. G. Ruddle Properties, Inc., in negotiating the sale of said bonds.

The principal contention of appellants is that the mortgage or deed of trust was altered, in material respects, after its execution, without the knowledge or consent of appellant Ruddle Properties, Inc.

Allan Ruddle, a witness for appellants, testified that he was the vice president of Ruddle Properties, Inc., at the time the mortgage or deed of trust was executed. The original mortgage or deed of trust, together with a copy, were handed to witness by Hugh Landram, the attorney for Ruddle Properties, Inc. He took them home, and the next day, August 10, 1922, he, his father, since deceased, and his brother, Garland Ruddle, then secretary of said company, carefully read the said document and the two documents were identical. Witness testified that there were pencil alterations in both the original instruments and in the copy, and that the alterations were the same in each; that he retained possession of said documents until August 14, 1922, when he and his father and brother went to Merced, and in the office of their attorney, Landram, the original was signed and acknowledged; that at that time the pencil interlineations were still on the original after its execution; that Phil Brooks, the agent of Hunter, Dulin & Co., came to the home of witness on August 15, 1922, and brought the bonds which were signed by his father and brother and were delivered to said Brooks together with the mortgage or deed of trust; that Brooks said that, when he got back to Los Angeles, he would write in ink the pencil notations contained in the original; this witness also testified that there was a good deal of hurry and rush among the attorneys in order to get the papers in shape for the bond issue; that all papers regarding this matter were prepared in Los Angeles and sent up from there. The testimony of Garland Ruddle on behalf of appellants was substantially the same as that of Allan Ruddle.

An examination of the copy of the mortgage or deed of trust returned by Allan Ruddle, and which appellants introduced in evidence as their Exhibit No. 7, shows about thirty interlineations in pencil, whereas the original mortgage or deed of trust executed on August 14, 1922, shows none (being Plaintiff's Exhibit 1).

H. K. Landram, a witness for respondent, testified that he was the attorney who represented J. G. Ruddle Properties, Inc., in the matter of their bond issue of $300,000; that the deed of trust securing same was executed in his office in Merced and in his presence, and was acknowledged before him as a notary public; that the said instrument did not when so executed contain any pencil notations, nor did it have any of the pencil notations that appear on Appellants' Exhibit No. 7. He stated on cross-examination that he could not say whether or not he read the deed of trust before it was executed. He had been instructed by Mr. North of the firm of Gibson, Dunn & Crutcher to be extremely careful that everything was done just right, and, while he could not say that the deed of trust produced in evidence by respondent was in the identical condition that the instrument was in when it was executed and acknowledged in his presence, he reiterated the statement that there was no pencil writing on that instrument at the time it was executed. R. L. North, a witness for respondent, testified that he was an attorney, and was associated with Gibson, Dunn & Crutcher of Los Angeles; that he had charge of legal matters connected with the bond issue of Ruddle Properties, Inc., and that he prepared the trust deed and other documents pertaining to the bond issue; that Landram was the attorney for said company, and that witness sent him the various documents relating to the transaction; that he sent Landram the deed of trust that was executed by the Ruddle Properties, Inc.; that Appellants' Exhibit No. 7 was an early draft of the proposed deed of trust; but that the deed of trust that he sent Landram for execution by the Ruddle Company was a completed instrument, and that the deed of trust is now in the same form it was when it was sent to Landram for execution; that the only writing with pen and ink that appears on the deed of trust is the filling in of certain dates which were placed there by witness before he sent it to Landram for execution; that a copy of this instrument was sent to the corporation commissioner a few days after its execution.

An inspection of Respondent's Exhibit No. 1, which is the deed of trust executed by the Ruddle Company, shows no pencil marks nor writings with pen and ink except the aforesaid dates.

One of the changes which appellant claims to have been made after its execution was that the deed of trust covers after-acquired property. On August 4, 1922, and again on August 11th following, resolutions were passed by the board of directors of the Ruddle Company authorizing the insertion of this clause in the deed of trust, and these resolutions were prepared by North.

Allan Ruddle testified that he discovered that changes had been made in the deed of trust in 1928; that at the last-named date he found a letter written by Brooks to Landram dated August 17, 1922, in which Brooks requested Landram to send his copy of the trust deed to him in order that he might substitute corrected pages which were made in the original, and that, upon such substitution being made, he would return it to Landram for his files. Landram made no reply to this letter. He further testified that he had a certified copy of this deed of trust made in 1924 for the purpose of securing a loan or for use in selling some of said stock.

[1, 2] The trial court found that the mortgage or deed of trust was not altered in any respect after its execution on August 14, 1924. We are of the opinion that this finding is supported by substantial evidence, and, such being the case, this finding is binding upon this court.

[3] Appellants next contend that the bonds amounting to $75,000 having been issued without the permission of the corporation commissioner are void. Supporting this contention he cites section 12 of the Corporate Securities Act of Statutes of 1917, p. 679, which provides "every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void."

The $75,000 worth of bonds for which no permit was issued were all issued and sold by appellant Ruddle Company in 1923 and 1924 for value. None of them matured until 1926. While there is no direct evidence that the holders of these bonds took them without notice that a permit for their issuance had not been given by the corporation commissioner, yet the inference is that they took them in the usual course of trade without such notice.

In the case of Goodale v. Thorn, 199 Cal. 307, 249 P. 11, 12, the court said: "Upon proof by the defendant of fraud or illegality in the inception of the note, the burden is cast upon the indorsee to show that he is an innocent holder. This the latter may do by showing that he purchased the note before maturity, or from an innocent indorsee for value, in the usual course of business. When this is done, unless the evidence shows that the note was taken by the plaintiff under circumstances creating the presumption that he knew the facts impeaching its validity, the burden is cast upon the defendant to show, if he would defeat the plaintiff in his action, that the latter took the instrument with notice of the defendant's equities. Eames v. Crosier, 101 Cal. 260, 35 P. 873. To the same effect are the cases of Sinkler v. Siljan, 136 Cal. 356, 68 P. 1024; Bell v. Pleasant, 145 Cal. 410, 78 P. 957 [104 Am. St. Rep. 61]; Blochman Commercial Bank v. Moretti, 177 Cal. 256, 170 P. 419."

The trustee in this case, the respondent, is merely a nominal party in this action; the real parties in interest are the owners and holders of the bonds. In the recent case of Eberhard v. Pacific Southwest Loan & Mortgage Corporation (Cal. Sup.) 9 P.(2d) 302, 303, after stating that there was nothing whatever to show that plaintiffs were anything more than innocent victims of appellant, which was now seeking to profit by its own deliberate wrong, the court said: "The inhibitions of the Corporate Securities Act * * * against sales of securities to the public without permits are meant to protect the public from imposition and deception—not primarily to benefit the seller. The seller and the purchaser are therefore in no sense in pari delicto where this provision is violated. The fact that the transaction may be void at the behest of the purchaser is not to allow a premium for real wrong done by the seller. The fundamental maxim that 'no one can take advantage of his own wrong' (section 3517, Civ. Code), and other kindred principles, immediately recur to the mind. The above is but a recast of the doctrine abundantly supported by authority and applied in cases involving this very act done under similar circumstances. See Pollak v. Staunton, 210 Cal. 656, 293 P. 26; Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418; Tatterson v. Kehrlein, 88 Cal. App. 34, 263 P. 285, and Castle v. Acme Ice Cream Co., 101 Cal. App. 94, 281 P. 396; Hemmeon v. Amalgamated, etc., Co., 95 Cal. App. 400, 273 P. 74."

The recent case of Braunstein v. Title Guarantee & Trust Co., 216 Cal. 780, 17 P.(2d) 104, is to the same effect.

[4] So in the instant case, there is no showing made that the bondholders are other than innocent victims of appellant, Ruddle Company, which is now seeking to profit by its own wrong.

We are therefore of the opinion that, under the circumstances, the defense that no permit was given to sell these bonds cannot avail appellants.

[5, 6] The only other point which requires notice is the contention of appellants that the trial court should have ordered the property sold in smaller units instead of as one parcel. The argument is based solely upon the testimony of their witness Allan Ruddle, who described the property as divided into six units of dairies, a number of orchards, vineyards, and some pasture land, and gave it as his opinion that a sale of the tract as a whole would realize only 50 per cent. of its value.

It may well be assumed that the trial court, in disbelieving the testimony of this witness on the issue of alteration, likewise gave it little force in drawing its conclusion on the manner of sale. However, taking such testimony at its face value, it would still fall far short of grounds for reversal. The trust indenture provided that, in the event of default and foreclosure, the whole of the property should be sold as one parcel and as an entirety, "unless such sale as an entirety be impracticable by reason of some statute or other cause." The term "impracticable" means "not practicable"; "incapable of being performed or accomplished by the means employed or at command." Webster's New International Dictionary. Respondents argue with much conviction that under the rule of ejusdem generis, where general words, such as "other cause," follow specific words which enumerate objects of one class, such as "statute," the general words will be construed to refer only to things of such class. See Matter of Petition of Johnson, 167 Cal. 142, 138 P. 740; Smith v. First Nat. Bank, 114 Okl. 293, 245 P. 653; United States v. Phez Co. (C. C. A.) 28 F.(2d) 106. Under this reasoning, the impracticability would have to arise from a statute or similar cause. But it is unnecessary to rely upon this doctrine, for the plain meaning of the words used excludes the interpretation sought by appellants. Their argument is simply that a sale as an entirety would be unprofitable; but they do not contend that it is impossible or even difficult, and, in fact, the sale actually did take place, realizing $310,000. It is by no means clear from the record that a reversal, followed by a resale in small units, each subject to individual redemption, would bring a greater return.

It follows that the trial court did not err in ordering the sale of the property as an entirety.

The judgment is modified by striking out paragraphs III, IV, V, and VI of the judgment relating to the liens of Hunter, Dulin & Co., Carl T. Wagner, and T. H. Carlon; and, as so modified, is affirmed.

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132 Cal.App. 72

**Georgia WALTERS, by her Guardian ad Litem, Richard Walters, Plaintiff and Respondent, v. Lawrence E. DU FOUR et al., Defendants and Appellants.**

**Civ. 4969 (3).**

Supreme Court of California.
July 17, 1933.

In Bank.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

On rehearing.

Rehearing denied.

Prior opinion, 22 P.(2d) 259.

Myrick & Deering and Scott, of San Francisco, and Russell F. O'Hara, of Vallejo, for appellants.

John J. McMahon, of San Francisco, and Thos. J. Horan, of Vallejo, for respondent.

PER CURIAM.

In denying the petition for a hearing of this cause by this court, we withhold our approval of that portion of the opinion which, in effect, sanctions the form and substance of instruction No. 38, but if error was committed in the giving of the instruction (a point which we do not decide), it was cured by instruction No. 8, as indicated in the opinion.

Petition denied.

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218 Cal. 490

**In re SHANNON'S ESTATE.**

**L. A. 14093.**

Supreme Court of California.
July 13, 1933.

**1. Appeal and error ⚷843(2).**

Termination of first guardianship and creation of second guardianship with same person as guardian *held* to render immaterial determination of questions raised by appeals from orders in first proceeding.

**2. Guardian and ward ⚷13(4).**

Record *held* to sustain propriety of orders appointing and refusing to remove stepmother as guardian for minors, where father was dead and natural mother had remarried and was living outside United States.

In Bank.

Appeal from Superior Court, Imperial County; V. M. Thompson, Judge.

In the matter of the guardianship of the persons and estates of Evelyn Shannon and Richard Shannon, minors. From an order appointing Alta Shannon as guardian and certain other orders, Florence Monsees appeals. On motion to dismiss the appeal or affirm the orders appealed from.

Orders affirmed.

Edward B. Patterson and Frank Birkhauser, both of El Centro, for appellant.

Whitelaw & Whitelaw, of El Centro, for respondent.

PRESTON, Justice.

This is a controversy between the natural mother and the alleged stepmother of two minor children for appointment as their guardian. The guardianship was awarded to the stepmother. An appeal was thereupon taken from various orders and rulings of the court below, as hereinafter set forth, and the matter is now before us on motion to dismiss the appeal or affirm the order or orders of the court below.

The mother of the children, Florence Shannon, now Florence Monsees, at the age of sixteen, and in the year 1919, married the father, James Shannon. Some seven years later she sued him for divorce and on September 13, 1926, was given an interlocutory decree on grounds of mental and physical cruelty. The two children of the marriage, Evelyn and Richard, then aged six and five years, respectively, were to spend six months of the year with each parent. Shortly after the entry of said interlocutory decree of divorce, and on November 3, 1926, James Shannon married Alta Shannon at Florence, Ariz. Questioning the legality of this ceremony, they were again married on December 23, 1926, at Mexicali, Mexico. Later they established a home in California for the two minor children above mentioned, and for their own daughter, Dorothy Jean Shannon. On May 8, 1931, James Shannon was killed in an industrial accident. He left a small estate, which went into the possession of Alta Shannon, as his widow; in addition the industrial accident commission awarded to the three children jointly, upon waiver of any claim of said widow, a death benefit of $5,000, payable to each of them at the rate of $8.33⅓ a week. Meanwhile the first wife had secured her final decree of divorce from James Shannon and on March 22, 1930, had married one Xel Monsees, who claimed to be willing and able not only to support her, but also to provide a home and an education for said two minor children of her first marriage.

On June 15, 1931, Alta Shannon petitioned to be made guardian of said Evelyn and Richard Shannon, then aged eleven and nine years, respectively. The mother, Florence Monsees, filed an answer and cross-petition. Hearings were had, and the court on June 27, 1931, made its order to the effect that said mother was not a fit, proper, and competent person to be appointed guardian of said children, but that Alta Shannon was and letters of guardianship were therefore granted to her as prayed and she was also awarded the payments from said compensation fund for use toward the maintenance and education of the children. In December, 1931, at the time of hearing of the first account current of the guardianship, Florence Monsees again appeared and petitioned for the removal of said guardian, claiming that James Shannon and Alta Shannon were never legally married and that the motive of the latter in winning the children to her side was merely to secure the estate of the father and the payments from said compensation fund; further that said guardian had misused the property and was wasting the estate of the children. Further proceedings were had. Alta Shannon waived her claim to the estate of said James Shannon in favor of all three of the children. In March, 1932, she filed her final account of the guardianship of the two minors and said guardianship was thereafter duly terminated by the court, pursuant to her petition, for the purpose of appointing her guardian of all three of the children. The final account was allowed, and on May 26, 1932, after further hearings, and over the objection of said Florence Monsees, Alta Shannon was duly appointed guardian of all three of said minor children. Florence Monsees thereupon moved for a new trial. The motion was denied and she then filed a notice of appeal from the "order * * * appointing Alta Shannon guardian of said minors and from order * * * refusing to revoke said order * * * so appointing said guardian, and from the order * * * refusing to remove said Alta Shannon as such guardian * * * and from the order refusing to grant a new trial * * * and also those signed by the court on May 12 * * * and May 16, 1932 (findings of fact, conclusions of law, and order allowing final account of guardian). * * *"

We are now asked to dismiss the appeal from the order of June 27, 1931, appointing Alta Shannon guardian of the two minors on the ground that said order was appealable and became final before the time of filing notice of appeal (July 1, 1932). We are also asked to dismiss said appeal and the other appeals upon the further ground that the questions thereby presented have become moot by reason of the termination of said guardianship.

[1, 2] It will readily be seen that the termination of the first guardianship and the creation of the second guardianship rendered immaterial the determination of all questions raised by the appeals from orders made in the first proceeding. But these two proceedings were so interwoven in the hearings by the court below as to make their separate review impossible. The record contains but one clerk's and one reporter's transcript, covering all hearings had and evidence taken from June, 1931, to May or June, 1932. In other words, the only real question raised by any of the appeals is that of the sufficiency of the evidence to support the conclusions of the court below. To determine this issue we have reviewed the entire record and find ourselves in thorough accord with the findings, orders and judgment. The evidence was not without conflict, but it well warranted the appointment and reappointment of Alta Shannon as guardian, and the various other orders made. In closing we shall set forth a portion of the memorandum decision made by the court below, which has our unqualified approval.

In said memorandum decision it is stated that although certain things in connection with the guardianship led the court to believe there might be some justification for removal of the guardian, on the other hand, considering the present and future rights and benefits of the minors, it seemed she should not be removed; that after talking alone with Evelyn and Richard Shannon, the court was thoroughly convinced that they looked upon Alta Shannon as their mother and looked upon Florence Monsees as a person not very near to them because during the five years of their development they had been reared in the home with Alta Shannon as their mother; that they also expressed great love and affection for their little half-sister and did not want to be separated from her; that the conclusion reached by the court made the estate, including the home, available for all the children; that the children were doing exceedingly well in school and were being well reared and educated; that the present home of Mr. and Mrs. Monsees is in Canada; that giving Mr. Monsees full credit for sincerity in his offer to care for the minors, there would be no legal responsibility upon him and he would be a nonresident of both California and the United States; that if the children were placed in the care of their natural mother, they would be removed from the jurisdiction of the court, from their property and home, from the school they have attended for several years and from their associates, and it would mean breaking up an established family and placing said children with a mother who has had little contact with them for five years or more and a stepfather whom they have seen only a few times, in entirely strange surroundings; that considering all these things, the court could not bring itself to make an order affecting the present status of said children.

As above stated, it is our view that under the evidence presented, the court made wise disposition of this cause.

The several orders and judgment appealed from are hereby affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

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218 Cal. 460

### HERSH et al. v. GARAU et ux. (MacCONNELL et al., Interveners).

### L. A. 12452.

Supreme Court of California.

June 30, 1933.

**1. Appeal and error 🔑1011(1).**

Trial court's finding based on conflicting evidence is conclusive unless testimony is so obviously false or so inherently improbable as to require its rejection.

**2. Vendor and purchaser 🔑44.**

Evidence sustained finding that option to purchase realty had not been revoked when exercised by optionee's assignee.

**3. Vendor and purchaser 🔑18(½).**

Option to purchase realty constituted continuing offer which remained open for agreed term thereof unless sooner revoked by notice to optionee, irrespective of whether consideration was given for option.

**4. Vendor and purchaser 🔑18(3).**

Option to purchase realty not revoked prior to acceptance by optionee's assignee became valid contract on proper tender of performance.

**5. Vendor and purchaser 🔑18(3).**

Tender made by legal owner of option to purchase realty *held* not rendered ineffective because legal owner held title to option as trustee for undisclosed beneficiary.

**6. Vendor and purchaser 🔑350.**

Evidence sustained finding that assignee of option to purchase realty had ability to pay consideration required by option.

**7. Vendor and purchaser 🔑350.**

Evidence sustained finding that at time optionors refused to convey property, it had increased in value not less than $150,000 in excess of consideration set out in option.

**8. Vendor and purchaser 🔑350.**

Evidence sustained finding that optionors acted in bad faith in refusing to convey property in accordance with option to purchase by reason of increase in value of property (Civ. Code, § 3306).

In Bank.

Appeal from Superior Court, Los Angeles County; Frank Lamberson, Judge.

Action by Sara F. Hersh and husband against Aurelio Garau and wife, in which Allen R. MacConnell, as trustee in bankruptcy of the Green Mill, Incorporated, and another intervened. From an adverse judgment, defendants appeal.

Affirmed.

For prior opinion, see 14 P.(2d) 534.

See, also, 126 Cal. App. 380, 14 P.(2d) 536.

Haas & Dunnigan, Walter F. Haas, H. C. Johnston, G. E. Kerrin, and W. E. McClintock, all of Los Angeles, for appellants.

Meserve, Mumper, Hughes & Robertson and Baldwin Robertson, all of Los Angeles, for respondents.

M. Seaton Cohen, Ellis I. Hirschfeld, and Samuel W. Blum, all of Los Angeles, for intervener Ellis I. Hirschfeld.

Holbrook, Taylor, Tarr & Horton, Joseph K. Horton, and D. Howard Painter, all of Los Angeles, for intervener Allen R. MacConnell.

CURTIS, Justice.

This action was instituted by plaintiffs, Sara F. Hersh and Samuel Hersh, husband and wife, to recover damages in the sum of $150,000 for the refusal on the part of defendants, Aurelio Garau and Sarah Garau, husband and wife, to convey to plaintiffs certain real property in accordance with the terms of a written option to purchase said property given by defendants to one Morris Rauch and by him assigned to plaintiff Samuel Hersh.

The undisputed facts of the case, very briefly stated, are as follows: In November, 1922, Aurelio Garau and his wife, Sarah Garau, were the owners in fee simple of a piece of property consisting of approximately eight acres known as the "Garau Home Place" located near Culver City, which property is bounded on the south side by Washington boulevard, a major boulevard from Los Angeles to Venice, on the west side by National boulevard, and on the north side by

Venice boulevard. During the month of November, 1922, Garau and his wife entered into an agreement leasing said property to the Green Mill Catering Company, and in January, 1923, said company commenced the construction thereon of a large café and restaurant building. Thereafter the Green Mill, Inc., was formed, which assumed the rights, duties, and privileges of said Green Mill Catering Company and completed said building, at a total cost in excess of $90,000. During this period of construction Morris Rauch secured from Garau and his wife a written option, dated March 26, 1923, for one year, to purchase said property for a consideration of $90,000 cash, or upon terms to be agreed upon by the parties. This option was given for the reason that Rauch stated that it was impossible for the Green Mill, Inc., to finance the construction of the building on leased property without an option to purchase the property during the life of the lease, and it was the understanding of Garau and Rauch that upon the satisfactory completion of the building Rauch should repurchase from Garau the stock in the Green Mill, Inc., which Garau had theretofore purchased. Thereafter, Rauch interested Samuel Hersh in furnishing money for the completion of said building, and Hersh out of funds owned by his wife put into the construction of said building a substantial amount of money and Rauch assigned, by written assignment, to Samuel Hersh, the option upon said real property. The date of said written assignment was September 26, 1923, and two days later it was put on record in the office of the county recorder. At the same time another written agreement was entered into between Rauch and Hersh with reference to the purchase of stock in the Green Mill, Inc., by Hersh, and setting out certain conditions upon which Rauch would be entitled to a one-half interest in said option. On February 15, 1924, Hersh personally delivered to Garau and his wife a written notification of his election to exercise said option, agreeing unconditionally therein to pay the $90,000 in cash, or upon any terms of payment satisfactory to Garau. Garau informed Hersh that he should see his (Garau's) attorney, and thereafter Hersh received from the attorney for Garau a letter stating that Garau declined to accept the tender or offer of cash or terms "for the reason that no consideration of any kind was paid Mr. or Mrs. Garau * * * for the option mentioned in your letter." Subsequent to this rejection of the tender, Morris Rauch was killed in an accident, and was not available as a witness by either party. Thereafter the Green Mill, Inc., went into bankruptcy.

The case was tried by the court sitting without a jury and judgment was rendered in favor of plaintiffs and against the defendants for damages in the sum of $150,000. The complaint alleged that the consideration moving to said Morris Rauch for said assignment was furnished by and was the property of Sara F. Hersh, and that said assignment was taken in the name of Samuel Hersh, as the trustee of and for the benefit of Sara F. Hersh. Said judgment was, therefore, rendered in favor of the plaintiffs "for the benefit of Sara F. Hersh as her sole and separate property." From this judgment the defendants have appealed.

Appellants advance as the basis of the claim that respondents are not entitled to damages for the refusal of appellants to convey said property in accordance with the terms of the written option the following reasons: (1) No consideration was paid by Morris Rauch to appellants for the option, and they, as optionors, were therefore not required to carry out the terms of the option; (2) at a time prior to the assignment of the option by Rauch to Hersh, the original parties, appellant Garau and Morris Rauch, by mutual consent and agreement, orally expressed, had abandoned the option and it thereafter ceased to have legal force or effect; (3) the tender of performance made by Hersh to Aurelio Garau was not effectual for the reason that, although Hersh was the legal owner of said option, he was holding it in trust for persons whose interest he did not disclose to the optionors at the time of said tender; (4) Hersh at the time of said tender did not have the present ability to pay the consideration of $90,000 cash for said real property; (5) the property had not increased in value and was not worth the value of $240,000 on February 15, 1924, the date of the tender by the optionee; and (6) the disinclination and refusal of the optionors to convey said real property was based upon an honest belief that said option was null and void and of no effect and not upon the fact that the value of the property had increased from $90,000 to $240,000, and that, therefore, the optionors were not acting in bad faith in making such refusal, and consequently the measure of damage is not that set out in section 3306 of the Civil Code.

It is apparent that every point raised by appellants has to do with a question of fact. The case, therefore, simply presents the question of whether there is sufficient evidence to support the findings of the trial court upon which the judgment is based. In brief, the trial court found that the option was given by the defendants for a valuable consideration; that it has never been revoked; that plaintiffs were ready, able, and willing to pay the consideration as the purchase price of the property on February 15, 1924; that plaintiffs made a proper tender and thereupon exercised said option; that the defendants in bad faith refused to convey said property by reason of the increase in value of said property, and that the property had increased in value and was worth at said time not less than $150,000 in excess of the consideration set out in said option.

[1] We have read and carefully examined the record and are of the opinion that the findings so made are supported by the evidence. There is a conflict of evidence it is true, but the rule is well established that in such a situation the determination of the trial court is conclusive unless the testimony is so obviously false or so inherently improbable as to require its rejection. Appellants argue that the evidence offered in fafor of plaintiffs is unworthy of credence and should be rejected. There is nothing in the facts and circumstances as testified by plaintiffs and witnesses in behalf of plaintiffs so inherently improbable as to render such testimony unworthy of credence. Neither are there contradictions or inconsistencies therein which would indicate that the testimony was obviously false. The trial court deemed the testimony in behalf of plaintiffs worthy of belief and accepted as true plaintiffs' version of the transaction. We are of the opinion that the trial court was amply justified in so doing.

[2-4] It might be well to here set out briefly the additional facts educed upon the trial of the case which support the position of plaintiffs with reference to the validity of the option. Although Garau testified that, previous to the assignment of the option to Hersh by Morris Rauch, it had been abandoned by mutual consent of the original parties, orally expressed on several different occasions, there is in the record testimony by Samuel Hersh, which was corroborated by the testimony of another witness, that before Hersh advanced any money for the construction of the Green Mill café, Mr. Rauch brought Mr. Garau to see Mr. Hersh for the express purpose of having Mr. Garau assure Mr. Hersh that the option was valid, in order that Hersh might be induced to invest his money, and that during the conversation Mr. Garau was asked "if everything was all right; if the option was regular and valid," to which Mr. Garau replied that "everything was all right, he was very anxious to have the building completed, because it had been partly abandoned then." Mr. Levy, in corroboration of this testimony, testified that he was introduced to Mr. Garau by Mr. Rauch and he had inquired of Mr. Garau if the option was a bona fide option, stating that Mr. Hersh was thinking of putting money into the venture and before Hersh put any money into it, he wanted to be sure "there was no hitch at all." At that time Mr. Garau said: "That is all right, I don't care whose money goes in if the building is completed. Mr. Rauch has this option and when he pays me at any time at all, he can have the building and he can have the land." The witness then asked Garau if he would be willing to come up to Mr. Hersh's office and make the same statement, and the following day Mr. Garau came to Mr. Hersh's office and stated in the presence of Mr. Hersh and Mr. Rauch the substance of what he had said the day previous—that the option was a valid option and that if the money was tendered him at any time at all, he would convey the property to Mr. Hersh or Mr. Rauch. Mr. Garau admitted going to Hersh's office but denied discussing the option. In addition to this testimony of Hersh and Levy with reference to this occasion, there is the testimony of Mr. Rubens, corroborated to some extent by that of Mr. Rosen, that on another occasion in September or October, 1923, at the office of the attorney for Mr. Garau, at which there were present several persons besides Mr. Garau and his attorney, Mr. Rauch, Mr. Hersh, Mr. Levy, and the witness, the question of the option was discussed in the presence of Mr. Garau, at which time Mr. Rauch stated that he had assigned the option to Mr. Hersh and was going to get the money for finishing the construction of the building from Mr. Hersh. The question also came up as to how Mr. Garau would take the purchase price and it was suggested that it would not be beneficial for him to take the entire amount in cash as it would raise his income tax for the year tremendously. It is apparent that despite the testimony of Garau that the option had been withdrawn and abandoned by the original parties prior to its assignment by Rauch to Hersh, there is sufficient evidence to support the finding of the trial court that the option had not been withdrawn but was in fact in full force and effect at least up to the time of the conversations herein narrated. Obviously this discredits the claim of appellants that the option had been withdrawn previous to its assignment to Mr. Hersh. And we think there is sufficient evidence to warrant the conclusion that no attempt was made to revoke the option between the time it was assigned to Hersh and the date on which Hersh made tender of performance to the optionors. Mr. Hersh testified positively that at no time previous to his tender did Garau notify or inform him that the option had been revoked and was no longer effective. There was never any attempt made to revoke the option by written notice prior to its acceptance, and the letter written by the attorney for Garau *after* the tender was made by Hersh failed to state that the option had already been revoked. Irrespective, therefore, of whether any consideration was given for the option, it constituted a continuing offer which remained open for one year unless sooner revoked by notice to the optionee, and the option in the instant case not having been revoked prior to acceptance, became a valid

and binding contract between the parties as soon as proper tender of performance was made by the optionee.

We do not wish to be understood as holding that there was in fact no consideration. "A written instrument is presumptive evidence of a consideration." Civ. Code, § 1614. And, "the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." Civ. Code, § 1615. Garau, it is true, testified that Rauch paid him nothing for the option. But accepting as true the fact that no money was paid for the option, there is in the record the testimony of Garau that one of the reasons he gave the option to Rauch was the promise of Rauch to repurchase from him the Green Mill, Inc., stock which he had theretofore bought. The trial court may well have concluded that this was a sufficient consideration for the giving of the option.

[5] We are satisfied that the tender made by Hersh was proper and sufficient. The authorities cited by appellants in support of their contention that Hersh, although the legal owner of the option, was in fact holding such title as trustee for other undisclosed persons and could not, therefore, make the tender in his own name, do not involve the question of a trustee, but involve situations in which tender was attempted to be made by strangers or mere volunteers. Obviously they are without application here. Hersh was not a stranger or volunteer. He was the legal owner of the title to the option and was known to be the legal owner by the optionor, Garau. Garau's own testimony shows that he looked up the records and found that the assignment from Rauch to Hersh had been recorded. The tender made by Hersh cannot for this reason be held to be ineffective.

[6] An examination of the record with reference to the ability of respondents to pay the $90,000 cash consideration required by the terms of the option shows that the offer to pay this amount in cash, or upon terms to be agreed upon, was not a mere idle gesture. Mr. Hersh testified that he was borrowing and lending money all the time as part of his business and was prepared to meet the payment when he needed the money. His statement of his financial standing furnished to the Bank of Italy in February, 1924, showed that he and his wife jointly owned real and personal property having a net financial worth of over $300,000. Appellants make much of the fact that the bank balances of respondents only totaled $2,816 on the date of the purported tender. In view of respondents' financial worth and rating this fact is not of vital importance. In Laack v. Dimmick, 95 Cal. App. 456, 273 P. 50, 55, the court held that it was not necessary that in order for a purchaser to be able to buy he must have the purchase money on hand in the form of money or to his credit at the bank, saying: "The word 'able' means financially able. This does not mean, however, that such purchaser must have all the money in his immediate possession or to his credit at a bank, but only that he must be able to command the necessary funds to close the deal within the time required. * * * It is much more clearly sufficient if the purchaser has assets of greater value than the purchase price and a financial rating which will enable him to command the funds when needed. For in such event the purchaser is not only able to purchase, but is able to respond in damages if he refuse to go ahead with the contract." And in Russell v. Ramm, 200 Cal. 348, 254 P. 532, 534, the court said: "The rule * * * which would require a would-be purchaser of property to make a showing, either that he had the purchase price on hand in the form of money or that he had consummated such a loan upon his available properties or securities * * * would be to lay down too drastic a rule governing business transactions of the kind presented in the instant case." Both of the above cases involved suits for brokers' commissions, but we think the same principle is applicable to the case of an option. We think it sufficiently appears from the record that if the appellants had accepted the exercise of the option and subsequently the respondents had refused to perform, the respondents would have been amply able to respond in damages. This being so, the finding of the trial court with reference to the ability of respondents at the time of making the tender was clearly correct.

[7] A considerable portion of the record is taken up with testimony of real estate men as to the market value of the property in February, 1924, the date of the tender of performance. Appellants insist that the finding of the court that property worth $90,000 in March, 1923, was worth $240,000, an increase of $150,000, in February, 1924, eleven months later, is so ridiculous that on its face it is palpably false. To any one not familiar with the tremendous increase in the values of real estate during this particular period in and around Los Angeles, the claim of appellants would seem to be justified. But appellants in their opening brief state that "as a matter of common knowledge, the Los Angeles territory was in the midst of an unusual boom and a flood of easy money." Three real estate men testified as witnesses for the respondents. The first witness, Mr. C. V. Loop, placed the value at $300,000 in February, 1924. Mr. Loop had been engaged in the real estate business in Culver City and had had actual experience in the purchase and sale of real property, and in the making of appraisals, having been chairman of the appraisal committee of the Real Estate Board, and one of the appraisers on the open-

ing and widening of Exposition boulevard, as well as other private appraisals. Mr. Loop was familiar with the property, as he had a purchaser interested in the purchase of the property at that time. He knew of the lease on the property here involved and had taken that into consideration in making his estimate of the value of the property. Mr. Glen A. Davidson, another witness for respondents, was, at the time of the trial, chairman of the appraisal committee of the Culver City Realty Board, and had acted as referee under an appointment by a judge of the superior court of Los Angeles county in a condemnation suit which involved land embraced in this action. He had also appraised property for the First National Bank of Culver City, and was apparently well qualified to give his opinion as to the value of the real estate. Mr. Davidson, after an extended explanation of the manner in which he arrived at his figures, placed the market value of the property here involved in February, 1924, at $259,708.75. He did not include in this estimate the value of the Green Mill café building, stating that he figured the value of the buildings which would revert to the lessor would counterbalance the fact that there was a lease bringing in a low rental on the property. Mr. Melville Hall, who had been in the real estate business since 1918, engaged in purchasing raw acreage and subdividing it, valued the property at $240,000 for the purpose of subdivision on terms, and not less than $200,000 cash. He stated that values had increased tremendously during that period. The only testimony contradictory of this evidence was that offered by Mr. Garau himself, who claimed it was not worth more than $120,000, and a witness in his behalf, who had only been in the real estate business for a year, and who placed the value of the property without improvements at $60,000. There can be no question but that the property by reason of its frontage on three main boulevards leading from the beach cities to Los Angeles was in a particularly advantageous position and undoubtedly the increase in its value was greater than that of property in the vicinity not fronting on all three boulevards. It appears from the record that the real estate men testifying for the respondents are men of standing in the community, with considerable business experience along real estate lines. Their testimony was accepted as true by the trial court, and the findings based thereon will not be disturbed.

[8] As to the finding relative to bad faith, it will suffice to say that although it is true that there is no direct evidence in the record of bad faith, no one who could testify that appellants had admitted that their reason for refusing to perform was the increase in the value of the property, the circumstances surrounding the transaction practically compel this conclusion. Appellants insist that bad faith cannot be predicated upon an optionor's refusal to accept tender based upon his honest belief that the option was not valid by reason of the fact that no consideration had been given for it and it had in fact been revoked by mutual consent of the original parties. If the record sustained appellant Garau's claim that he did honestly entertain a belief that the option had been revoked prior to the time Hersh as optionee made the tender and was no longer effective, the trial court would not have been justified in making, and it is extremely doubtful whether it would have made, a finding that the sole reason for appellants' refusal to accept tender was the rise in price in real estate in that vicinity. However, it must be borne in mind that according to the testimony of respondents' witnesses, at the time of the assignment of the option by Rauch to Hersh, and therefore subsequent to the time when, according to Garau, the option had been abandoned by mutual consent and was no longer effective, Garau informed Hersh that the option was valid and subsisting and made no claim that it had been in fact revoked. If this testimony be true, and the trial court was warranted in accepting it as true, the conclusion is inescapable that Garau did not in fact, as indicated by his conduct on that occasion, entertain an honest belief that said option had been abandoned by the mutual consent of himself and Rauch. Moreover, it is apparently conceded by appellants that subsequent to the assignment by Rauch to Hersh, at a meeeting in the office of Garau's attorney, the question of the option was discussed. This clearly indicates that appellants did not entertain an honest belief that the option had been previously revoked. Upon this showing the trial court was justified in making the finding it did with reference to bad faith.

We are satisfied that there is substantial evidence to support the findings of the trial court and that the findings, in turn, support the judgment.

Judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.

218 Cal. 425

**ABBOTT v. COOPER et al.**

**L. A. 14012.**

Supreme Court of California.

June 29, 1933.

Rehearing Denied July 28, 1933.

**1. Appeal and error** ⚷927(3).

On appeal from judgment of nonsuit, plaintiff's evidence must be taken as true and all reasonable inferences must be drawn in plaintiff's favor.

**2. False imprisonment** ⚷8.

Jailer taking into custody private police officer arrested without warrant by officer of rival private police patrol stating he did not know what charges were, *held* liable for false imprisonment (Pen. Code, §§ 142, 1597, 1611; Pol. Code, § 4157).

> Facts disclosed that both the officer arrested and the arresting officers were members of different private police patrols, and also deputies under different constables of the township; that officer suing for false imprisonment was arrested without warrant and kept in custody for about 8½ hours and then released; that he was refused release on bail or the use of a telephone; and that on jailer's inquiry as to what the charges were, arresting officer replied that he did not know.

**3. Sheriffs and constables** ⚷157(3).

Deputy constable's act in arresting private police officer without warrant or charge and deputy sheriff's act as jailer in taking private officer into custody *held* acts colore officii, rendering constable, sheriff, and sheriff's surety liable for false imprisonment (Pen. Code, §§ 142, 1597, 1611; Pol. Code, § 4157).

In Bank.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by L. A. Abbott against Edward F. Cooper and others. From the judgments, plaintiff appeals.

Reversed.

For prior opinion, see 14 P.(2d) 554.

Curtis Hillyer, Irve C. Boldman, and Hillyer & Boldman, all of San Diego, for appellant.

Wright & McKee and C. M. Monroe, all of San Diego, for respondent Webber.

Harvey H. Atherton, of San Diego, for respondents Cooper, Macy, and Fidelity & Deposit Co. of Maryland.

SEAWELL, Justice.

This appeal is taken from a judgment of nonsuit entered by the superior court in and for the county of San Diego against plaintiff and in favor of defendants Ed F. Cooper, as sheriff of the county of San Diego; Edwin S. Macy, deputy sheriff and jailer; the Fidelity & Deposit Company of Maryland, said sheriff's bond, conditioned for the faithful performance of official duty of himself and his deputies; and Harry Webber, a constable in and for said county of San Diego. Judgment by default in the sum of $2,000 was rendered by the trial court at the conclusion of the trial against two other defendants, C. V. Carson and H. Atlee Worsham, both of whom were deputy constables under said Webber, from which no appeal was taken.

The action was brought against said defendants to recover damages suffered by plaintiff by reason of his unauthorized arrest and imprisonment by the persons and in the manner herein related. There is no dispute as to the facts as testified to by the plaintiff, who was the sole witness in the case.

In addition to being deputy constables under Constable Webber, Carson and Worsham were engaged in conducting a private police patrol in or about the city of San Diego. L. A. Abbott, the plaintiff, was also engaged in conducting a rival private police patrol in said city of San Diego, and was also a deputy constable by appointment of another constable whose jurisdiction also included the territory of the township of San Diego. Abbott, at the time he was arrested, was operating under a license from the state board of prison directors. He was dressed in a blue uniform and was wearing on his person a constable's badge of office, and also a badge showing that he was in the service of the state board of prison directors. All of the parties to the action were well acquainted with one another, both personally and officially. It is a reasonable inference from the uncontradicted evidence that a rivalry existed between the private police patrol headed by Carson and Worsham and that headed by Abbott. From the testimony given by Abbott, which will hereafter be referred to, it is also fairly inferable from said testimony that the feeling of hostility existing on the part of Carson and Worsham against Abbott was shared by the sheriff and his deputy. Carson, upon delivering Abbott to Macy, the jailer in charge, stated to him that he was "carrying out his orders," and ordered the jailer to lock Abbott up. The jailer, who beyond question recognized Carson as a person in authority in the premises, yielded ready compliance with Carson's orders, and locked Abbott up without a semblance of authority, warrant or right to do so. Whence Carson's orders does not directly appear from the scant record before us, but as the sheriff was the only person who could have given orders which the jailer would have felt bound to obey, the inference may be drawn that Carson was acting under an understanding with the sheriff as to the kind of treatment that should be accorded Abbott should opportunity present itself. Doubtless Carson did not mean that he was carrying out orders given by himself, but orders which he had received from some one in authority. This inference is strengthened by what was said and done at the jail as summarized by the District Court of Appeal, Fourth District, when this cause was before that court upon appeal. The unchallenged authority which Carson exercised in giving orders to the jailer and the latter's obedience to said orders, all of which stands admitted upon the record, are made evident by the following excerpts taken from the opinion of said District Court of Appeal, which correctly states the evidence of the only witness called to testify in the case and the law applicable to said facts as herein set forth:

About 2 o'clock on the morning of November 26, 1930, Carson and Worsham arrested the plaintiff and took him to the county jail where, upon their request and order, he was locked up by the defendant Macy, who, as a deputy under the defendant Cooper, the sheriff of San Diego county, was in charge of the jail. The plaintiff was held in jail for about eight and one-half hours and then released.

It appears from the evidence that on the night in question, the appellant and one of his assistants, named Sizer, were driving along in an automobile upon a mission connected with their business of a private police patrol. While so proceeding they came upon Carson and Worsham, whose car had in some manner become caught in a bridge, and stopped and assisted them in extricating their car. Carson and Worsham recognized the appellant and called him by name. Shortly after the appellant drove on, Carson and Worsham followed him and ordered him to pull into the curb. When he complied Worsham asked him what he was looking for, and upon receiving the reply, "I don't know as that is any of your business," Carson ordered the appellant from his car and told him he was under arrest. The appellant's gun was taken from him and he, with Sizer, was taken to the county jail. The respondent Macy received the appellant and took from him various articles, including his deputy constable badge and his private police badge. Upon the appellant's asking Macy the reason for his detention, Macy turned to Carson and asked him what the charges were, to which Carson replied: "Damned if I know. Damned if I believe he is allowed out in the county. We will leave him in here over night and let Sheriff Cooper decide it in the morning." Whereupon Macy asked Carson if Sizer was to be arrested also, to which Carson replied: "No, he is our friend; we don't want him, we want Abbott." Thereupon Sizer was released. The appellant also testified that he was refused permission to use the telephone; that he asked to be released on bail, saying: "I am a bonded man. If I have to have bail, can't I get out on bail?" Macy replied: "No, it's up to Carson, if he wants to let you out, it's all right." Macy then asked Carson if he would let the appellant out and Carson replied: "No, I am carrying out my orders, lock him up." * * * About 8:30 o'clock the next morning he was handed his articles and told to, "Get out of here."

[1] This, being the only evidence, must be taken as true in view of the motion for nonsuit, and all reasonable inferences therefrom must be drawn in favor of the appellant. It seems a fair and reasonable inference from this evidence that the arrest in question was made because of some rivalry between the respective private patrols and not because of any offense committed by the appellant. So far as appears from the evidence, there was no justification for the arrest, it was made without authority of law, and for the purposes of this appeal it must be held to have been unauthorized and unlawful. The only questions raised relate to the responsibility of parties other than those making the arrest.

[2] The first question presented is as to the liability of respondent Macy. The appellant argues that it appears from the evidence that Macy knew or should have known that the arrest was illegal and that he had no right to imprison the appellant. On behalf of this respondent it is urged that, under sections 142, 1597, and 1611 of the Penal Code and section 4157 of the Political Code, it was his duty to receive and hold the appellant when presented at the jail as a prisoner by the defendant Carson, a peace officer. It is argued that such a jailer is merely a ministerial officer and that it is no part of his duty to make any investigation or any decision as to whether or not any person brought to the jail shall be kept there. While it should not be held to be the duty of a jailer to make any extensive investigation before receiving a prisoner brought to him for custody, we think this contention of this respondent cannot be fully sustained. This arrest was made without a warrant, and whether Carson and Worsham be considered as having made the arrest as deputies of a constable or as private persons, they were only authorized to make an arrest for an offense committed or attempted in their presence or under certain circumstances upon the belief that the person arrested had committed a felony. Pen. Code, §§ 836 and 837. In Boaz v. Tate, 43 Ind. 60, the court said: "We have said that the marshal had authority to arrest when the offense was committed in his view and, under certain circumstances, commit to jail; that such authority necessarily conferred upon the jailer the right to receive and imprison the prisoner. If he had the right to receive

the prisoner when brought to him by the marshal with the declaration that he had been arrested for an offense committed on view, that declaration would stand in the place of a mittimus in other cases, and it would be the duty of the jailer to receive him as a prisoner, without regard to the question of his guilt or innocence."

Conceding that a similar rule applies in this state and that a jailer is justified in receiving a prisoner without a warrant upon the declaration of the officer or person bringing him in that the arrest has been made for an offense on view or in the belief that a felony has been committed, the circumstances here fall far short of showing any such justification. Even if it could be held that a jailer is authorized to receive and hold a prisoner in the absence of any statement or declaration on the part of the officer or person bringing him in, we think it must be held that such a jailer has no authority to receive and place in custody a person brought in by another when the information furnished to the jailer affirmatively shows that the arrest has been made without authority, and that the person making the arrest neither knows what the charge is nor makes the claim that any offense has been committed either in his presence or otherwise. We think the information here conveyed to the respondent Macy was such that he knew or should have known that the arrest was illegal, and was such as to inform him that he had no right to imprison the appellant. It follows that, so far as shown by this evidence, the respondent Macy was himself liable for his wrongful act, whether done officially or otherwise (Gomez v. Scanlan, 155 Cal. 528, 102 P. 12), and that, as to him, the judgment of nonsuit was improperly entered.

[3] This brings us to a consideration of the question whether the sheriff and his surety and Constable Webber are liable for the acts of their respective deputies committed as herein set forth. The trial court held, as did said District Court of Appeal, that the acts of said deputies were extra-official acts and neither the principals nor their sureties are liable therefor.

It is not contended by any party to the action that said arrests were made upon a warrant of arrest, or for a crime committed in the presence of said arresting officers, or that plaintiff was delivered to said jailers upon the authority of a mittimus, or that any declaration was made to the jailer by said officers that plaintiff had committed a crime in the presence of either of said arresting officers, which declaration may satisfy the law or take the place of a mittimus. On the contrary, when the jailer inquired as to the charges made against Abbott, Carson replied: "Damned if I know. Damned if I believe he is allowed out in the county." He finally decided that plaintiff should be kept in jail overnight, and his fate left to the decision of the sheriff upon his arrival at a later hour. It is admitted that the acts of the jailer in detaining plaintiff in prison were unauthorized and unlawful, but it is the contention of respondents that the jailer's conduct was so patently unwarranted as to have amounted to conclusive proof that he knew that he was committing a trespass in detaining plaintiff in the circumstances of plaintiff's delivery to him, and therefore, as he was not acting under color of his office, his principal and the surety are not liable. We cannot subscribe to this doctrine, as it would tend to excuse or mitigate the wrongful acts of the officer if said acts were accompanied by unusual acts of oppression or amounted to a flagrant abuse of official duty, and penalize the offender only when his acts were less culpable. The fallacy of respondents' argument is well met in Clancy v. Kenworthy, 74 Iowa, 740, 35 N. W. 427, 428, 7 Am. St. Rep. 508, and by many other decisions spread throughout the states which adopt the reasoning of the Iowa court, from which we quote: "But it is insisted that, as the constable is shown to have had no lawful authority to arrest plaintiff, his act was therefore not done in the line of his duty. In truth his act was in the line—direction—of official duty, but was illegal because it was in excess of his duty. In the discharge of official functions he violated his duty, and oppressed the plaintiff. This is all there is of it. If, in exercising the functions of his office, defendant is not liable for acts because they are illegal or forbidden by law, and for that reason are trespasses or wrongs, he cannot be held liable on the bond at all, for the reason that all violations of duty and acts of oppression result in trespasses or wrongs. For lawful acts in discharge of his duty he of course is not liable. It follows that, if defendant's position be sound, no action can be maintained upon the bond in any case. In support of our conclusions, see Tieman v. Haw, 49 Iowa, 312." See, also, Greenius v. American Surety Co., 92 Wash. 401, 159 P. 384, L. R. A. 1917F, 1134.

In holding that a deputy sheriff and his principal and sureties were liable for the act of a deputy falsely claiming to have a warrant for a person not formally charged with crime, and who, under guise of authority of his office arrested and took a person into custody, had committed an unlawful and unauthorized act under color of his office the Supreme Court of North Dakota, in Lee v. Charmley, 20 N. D. 570, 129 N. W. 448, 449, 33 L. R. A. (N. S.) 275, said: "The almost uniform current of the later cases * * * regards wrongful acts of a public officer colore officii as official acts for which the sureties upon his bond are liable. Such is the holding of the courts of last resort of Pennsylvania, Maine, Massachusetts, Ohio, Virginia, Kentucky, Missouri, Iowa, Nebraska, Texas, California, Minnesota, Illinois, and of the Supreme Court of the United States. And in reviewing these authorities this court, in one of its former opinions, has remarked: 'While there is a dispute among the authorities whether the sureties on a sheriff's bond are liable for the wrongful act of their principal in seizing property of a third person, the more numerous decisions are found arrayed in support of the rule that they are liable, and these cases appear to us to have the best of the argument. See Lammon v. Feusier, 111 U. S. 17, 28 L. Ed. 337, 4 S. Ct. 286, where the authorities are reviewed and where the doctrine we deem sound is enunciated.' "

Lammon v. Feusier, last above cited, holds upon a review of a long list of cases that where a person holding the office of sheriff or constable does acts colore officii, though he had no sufficient warrant to do the act, he is responsible to third persons in an action for a breach of official duty. Such a rule is declared to be supported by the weight of authority. We may paraphrase the language of that decision and say, as was there said, respondent Macy was an officer in charge of a county jail, and had authority to detain persons charged with crime on a suitable writ or process. He assumed to have such authority and thereupon took from plaintiff Abbott all of his personal property and refused to release him or permit him to arrange for bail by telephone message or otherwise, and held him as a prisoner. He exercised every function a jailer or officer could have exercised in the discharge of official duty.

In Johnson v. Williams, 111 Ky. 289, 63 S. W. 759, 760, 54 L. R. A. 220, 98 Am. St. Rep. 416, quoting from Knowlton v. Bartlett, 1 Pick. (Mass.) 273, the court said: " 'If the act from which the injury resulted was an official act, the authorities are clear that the sheriff is answerable. If it was not an official, but a personal, act, it is equally clear that he is not answerable. But an official act does not mean what a deputy might lawfully do in the execution of his office. If so, no action could ever lie against the sheriff for the misconduct of his deputy. It means, therefore, whatever is done under color or by virtue of his office.' To hold the deputy and his sureties liable to the sheriff on his bond, it is not necessary that the deputy should be acting under color of some writ, but if he is acting under color of his office, and professing so to act, and inducing others interested to believe he is acting colore officii, he and his sureties will be bound by such acts. No other rule would be safe. Sureties are not needed on a sheriff's bond, if they are only to be held when he acts legally. They vouch for his acts, and bind themselves to make good any damage he may cause to any one while acting under color of his office."

The Supreme Court of New Mexico, in State v. Llewellyn, 23 N. M. 43, 167 P. 414, 424, upon consideration of the question here presented said: "The rule exempting sureties from liability, for acts colore officii, was doubtless adopted by many of the courts before the advent of surety companies, whose business it is, for a stipulated compensation, to guarantee the fidelity of officers and employees. The obligation of sureties was then ordinarily assumed without pecuniary compensation, and was not extended by implication or construction. Their liability was strictissimi juris. In this state no definite rule on the subject has been established by the courts, and we see no good reason for a departure from the apparent majority rule that the surety is liable for the acts of the principal colore officii. We believe the public interests will be more surely protected and safeguarded by the establishment of such rule here."

There are unquestionably cases in which the act of the deputy is clearly a trespass or private tort and bears no semblance or show of color to the performance of official duty, and these cases are readily distinguishable from the cases cited above. The three California cases cited by respondents, Felonicher v. Stingley, 142 Cal. 630, 76 P. 504, Neff v. Redmond, 54 Cal. App. 757, 202 P. 925, and Filarski v. Covey, 75 Cal. App. 353, 242 P. 874, more fully illustrate respondents' claim than any others to be found in our reports. The first was an action against the constable and the sureties on his official bond for damages on account of said constable by force and violence compelling a married woman to denude herself for the purposes of examination, and taking from her person certain rings and other personal effects. The second case cited and relied upon was an action brought against a sheriff and the sureties to recover a sum of money deposited with the sheriff upon agreement of the parties interested and later embezzled by his undersheriff. Said moneys were paid to the sheriff after an attachment which had been levied was discharged and the parties to the action had agreed in writing upon the payment of certain monthly installments to the sheriff. Whatever legal rights the plaintiff had under the writ of attachment were stipulated away and the sheriff was no longer acting in his official capacity. The third cited case was an action brought against a deputy sheriff, his principal, and the latter's bond to recover for the negligent operation of an automobile by said deputy sheriff, which caused the death of a minor while said officer was returning from calling upon a magistrate notifying him that a person was held in the county jail awaiting a preliminary hearing.

The above are practically the only decisions of this state which are cited to sustain the judgment of the trial court. That they do not sustain the respondents is obvious from the abstract of facts herein set forth. It may be added that whenever this court has spoken upon the precise question herein presented the trend of thought seems to favor appellant's contention that said jailer and deputies were acting colore officii.

The judgment of nonsuit as to defendants Ed F. Cooper, Edwin S. Macy, Harry E. Webber, and the Fidelity & Deposit Company of Maryland, a corporation, is reversed.

We concur: WASTE, C. J.; THOMPSON, J.; LANGDON, J.; CURTIS, J.

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218 Cal. 518

## In re O'CONNOR'S ESTATE.

### O'CONNOR v. O'CONNOR.

S. F. 14613.

Supreme Court of California.

July 18, 1933.

**1. Assignments** 🔑**8.**

Under Indiana law, wife's inchoate interest in husband's lands is not present estate, and so long as title remains in husband her inchoate right alone cannot be conveyed (Burns' Ann. St. Ind. 1926, §§ 3337, 3349).

**2. Descent and distribution** 🔑**69.**

Under Indiana law, husband may dispose of his personalty without wife's consent, except in expectancy of death to defeat her statutory distributive right (Burns' Ann. St. Ind. 1926, § 3343).

**3. Descent and distribution** 🔑**5.**

Wife having only expectancy in decedent's personal estate under law of matrimonial domicile, and decedent having established his domicile in California, wife *held* not entitled to portion of decedent's personalty which she could have claimed under law of matrimonial domicile (Burns' Ann. St. Ind. 1926, § 3343; Civ. Code Cal. § 129).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Petition by Caroline H. O'Connor for a decree of partial distribution of the estate of Joseph S. O'Connor, deceased, opposed by Charles B. O'Connor, executor. From the order sustaining the demurrer to the petition, the petitioner appeals.

Affirmed.

Prior opinion, 14 P.(2d) 152.

Shelton, Gray & McWilliams and Charles A. Gray, all of San Francisco, Olin L. Everts, of Fresno, and U. S. Lesh and James E. Lesh, both of Indianapolis, Ind., for appellant.

Perry Evans, of San Francisco, for respondent.

PER CURIAM.

We have re-examined the questions involved in this appeal and find ourselves in entire accord with the conclusion and opinion of the District Court of Appeal, Division 1 of the First Appellate District, and we hereby adopt that opinion as the opinion of this court in this case, as follows:

An appeal from an order and decree sustaining the demurrer of respondent executor to appellant's petition for a decree of partial distribution and denying said petition.

Appellant is the widow of decedent, who at the time of his death was a resident of California. They were married on March 28, 1925, at which time, according to the petition, both had their legal residence and domicile in Indiana. Within a few days after the marriage they separated, and decedent came to California, where he established his residence. Thereafter he commenced in Los Angeles county an action for a divorce from appellant, but died testate before the action terminated. Proceedings for the administration of his estate are pending in the superior court of the city and county of San Francisco. The petition alleged:

"That prior to her marriage with decedent the decedent represented to the petitioner that he owned stocks, bonds and other securities of an amount in value in excess of $200.000, which stocks, bonds and securities were issued by corporations having their domicile in said state of Indiana; that said decedent did in fact own said securities at and prior to the time of said marriage, and he made said representations to the petitioner as inducements for her engagement to marry him, and they were intended to and in fact did operate as a part of the consideration for the consummation of said marriage on part of the petitioner.

"That at, prior to and continuously since the time of said marriage it was and is the law of said state of Indiana that if a man dies testate leaving a widow, one-third of his personal estate shall descend to said widow subject to its proportion of the debts of said decedent, and that any such widow shall have the right to reject and renounce the provisions made for her under the terms of the will and elect to take under the laws of said state; that it was and is further provided by the laws of said state that any surviving wife desiring to renounce the provisions made for her in any such will shall file her election in writing, duly signed and acknowledged before some officer authorized to take acknowledgments of deeds, and cause such election to be filed within one year after such will has been admitted to probate in said state.

"That similar statutory provisions were made in favor of a husband with reference to property and property rights owned by a wife, with like right of election in favor of a surviving husband to take under the law instead of any provisions made for him by will; that under the decisions of the courts of said state having final jurisdiction over the subject-matter thereof, said statutory provisions have been construed as modifying the common-law property rights as between husband and wife, and holding it to be the law of said state that by virtue of the marital contract and the rights accruing therefrom the law casts upon each a contingent interest in the other's property which in the event of death becomes fixed in the survivor and which can be abridged or taken away only to the extent stipulated in a marriage settlement; that your petitioner herein has duly executed and filed or caused to be filed her renunciation of the decedent's will and the provision therein made for her and her election to take under the laws of their matrimonial domicile, being said state of Indiana, which renunciation and election was filed within the time and in the manner required by law.

"That after the separation between your petitioner and the decedent as hereinbefore stated, the decedent disposed of the stocks, bonds and securities so owned by him at the time of their marriage and converted the proceeds thereof into the property, stocks and bonds described in the inventory filed by the executor herein, and that the property and property rights represented by said inventory are in legal effect the same as those owned by the decedent at the time of their marriage; that the petitioner is entitled to a distributive share of the funds remaining for distribution after the payment of the decedent's debts, in an amount equal to one-third thereof."

Appellant contends that she is entitled to the portion of decedent's personal estate which she could have claimed under the laws of Indiana notwithstanding his attempted disposal thereof by his will.

By the Code of 1852 dower was abolished in Indiana. May v. Fletcher, 40 Ind. 575. But with regard to the wife's interest in her deceased husband's real estate it is provided by statute that "if a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee-simple, free from all demands of creditors * * *" (Burns' Annotated Indiana Statutes 1926, § 3337 [3014]); and that "a surviving wife is entitled * * * to one-third of all the real estate of which her husband may have been seized in fee-simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law, and also of all lands in which her husband had an equitable interest at the time of his death: Provided, That if the husband shall have left a will, the wife may elect to take under the will instead of this or the foregoing provisions" (Burns' Annotated Indiana Statutes 1926, § 3349 [3029]).

[1] It has been held with respect to said section 3337 (3014) that the wife acquires her title thereunder by descent as an heir of her husband; but that under section 3349 (3029) her title is by purchase by virtue of her marital rights and not as an heir, and that in both cases her title vests at the same time and by virtue of the happening of the same event, namely, the death of her husband (May v. Fletcher, supra; Bowers v. Lillis, 187 Ind. 1, 115 N. E. 930), so that, while her inchoate interest in the lands of her husband is an estate in the land itself and not a mere incumbrance (Clements v. Davis, 155 Ind. 624, 57 N. E. 905), it is not a present estate, and so long as the title remains in the husband her inchoate right alone cannot be conveyed (Davenport v. Gwilliams, 133 Ind. 142, 31 N. E. 790, 22 L. R. A. 244; Unger v. Mellinger, 37 Ind. App. 639, 77 N. E. 814, 117 Am. St. Rep. 348). The community system does not prevail in Indiana, and appellant admits that prior to 1891 there was no statute of that state giving to a surviving widow an interest in her deceased husband's personal estate akin to the common-law right of dower and not subject to be defeated by will. See Pond v. Sweetser, 85 Ind. 144; Loy v. Loy, 128 Ind. 150, 27 N. E. 351. She claims, however, that the Act of March 9, 1891, Acts 1891, p. 404, c. 185 (Burns' Annotated Indiana Statutes 1926, § 3343 [3025]), gives such right.

This act provided as follows: "If a man die testate leaving a widow, one third of his personal estate shall descend to said widow, subject, however, to its proportion of the debts of said decedent: Provided, however, That nothing in this act shall be construed to reduce the interest which the law now gives a widow in the estate of a deceased husband: And provided, further, That such widow may elect to take under the will of said decedent instead of this or any other law of descent of this state, which election shall be made within ninety days after said will has been admitted to probate in this state, and in the same manner as widows are now required by law to elect." This section was referred to in Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40, 100 N. E. 1049, 102 N. E. 282, an action involving the validity of a gift. The gift was conditioned on the event of the donor's death, with a reservation of the use of the property during his life and was testamentary in character. It was also made with the intention of defeating his wife's right to share in his personal estate at his death, and was held to be void. The court, with respect to the husband's power of control over his personal property in that state, held that there could be no question but that as a general rule he had the absolute control of his personal property during his life and could give and otherwise dispose of it without his wife's consent free from any claim of hers, but that where the transfer was a mere device by which he sought to deprive his wife of her distributive share under the statute the same rule should apply as in cases of conveyances of real property for the purpose of defeating the wife's right to dower. In its opinion the court cites cases from other jurisdictions which refer to the right of a wife to share in her deceased husband's personal estate as a dower right. An examination of these cases shows that with one exception, namely, where by statute "dower" was given in the personal estate of the husband, the court used the term to describe the widow's statutory right to a distributive share of her deceased husband's personal estate. That the term is sometimes so used is shown in Howard v. Strode, 242 Mo. 210, 146 S. W. 792, Ann. Cas. 1913C, 1057.

Appellant cites other Indiana cases which she contends support her claim. In Carroll v. Swift, 10 Ind. App. 170, 37 N. E. 1061, 1062, the court said that "prior to the Act of March 9, 1891 * * * a surviving wife took no absolute interest in the personal estate of her husband, except as to the statutory allowance of $500. He might dispose of the surplus, after the payment of debts, by will." This case involved the right of a widow to the distribution of part of her husband's personal property, and the question of her interest therein was not necessary to the decision, or decided.

In Murphey v. Brown, 159 Ind. 106, 62 N. E. 275, a widow claimed the whole of her husband's estate under the provisions of a statute; but the question of her interest in his personal property other than her right to a distributive share thereof upon his death was not involved.

In Unger v. Mellinger, supra, the validity of a postnuptial contract was considered, and the court in its opinion speaks of the "contingent" and "inchoate" right of each spouse in the property of the other, but the character of such right in personal property was not considered. None of these cases appear to us to have decided the question presented in the case at bar.

[2] As stated, a husband may under the Indiana laws dispose of his personal property during his lifetime without his wife's consent and free from any claim by her, provided it be not done in expectation of death and for the purpose of defeating her distributive right under the statute (Crawfordsville Trust Co. v. Ramsey, supra), and no statute or decision from that state has been called to our attention which provides or holds that the wife enjoys any ordinary rights of ownership in her husband's personal property during his lifetime, or has a more complete interest therein than that of an expectancy as heir if she survives him.

Appellant concedes that the property in question if governed by the California law would be the separate property of decedent and subject to his testamentary disposition; also that as a general rule the descent of personal property is governed by the laws of the state where decedent was domiciled at the time of his death; but she insists that the contract of marriage in relation to property rights should be governed, as other contracts, by the laws of the jurisdiction where it was to be carried out—in this instance by the laws of Indiana.

This doctrine has been recognized and applied in instances where rights in the property of one spouse were held to have vested at the time of the marriage. The rule is stated in Wharton on Conflict of Laws, § 193a, as follows: "While * * * it is undoubtedly true that the intestacy laws of the last domicile of the deceased govern the distribution of the personal estate of either husband or wife in case of intestacy, a distinction is to be observed between the mere inchoate rights of either spouse to share in the distribution of the other's estate at his death and a vested right which attaches at the time of marriage though its enjoyment may be postponed until the death of the other spouse." The author says further that the latter right is not divested by a change of domicile, but that a mere statute of distribution of the original matrimonial domicile, or any domicile other than the last, by which either spouse is to share in the other's personal estate upon the latter's death creates no vested right, and therefore offers no obstacle to the application of the statute of distribution of the last domicile.

Appellant in this connection cites a number of decisions. Kraemer v. Kraemer, 52 Cal. 302, holds that where there is no express contract the law of the matrimonial domicile will govern as to personal property everywhere. See, also, Estate of Drishaus, 199 Cal. 369, 249 P. 515. Bonati v. Welsch, 24 N. Y. 157, was an action by a widow to recover from her husband's estate the amount received by him from the sale of certain real property situated in France. The spouses were married and living in that country when plaintiff inherited the property from her mother. She was later abandoned by her husband, who died domiciled in New York. It appeared that by the French law the property which came to her by succession belonged to her, but that her husband had the management of it, with the right to retain the avails of the sale during the existence of the community, which terminated upon his death, whereupon she would have a valid claim against his estate. It was held that as a creditor of her husband under the laws of France her rights continued and attached to the property of her husband situated in New York.

Harral v. Harral, 39 N. J. Eq. 279, 51 Am. Rep. 17, was a similar case. The parties married and established their domicile in France without any contract as to property. By the laws of that country, where there was no contract and the marriage was followed by a conjugal domicile the property of married persons became subject to the community law. Under this law the husband, who had the management of the community property, might dispose of his share by will, but not the share of his wife to which she became entitled upon his death. After the marriage the husband became insane and was brought to the United States, where he died. It was held by reason of the above facts that his personal property became subject to the law mentioned, and that his widow was entitled to a half thereof notwithstanding that by his will he had bequeathed the whole to others.

It was held in Doss v. Campbell, 19 Ala. 590, 54 Am. Dec. 198, that where the wife acquired separate property under the laws of California and removed with it to Alabama, where she could not have acquired a separate interest in the property under the same facts, that the removal did not destroy her property interest.

So in Holmes v. Holmes, 4 Barb. (N. Y.) 295, a wife who had obtained a decree a mensa et thoro inherited a legacy from her father. Under the law then in force her husband was entitled to the legacy, which he received. A subsequent act would have made the wife the owner, but it was held that the later statute did not apply, as "the marriage of the parties and the vesting of the money were prior to the passage of the act."

In Noonan v. Kemp, 34 Md. 73, 6 Am. Rep. 307, a citizen of Maryland left a legacy to his daughter, who resided in Kentucky. The latter died before the distribution of her father's estate, leaving a husband surviving. Under the Kentucky law the husband succeeded to the entire personal estate of his deceased wife. It was held that the legacy, like any other personal property owned by the daughter, was deemed to be situated in Kentucky and governed by its laws.

Other cases declaring similar principles decided in Indiana and other jurisdictions are cited by appellant, but none involved the question presented here.

In addition she cites cases dealing with the question whether or not the provision made by law for the wife is in the nature of an inheritance and subject to a succession tax, which cases hold that such a provision is not an inheritance but belongs to her independent of any right of inheritance or succession. These cases are contrary to the California rule that upon the death of the husband the wife took one-half of the community property as heir. Estate of Moffitt, 153 Cal. 359, 95 P. 653, 1025, 20 L. R. A. (N. S.) 207; Estate of Dargie, 176 Cal. 720, 169 P. 360.

[3] The mere fact that under the Indiana laws (section 3343 [3025]) the power of the husband to dispose of his personal property by will was subject to the right of his wife at her election to claim a third thereof gave her no more than an expectancy in this portion of his estate. As was held in Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, such a limitation of the husband's right would give the wife no interest in his property during his lifetime. We are satisfied that appellant had no present fixed right or interest in decedent's personal estate, or more than a mere expectancy, which depended upon survivorship to become a vested right. This being true, and he having established his domicile in California, as he might do (Civ. Code, § 129), the property was subject to the law of this state, which governs its disposition and distribution whether he died testate or intestate.

The order appealed from is affirmed.

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133 Cal.App. 228

## Ex parte MILLER.

Cr. 1273.

District Court of Appeal, Third District, California.

July 10, 1933.

**1. Indictment and information** ⚷114.

To support judgment adjudging defendant habitual criminal, service of term in state prison following either prior conviction must be alleged in information and proven (Pen. Code, § 644).

**2. Criminal law** ⚷1202(6).

Where information does not charge serving of sentence after prior convictions, plea of guilty does not supply deficiency as basis for adjudging defendant habitual criminal (Pen. Code, § 644).

**3. Habeas corpus** ⚷50.

Where prisoner has not completed term for which he could be legally confined, prisoner is not entitled to writ of habeas corpus to obtain discharge on ground sentence is excessive.

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Application by Conrad Miller for a writ of habeas corpus prayed to be directed to the Warden of the San Quentin Prison to secure release of petitioner on the ground of illegal detention.

Writ denied.

Conrad Miller, in pro. per.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The record in this case shows that the above-named petitioner was, in the superior court of the county of San Joaquin, on the 21st day of October, 1929, convicted of burglary, upon an information charging him with three counts. Each count charged the defendant with the crime of burglary in the second degree. The information also charged the defendant with having suffered two prior convictions for offenses, one committed in the county of Los Angeles and the other in the county of Kern. Following the conviction, as above stated, the defendant was adjudged to be an habitual criminal, and sentenced to the state prison for such term as should thereafter be fixed by law. Thereafter, and on or about the 27th day of August, 1932, the state board of prison terms and paroles fixed the sentence of the petitioner for life.

The record further shows that, at the time the petitioner was arraigned and pleaded to the offenses charged in the information, the plea as to the prior convictions was entered by the attorney for the petitioner as to both charges.

Basing his petition upon the provisions of section 1018 of the Penal Code, it is urged that the judgment against the petitioner is void, as said section provides that a plea of guilty can only be entered by the defendant himself.

[1] So far as the record shows by the return of the warden of the state prison at Folsom, it does not appear that the defendant was charged with having served a term in a state prison following either one of the prior convictions alleged in the information. This, of course, is necessary in order to support the rule of the court adjudging the defendant to be an habitual criminal under the provisions of section 644 of the Penal Code. This section is in its provisions similar to the provisions of sections 666, 667, and 668, which required not only conviction, but the serving of a term of imprisonment following the conviction.

[2] The Supreme Court, in the case of People v. Dawson, 210 Cal. 366, 292 P. 267, has definitely held that the information must charge the serving of the prior terms, and this must be followed by proof of the service, and that a plea of guilty only goes to the extent of the charge in the information, and, if the information does not charge the serving of sentences, the plea of guilty does not supply the deficiency, as it is only a plea of guilty of the charge contained in the information.

We do not need to enter into a discussion of whether the plea in this case conformed to the provisions of section 1018 of the Penal Code, by reason of the fact that the plea would not be any more extensive or inclusive, whether entered by the defendant or by his attorney, as in neither case would it exceed the terms of the information.

It does not follow, however, from what we have said, that the writ should be granted.

[3] Subdivision 2 of section 461 of the Penal Code provides that burglary in the second degree may be punished by imprisonment for a term not less than one year, nor more than fifteen years. As the judgment in this case was dated October 23, 1929, it is evident that the petitioner has not yet served the term for which he could be legally confined. Prior to the expiration of such date, the petitioner is not entitled to a writ directing his discharge.

The Supreme Court, in the case of In re Morck, 180 Cal. 384, 181 P. 657, held as follows: "It is the established practice of this court not to consider any question of excessive sentence until the expiration of the time for which the prisoner may be lawfully confined." Following this rule, the petitioner cannot complain of any excess of his sentence until the expiration of the time when the board of prison terms and paroles may provide for his confinement.

The writ is denied.

I concur: PULLEN, P. J.

133 Cal.App. 262

## In the Matter of the Application of William L. GRAVES for a Writ of Habeas Corpus.

Cr. 1760.

District Court of Appeal, First District, Division 1, California.

July 13, 1933.

Application for writ of habeas corpus prayed to be directed to the Sheriff of Alameda County to secure release of petitioner from custody.

Writ denied.

Frank W. Creely, of Oakland, for petitioner.

PER CURIAM.

Under the authority of In re Jorgensen, 19 Cal. App. 217, 124 P. 1055, Ex parte Karlson, 160 Cal. 378, 117 P. 447, Ann. Cas. 1912D, 1334, and In re Mason, 69 Cal. App. 598, 232 P. 157, the application for the writ of habeas corpus is denied.

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## DAVIS v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.*

Civ. 8571.

District Court of Appeal, Second District, Division 2, California.

June 19, 1933.

Rehearing Denied July 17, 1933.

Hearing Granted by Supreme Court Aug. 17, 1933.

**1. Jury 🔑14(2).**

Action to recover, because of fraud, purchase money paid on land contracts, where plaintiff alleged that plaintiff had received nothing and had rescinded contract and demanded money back, *held* action at law, not in equity, and hence was triable by jury (Civ. Code, §§ 1688–1691; Const. art. 1, § 7).

**2. Courts 🔑91(1).**

If court gives two inconsistent reasons for decision, and lower courts cannot follow one without disregarding other, they will follow the one which is unequivocal in meaning and in accordance with settled doctrine.

**3. Courts 🔑91(1).**

Courts will not follow new course leading only to confusion, unless it is apparent that higher court intended to reverse former doctrine.

On Petition for Rehearing.

**4. Appeal and error 🔑520(2).**

Fact that motion to strike plaintiff's demand for jury trial was based solely on ground that case was in equity and not triable by jury, and that, on plaintiff's refusal to proceed without jury, judgment of dismissal was entered, being shown in judgment and appearing in judgment roll, *held* in record on appeal.

**5. Exceptions, bill of 🔑1.**

Only purpose of bill of exceptions is to enable appellate court to review errors in law not appearing on face of record.

**6. Appeal and error 🔑277.**

Order erroneously striking plaintiff's demand for jury trial, being denial of plaintiff's constitutional right, *held* "interlocutory order finally determining rights of party" and was deemed excepted to (Code Civ. Proc. § 647; Const. art. 1, § 7).

[Ed. Note.—For other definitions of "Interlocutory Order," see Words & Phrases.]

**7. Appeal and error 🔑1031(1).**

Order striking plaintiff's demand for jury trial being denial of plaintiff's constitutional right, it was presumed that prejudice resulted from denial (Const. art. 1, § 7).

WORKS, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by Ethel Davis against the Security-First National Bank of Los Angeles, formerly known as the Los Angeles-First National Trust & Savings Bank, and others. From a judgment of dismissal, plaintiff appeals.

Reversed, with directions.

W. H. Douglass, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles, for respondents.

STEPHENS, Justice.

This is an action for the recovery of money paid on two contracts for the purchase of lots in a tract of land. The judgment went for defendant, and the plaintiff appeals.

The complaint alleges that respondent fraudulently represented that the tract in which the lots were situated would be improved in various ways, and that plaintiff, appellant here, relied upon such representations, but they were never made good; that she had received nothing and had rescinded the contract and demanded her money back.

After issue joined, appellant made demand for a jury, which demand was successfully resisted by respondents. Appellant refused to proceed to trial without a jury, and the court granted a motion for judgment of dismissal.

[1] The whole question is whether or not the facts alleged stated a case in law or in

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*For subsequent opinion see 36 P.2d 649.

equity. The authorities hereinafter cited show that an action for the return of purchase money following an accomplished rescission is an action at law whether or not there is fraud in the case. The respondents base their claim that the case sounds in equity principally on Stone v. Superior Court, 214 Cal. 272, 4 P.(2d) 777, 778, 77 A. L. R. 743. Throughout this opinion we shall repeatedly refer to several leading cases, and for clarity and brevity shall first cite them in the regular manner but thereafter refer to them as the "Stone" Case, etc.

McNeese v. McNeese, 190 Cal. 402, 213 P. 36, 37, holds: "The interposition of a court of equity to set the contract aside was not necessary to rescission. A contract may be rescinded by the act of the party entitled and desiring to rescind." This case also holds that the action for the return of personal property after rescission is one in law. The holding here is authority for the principle that the presence of rescission does not itself lay the case in equity.

It may be here mentioned that no point of fraud or deceit is involved in the McNeese Case or the very recent case of Bennett v. Superior Court (Cal. Sup.) 21 P.(2d) 946, 949, but the authorities are to the effect that the mere presence of fraud and deceit with rescission does not necessarily constitute a case as sounding in equity.

Appellant insists that she has rescinded her contract and that she has brought a suit in law for the return of the money paid after failure of consideration and is entitled to submit the issues of her case to a jury. It would seem and indeed it is conceded that her contention must be sustained unless the action sounds in equity. It is hardly necessary here to argue the point that without the Stone Case and under the McNeese Case, where there is no fraud, and under Ito v. Watanabe, 213 Cal. 487, 2 P.(2d) 799, and others where there is fraud, that the action would be held to be an action at law after an accomplished rescission. Sections 1688-1691, inc., Civ. Code, Cal. We shall therefore turn our immediate attention to the question as to whether or not the Stone Case is authority in support of respondents' contention that the action here is one in equity. In other words, does it overrule the theretofore settled law on the subject? We think it does not.

In the Stone Case the court was asked to, and did, issue the writ of mandamus against the superior court to dismiss an attachment issued under the following facts: The plaintiff in Thorndike v. Stone, a case then pending in the superior court, had purchased certain shares of stock under the inducement of false, fraudulent, and deceitful representations. The stock was valueless. She promptly served notice of rescission, offered to return the stock, and demanded her money back. Defendant refused to comply, she brought suit in two counts, and the writ of attachment issued. The first count set up the facts as to false inducements, and the second count was in the form of money had and received.

The opinion holds that the count alleging the facts determines the nature of the action, and that the additional common count does not aid the plaintiff, but we have nothing to do with that here.

Much confusion has followed the following language which we quote from the opinion in that case: "The first count in the plaintiff's complaint in said action clearly and unmistakably *set forth a cause of action for equitable relief* arising out of a transaction which she had been induced to enter into by certain false and fraudulent misrepresentations of the defendants in said action, which are set forth with much detail in the first count of her complaint, and upon which she based the exercise of her right of rescission and her right to a recovery of the money or property with which she had parted as a result of said false and fraudulent misrepresentations. The cause of action thus set forth was essentially *an action sounding in fraud and deceit, and based upon her rescission* of the transaction between herself and said defendants, undertaken by her upon the discovery of said fraud and deceit. Had the plaintiff's complaint contained this first count only, it would seem to be beyond question that the plaintiff would not have been entitled to the issuance of a writ of attachment thereon." (Italics ours.)

While the language "set forth a cause for equitable relief," standing alone, might justify the conclusion that the author meant to hold the case as sounding in equity, such a conclusion is entirely negatived by the opinion when read as a whole.

In considering the Stone Case, it must ever be kept in mind that the kind of action was not the issue; the issue was whether or not an attachment was proper in the case. Stanford Hotel Co. v. Schwind Co., 180 Cal. 348, 181 P. 780, as quoted in the Bennett opinion, supra, holds that the fact that a case has equitable qualities does not necessarily negative an attachment. "Hence it is not necessary in order to uphold the writ of attachment to establish the proposition that the action is either legal or equitable. What must be established is that the action is based upon contract, either express or implied, for the direct payment of money." Directly to the point is the following from the Bennett opinion: "To the same effect are Weintraub v. Superior Court, 91 Cal. App. 763, 267 P. 733, and a number of other cases. The rule is established upon well-considered authority that, if upon the examination of the complaint the gravamen of the action forces the conclusion that it is an action for the recovery of a specific sum of money upon a contract, express or implied, an attachment will issue regardless of the fact that the exercise of equitable powers of the court are also incidentally involved. In the instant case the suit is upon a contract, so far as the right of attachment is concerned, for the return of a specific sum of money by reason of failure of consideration."

It is our view that the Stone opinion is not authority for holding that that case sounds in equity, for every word of the opinion following the quoted phrase reasons to, and every case cited is authority for, the proposition that the case is an action ex delicto for fraud, an action in law. The second italicized phrase in the quoted paragraph from the Stone opinion, "*an action sounding in fraud and deceit, and based upon her rescission,*" is held to be an action at law by every case cited in the Stone opinion in which that question is treated, and the author of the opinion was merely pointing out that it arose from some source other than contract.

Immediately after the above-quoted paragraph, the opinion comments with approval upon the case of Hallidie v. Enginger, 175 Cal. 505, 166 P. 1, which clearly and unmistakably holds that an action to recover money paid under fraud and deceit is not equitable in the sense of pleading, but falls on the law side. The point for decision was about the same in both cases. Under section 537, subd. 1, Code of Civil Procedure, an attachment may issue "In an action upon a contract, express or implied, for the direct payment of money." The appellant in the Hallidie Case contended that, even if the action be considered an action in equity, still, as it is upon an implied contract for the direct payment of money, the attachment was legal. In answer to this postulate, Mr. Justice Henshaw traced the development of pleading and arrived at the conclusion that attachments issue only in those cases which arise directly from contract and those which arise from implied contracts by relation to contract, and never by relation to facts ex delicto. The opinion in the Bennett Case, which we may add is another attachment case, states the point in unmistakable language: "Stone v. Superior Court, supra, involved the element of fraud and holds no more than that, where the gravamen of the complaint is fraud the plaintiff is not entitled to a writ of attachment, and the action is not changed where a second count is framed for money had and received if said count is based upon the same facts constituting the action on fraud. The Stone Case held strictly to the rule that an action on fraud is ex delicto, and no implied contract for the direct payment of money, or any other honest implication, could possibly be ingrafted upon a transaction that was fraudulent ab initio. [Our citations: Loaiza v. Superior Court, 85 Cal. 11, 24 P. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197; Lemle v. Barry, 181 Cal. 1, 183 P. 150.] In fact, fraud vitiates everything, and there can be no contractual relations between the defrauder and the defrauded. * * * The weight of the decisions of this state is to the effect that, where the foundation of the action is a demand for equitable relief the attachment will not issue, but, as the authorities state, where some exercise of equitable powers, as in settling accounts and striking a balance, is incidentally involved in the action, the writ will issue if the pleadings warrant it"—citing Hallidie and other cases. By the latter part of this quotation and by the Hallidie Case it will be seen that the expression "set forth a cause of action for equitable relief" does not necessarily mean that the case sounds in equity, for a case may have incidental equitable phases to it and yet sound in law.

The very next case considered in the Stone opinion is San Francisco Iron & Metal Co. v. Abraham, 211 Cal. 552, 296 P. 82, 83, an action in deceit and also an attachment case. The court says, after the statement of fact, "The foregoing facts show that the plaintiff's grievance is a tort and under our statute it [the plaintiff corporation] was not entitled to an attachment. Code Civ. Proc. § 537; Hallidie v. Enginger, 175 Cal. 505, 509, 166 P. 1."

The next case considered is Powers v. Freeland, 114 Cal. App. 146, 299 P. 736, and the Stone opinion states it is "precisely in point." This case is a deceit case, and the opinion denominates the case as one in tort.

It strikes us with considerable force that immediately after citing and quoting from these cases the writer of the Stone opinion came directly to his reasoned conclusion. This conclusion, as one would expect it to be, is entirely consistent with all of the cited cases and *none of them say the case sounds in equity.* They all say they sound in fraud and deceit, which we have seen is an action in law (also see Stephan v. Superior Court, 183 Cal. 673, 192 P. 1083). We quote the concluding paragraph referred to: "From the foregoing review of the authorities, it would seem to be clear that the plaintiff's real cause of action in the case of Thorndike v. Stone, was an *action sounding in fraud and deceit*, and that to such a cause of action the provisions of section 537 of the Code of Civil Procedure, providing for the issuance of writs of attachment in proper cases, can be given no application." (Italics ours.) Nowhere in the opinion does the author say the cause sounds in equity, but twice he says "it sounds in fraud and deceit." Unless it is necessary, it would be doing the able, learned, and experienced lawyer and judge, Mr. Justice Richards, the author of the opinion, a great injustice to construe the opinion exactly opposite to the doctrine expressed in every opinion he cited, to the point under consideration, and the same can be said for the Chief Justice and the two associate justices who concur in the opinion. The meaning of the language that has misdirected so many able jurists is admirably explained by a historic quotation in Jensen v. Culver (Cal. Super.) 15 P.(2d) 907, 909: "Rather we see in the expression, 'a cause of action for equitable relief,' [referring to the phrase as quoted from the Stone Case] a present day application of the thought expressed by Lord Mansfield in Moses v. MacFerlan (1760) 2 Burrows, 1005, where, delivering the opinion of a court dealing only with cases at law, he held that an action on the case for money had and received was proper, saying: 'This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged * * * the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.'"

[2, 3] If this is not the sense in which the questioned expression is used, then we must find that the opinion gives two inconsistent reasons for the decision in the case. If two inconsistent reasons are given for a decision and courts cannot follow one without disregarding the other, they will follow the one, if such there is, that is unequivocal in meaning and is in accord with the settled doctrine. Courts will not follow a new course that leads only to confusion unless it is apparent that the higher court intended to reverse the former doctrine. Of course, we should not find the decision inconsistent unless the language used drives us to it. We conclude that the Stone Case is consistent with and does not overrule the leading cases and the settled law as to the nature of an action for the return of money or property after rescission of a contract by a party thereto.

If we now apply these principles to the instant case, we see that the claim for the return of the purchase money is not based directly upon a contract to return it nor yet upon an obligation which arose from or out of a contract to return it. It is based directly and arises out of tortious facts, viz.: The false representations of inducement. Upon this point alone was the attachment declared wrong in the Hallidie Case, and upon this point alone can the Stone Case be found consistent with itself.

Unquestionably the learned judge in the instant case was misled by the ill-starred language of the Stone Case, and he was not alone in that. The Court of Appeal was assertedly following the Stone Case when the Bennett Case was before it. The cases of Ingalls v. Superior Court, 121 Cal. App. 453, 9 P.(2d) 266, a case comparable to the instant case in principle, and Fair View Farms Co. v. Superior Court, 123 Cal. App. 9, 10 P.(2d) 1011, comparable to the McNeese Case (no fraud), cite Stone v. Superior Court, supra, as authority. The Court of Appeal in Ryker v. Lindenberg, 20 P.(2d) 763, did likewise, and that case is now before the Supreme Court for hearing. Taback v. Greenberg, 108 Cal. App. 759, 292 P. 279, decided prior to the Stone Case, takes the opposite view. In Jensen v. Culver (Cal. Super.) 15 P.(2d) 907, the point of the municipal court's assuming jurisdiction of an action for money paid as consideration for a contract alleged to have been secured by fraud was under consideration. The money judgment prayed for was within the court's jurisdiction and the complaint alleged rescission of the contract which had been obtained by fraud. The court construed the Stone Case substantially as we have done in the instant case. Culver v. Superior Court (Cal. App.) 19 P.(2d) 43, is another phase of Jensen v. Culver, supra, and it followed that case. We hope this opinion may be helpful in clearing up the confusion that followed the Stone Case.

The judgment is reversed, with directions to the superior court to proceed to a trial of the case before a jury.

ARCHBALD, Justice pro tem.

I concur. I agree with Justice STEPHENS that, in view of the statements in Stone v. Superior Court, 214 Cal. 272, 4 P.(2d) 777, 778, 77 A. L. R. 743, to the effect that the first count in the complaint involved there was "essentially an action sounding in fraud and deceit," which statements are so fundamentally opposed to the confusing statement that such count "clearly and unmistakably set[s] forth a cause of action for equitable relief," such latter statement cannot be applied to a similar complaint so as to place it on the equity side of a court, thus denying to a plaintiff his right to a jury trial. That the Supreme Court does not intend it to be so applied appears from the case of Bennett v. Superior Court, 21 P.(2d) 946, as Justice STEPHENS has shown.

That the language in the first count of the complaint in the Stone Case has allegations that necessarily would be in a complaint for equitable relief under such facts is indisputable. Under many sets of facts law and equity have concurrent jurisdictions. The essential difference between the pleadings in such cases of concurrent jurisdiction is in the relief afforded. In a court of law, based on facts as shown in the Stone Case and this, the relief is by way of judgment for a sum of money either by way of damages for the fraud and deceit, or, in case of rescission, on the contract the law implies to pay back the money obtained by such fraud. If the case is in equity, the appeal *must* be for some relief peculiar to equity which the law cannot afford. There was no such appeal either in the Stone Case or in the case before us. Blackstone said, many years ago: "The want of a more specific remedy than can be obtained in the courts of law gives a concurrent jurisdiction to a court of equity in a great variety of cases. To instance in executory agreements. A court of equity will compel them to be carried into strict execution unless where it is impossible or improper; instead of giving damages for their nonperformance. * * * So waste, and other similar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction. Over questions that may be tried at law, in a great multiplicity of actions, a court of equity assumes a jurisdiction to prevent the expense and vexation of endless litigation and suits. In various kinds of frauds it assumes a concurrent jurisdiction, not only for the sake of a discovery, but of a more extensive and specific relief; as by setting aside fraudulent deeds, decreeing reconveyances or directing an absolute conveyance merely to stand as security." Book III, c. xxvii, p. 438, vol. II, Cooley's Blackstone (4th Ed.) p. 1183.

WORKS, Presiding Justice.

I dissent, and for the purpose of indicating the grounds of my disapproval of the majority opinion I here set down an opinion prepared by myself, before the writing of the opinoin by Justice STEPHENS, in the vain hope that it might receive the concurrence of my associates:

In this action for a recovery because of fraudulent misrepresentations leading to the execution of contracts for the purchase of lands, judgment went for defendants, and plaintiff appeals.

The complaint alleges that the agreements were for the purchase of two parcels situate in a certain tract of land which respondent corporations had placed on the market. The pleading is in two counts, each based upon one of the two contracts referred to. We shall quote from but one of the counts, as the two are alike in all respects which are material here. It is alleged "that the defendants for the purpose of inducing plaintiff to enter into the aforesaid agreement * * * falsely and fraudulently represented to plaintiff that a large, attractive and expensive clubhouse would be built on the tract of which the above-described lot was a part and parcel, and that the building of said clubhouse would greatly enhance the value of said above-described lot; that the defendants * * * further falsely and fraudulently represented to plaintiff that certain streets, driveways, pavements, sidewalks, water and sewers would be placed in and on the tract of which the above-described lot is a part and parcel, all of which, as represented, would greatly enhance the value of the above-described lot, and that plaintiff would in a few months and within a year at most, be able to realize a great profit on the said so-called investment." The complaint also contains the following paragraph: "That defendants in order further to deceive plaintiff and to induce her to enter into the contract aforesaid stated and represented to her that an architect had been sent to Europe to study the latest and most up-to-date type of Spanish architecture to the end that the said clubhouse * * * would be of the most modern type of Spanish architecture, and thereby greatly enhance the value of the above-described lot which plaintiff agreed to purchase. And in this connection plaintiff states that it is her belief and upon this belief she alleges that defendants did not send and did not intend to send an architect to Europe or elsewhere for the purpose of studying Spanish architecture or any other architecture in connection with the said clubhouse, but plaintiff states that it is her belief and upon this belief she alleges that said representations as to Spanish architecture and architects abroad were made for the sole purpose of deceiving plaintiff as alleged herein." It is alleged further that plaintiff relied upon the representations made to her and signed the contract as a consequence thereof. It is also averred in the complaint: "That defendants and their agents well knew at the time of making the representations aforesaid, that said improvements would not be made and placed upon the tract of which the above-described lot is a part and parcel, * * * and knew at the time of making said representations that the same were false and untrue and that plaintiff did not know that said representations were false, but believed them to be true, and relied thereon, and was deceived thereby; and that plaintiff purchased said lot believing said representations to be true." The pleading alleges that plaintiff had received nothing of value under the contract. It is also alleged that, when the time had passed for the promised making of the improvements, appellant ceased paying installments under the contract and notified respondents that she rescinded it. The prayer demanded judgment for a certain sum of money, being the total of the amounts paid by appellant under the two contracts.

Appellant in due form made demand for a jury in the trial court. Respondents then gave notice of motion "to strike the demand of the plaintiff for a jury herein and to remove the trial of the above-entitled cause to a nonjury department on the ground that the cause of action herein is an equitable one and not triable by a jury." The motion was later made and it was by the court granted. The minutes of the court, after referring to the motion, recite: "* * * Which motion is granted and plaintiff refuses to proceed to trial without a jury. Thereupon defendants move the court to dismiss the action on the ground that the plaintiff refuses to proceed without a jury and the motion is granted and a judgment of dismissal is ordered." Judgment was thereupon accordingly rendered.

Appellant insists that the action is one at law, and in support of her view cites several cases, among them McNeese v. McNeese, 190 Cal. 402, 213 P. 36. We think, however, that the disposition of the appeal must be governed by a comparatively recent decision of the Supreme Court and not by the cases cited. The facts disclosed by this later pronouncement, so far as the question whether the action was one at law or was a suit in equity is concerned, are not distinguishable from those of the present action. The basic question involved in the decision was whether an attachment could issue in the action. There is language in the opinion which shows that the plaintiff could not have the writ because the cause sounded in tort and not in contract. The court said, in addition, however, that the count of the complaint principally in question "clearly and unmistakably set forth a cause of action for equitable relief arising out of a transaction which she [plaintiff] had been induced to enter into by certain false and fraudulent misrepresentations of the defendants in said action." Stone v. Superior Court, 214 Cal. 272, 4 P. (2d) 777, 778, 77 A. L. R. 743.

Since the present appeal was briefed, and quite recently, the Supreme Court has announced a decision which bears upon the question now before us. The case is Bennett v. Superior Court (Cal. Sup.) 21 P.(2d) 946, 950. There is a concurring opinion following the main opinion of the court. At the beginning of this concurrence the assertion is made: "I concur in the conclusion reached in this opinion, but I think it should do expressly what it does in effect, namely, overrule the case of Stone v. Superior Court, 214 Cal. 272, 4 P.(2d) 777, 77 A. L. R. 743." The special concurrence was joined in by a justice other than its author. With great respect for the two justices, we cannot think that the decision overrules the Stone Case. Bennett v. Superior Court is another of those actions in which the basic question was whether the plaintiff was entitled to the writ of attachment. Before the action was commenced, as in the Stone Case, the plaintiffs by due notice had rescinded their contract with the defendants. In its decision in the Bennett Case the Supreme Court decided that an attachment was proper for the reason that the rescission had been made because of a failure of consideration and not upon the ground of fraud, which latter, as we have remarked above, was the case in the Stone action. In the Bennett Case the court determined, because the rescission was on the ground of a failure of consideration, that the action sounded in contract. The decision in the Stone Case was to the effect, for the reason that the rescission was on the ground of fraud, both that the action sounded in tort and that it was a suit in equity. Despite the assertion in the concurring opinion in the Bennett Case, the main opinion shows an intent to preserve the doctrine of the Stone Case, the prototype of the one now before us. It is said, for instance, in the Bennett opinion, immediately after a mention of the Stone Case and after a statement of what it decided: "The transaction in the instant case is strictly one arising out of contract. No claim is made that the contract was vitiated by fraud, or that fraud entered into the transaction in the slightest degree. It is a question solely of failure of consideration." And again: "The entire transaction sounds in contract. The ex delicto doctrine has no application to the case." Further, in commenting upon Stanford Hotel v. Schwind, 180 Cal. 348, 181 P. 780, it was said: "The court points out that in that case, as in the instant case, there was no suggestion that fraud entered into the making of the contract." And finally: "We do not regard Stone v. Superior Court, supra, as being in conflict with the cases last above cited [among which was McNeese v. McNeese, 190 Cal. 402, 213 P. 36], inasmuch as the question whether an attachment will lie in an action brought after rescission to recover back money paid under a contract wherein the consideration had failed was not in that [the Stone] case."

The present action is a suit in equity, and appellant was not entitled to a jury trial.

I think the judgment should be affirmed.

## On Petition for Rehearing.

PER CURIAM.

[4, 5] In their petition for rehearing respondents bring to our attention two points not touched upon in the majority opinion, being obscured by the interest in the question decided therein. We adhere to the decision expressed in the majority opinion that this case is a law action and that a trial by jury was erroneously denied by the lower court. Respondents urge that appellant's failure to except to the ruling of the trial court striking appellant's demand for a jury was a waiver of her objection and an acquiescence in such ruling, and that she suffered no prejudice by such denial.

The motion to strike was based solely on the ground that the case is in equity and not triable by a jury, and on plaintiff's refusal to proceed without a jury the judgment of dismissal was entered. All of such facts are shown in the judgment and appear in the judgment roll, and consequently so appear in the record before us. Sichler v. Look, 93 Cal. 600, 29 P. 220. The only purpose of a bill of exceptions is to enable appellate courts to review errors in law which do not appear on the face of the record, and "that which is a record already, cannot receive any higher degree of sanction by being made record a second time." Parsons v. Davis, 3 Cal. 421, 425.

[6, 7] Trial by jury in civil actions, unless waived as prescribed by law, is a constitutional right. Section 7, art. 1, Const. of California. If, as we think, the instant case is a civil action, appellant's constitutional right was denied and finally determined by the order which the court made. Such order was an "interlocutory order * * * finally determining the rights" of appellant, and under section 647 of the Code of Civil Procedure is deemed to have been excepted to. Being a constitutional right, it is to be presumed that prejudice resulted from the denial.

Petition for rehearing denied.

WORKS, P. J., dissents from the order denying a rehearing.

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133 Cal.App. 152

## PEOPLE v. EGAN et al.

Cr. 2342.

District Court of Appeal, Second District, Division 2, California.

July 3, 1933.

**1. Homicide** ⟹253(1).

Evidence sustained conviction for first-degree murder.

**2. Criminal law** ⟹371(4, 12).

Where questions of existence of conspiracy and of motive and intent of defendants prosecuted for murder committed during robbery were material, evidence of other crimes of same kind and perpetrated with peculiar similarity *held* admissible.

**3. Criminal law** ⟹369(2).

Statements, made in defendant's presence and not denied by him, showing participation in crime charged, *held* not inadmissible because statements showed similar participation in other like crimes of violence.

**4. Criminal law** ⟹407(2).

Defendant's failure to deny accusatory statements is indicative of consciousness of guilt.

**5. Criminal law** ⟹622(1).

Parties jointly charged with crime cannot as matter of right demand separate trials, but matter is left to court's discretion (Pen. Code, § 1098).

**6. Criminal law** ⟹622(1).

That defendants jointly charged with first-degree murder committed during robbery were denied separate trials *held* not abuse of discretion (Pen. Code, § 1098).

**7. Criminal law** ⟹519(4).

That statement was made while defendant was under arrest did not take away its voluntary character, established by evidence, nor render it inadmissible.

**8. Criminal law** ⟹525.

That defendant was shot just before statement was made and was possibly not in full possession of his faculties went to weight and not admissibility of statement.

**9. Criminal law** ⟹519(4).

Confession made by defendant to officers at hospital to which defendant, shot at time of arrest, was taken, *held* properly admitted in prosecution for murder committed during robbery.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Dallas Egan, Homer D. Rogers, and George Henry Turcott were charged with murder of the first degree. During the course of the trial, defendant Egan changed his plea to guilty, and the trial proceeded against the codefendants. Defendants Rogers and Turcott were convicted as charged, and they appeal.

Affirmed.

George B. Bush, Gladys Towles Root, and Philip C. Farman, all of Los Angeles, for appellant Rogers.

William I. O'Shaughnessy, of San Francisco, for appellant Turcott.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Defendants were tried before a jury on a joint information charging one Dallas Egan and themselves with the crime of murder. Egan was also charged with four prior convictions and Turcott with one. During the course of the trial Egan changed his plea to "guilty" and the trial proceeded against his codefendants. The jury returned a verdict of guilty of murder in the first degree as to defendant Rogers, fixing the punishment at life imprisonment with recommendation of leniency. As to Turcott, the jury returned a similar verdict without recommendation of leniency. From the judgments of conviction entered upon said verdicts and from orders denying their respective motions for a new trial, each defendant has appealed.

On July 23, 1932, three men entered the Broder jewelry store in Los Angeles and robbed the establishment. During the robbery William J. Kirkpatrick, an elderly man, was shot and killed. The three robbers then left the store and escaped in an automobile with two confederates, one of whom had acted as lookout man, while the other stayed at the wheel of the car while the crime was being perpetrated. Three of the men involved were white, one a negro, and the other a Mexican.

Appellant Rogers contends that the court erred: (1) In permitting the introduction of evidence of other crimes in which it is urged he did not participate and which it is contended are not connected with or pertinent to the one involved here; (2) in admitting statements of defendant Turcott as to such other crimes, and accusatory statements of one Lamey and defendant Egan in the presence of Rogers; and (3) in denying his motion for a separate trial; and (4) that the evidence is insufficient to justify the verdict.

Appellant Turcott urges: (a) That the admission of statements made by him to W. C. Burris was erroneous in that at the time such statements were made this appellant was unable to comprehend them; (b) that the evidence is insufficient to justify the verdict in that excluding "the so-called confession" there is no evidence connecting him with the crime; and that the court erred (c) in admitting such confessions because they were not shown to have been free and voluntary but were obtained by a promise and for a consideration; and (d) in admitting testimony as to other crimes without proof of the existence of a conspiracy.

[1] (1), (2), and (4). One witness testified that she was trying to park her car in the vicinity of the jewelry store at the time of the robbery and noticed a "brown car" with "a kind of a rumble seat in the back" parked in front of a radio store near the jewelry store; that it was "moving back and forth," one man at the wheel and another on the sidewalk by the front wheel; that she heard a shot and that three men ran out of the jewelry store and jumped into the brown car; that the man standing on the sidewalk also jumped into the car. Mr. McCormick, proprietor of the radio store, testified that he saw an Oakland cabriolet, "tan color," in front of his store at the time of the robbery, "rocking to and fro from the curb at an angle," with some one in the driver's seat, and that defendant "Rogers was standing there, one hand on the door"; that he heard two shots, rushed out on the sidewalk, and saw two men with guns running toward him and the cabriolet; that one of them said "move," whereupon the witness ran into his store; that he saw Rogers jump in the car, following the shooting. In addition to the foregoing there was evidence showing that Egan, who, it will be remembered, was jointly charged with appellants, followed by two men, one white and one colored, entered the jewelry store at the time in question, and with guns compelled the proprietor and his clerk to hold up their hands, "took pillow cases out of their pockets and started to empty jewelry" into them from the showcases; that Kirkpatrick entered and was shot in the head, dying from the effect thereof. At the time of Rogers' arrest a car was found, which he said his father owned but that he (Rogers) "had used it most of the time," and which answered the description of the car used in the robbery. Photographs of this machine were identified by witnesses as a fair representation of the automobile used at that time. There would seem to be sufficient evidence to support the verdict and judgment as to appellant Rogers.

After properly instructing the jury that it was only to be taken as against the defendant Rogers, the court admitted evidence of a statement made by defendant Egan, in Rogers' presence, which was to the effect that Rogers was with them in the jewelry store robbery at which Kirkpatrick was killed, that Rogers' car was used, and that Rogers stayed outside with the car and was given his share of the proceeds of the robbery, to which statement Rogers said nothing. Against both appellants, a statement made to the police officers by Turcott, in the presence of Rogers, was read in evidence, to the effect that Rogers was not only with them in the robbery of the jewelry store but that he went with them to San Bernardino on a trip when they planned to hold up a bank but did not execute the plan, and in which his car was used as well as a stolen La Salle; that about a week before the jewelry store robbery they held up an office of the Bureau of Water and Power in Los Angeles, using the ever-present Oakland car belonging to Rogers; that Rogers was with them at the time and sat behind the wheel of the car waiting while the holdup was being perpetrated, afterwards taking his "split" of the money, the others present being Egan and Alvarado, the Mexican, of the jewelry store robbery. During the making of such charges Rogers "stood mute." Although Turcott confessed to his part in the robbery of the jewelry store which resulted in the killing of Kirkpatrick, he was not identified by any prosecution witness.

A statement made by one Lamey in the presence of Rogers and some officers was also introduced in evidence, in which Lamey said that he met the parties in San Bernardino at the time mentioned in Turcott's statement, having gone there from Los Angeles for that purpose; that he rode in the "Oakland car" in San Bernardino while Rogers was driving it; and that Rogers told him that he, Rogers, drove the car on the jewelry robbery job and that a man was killed. After the statement was made an officer asked Rogers if his name "was Homer Rogers and he said yes." Asked if he wanted to make any statement then, Rogers said he "didn't have any statement to make."

Following the introduction of such statements in evidence, testimony of the robbery of the office of the Los Angeles Gas & Electric Company was admitted, showing that an Oakland car resembling that driven by Rogers was used, one man remaining outside with the automobile during the commission of the crime. Other witnesses identified Egan as one of the robbers. The same is true as to a robbery of the Lakeview Creamery, participated in by four men who drove up in an Oakland car resembling that used by Rogers, three of them, two identified as Egan and Turcott, and the third a Mexican or negro, entering the place and perpetrating the crime while the fourth remained at the wheel of the machine. There is abundant other evidence showing the close association, as well as participation in such events, of Egan, Turcott, Rogers, Alvarado, the Mexican, and Johnson, a negro, from the holdup of the Bureau of Water and Power office to the robbery of the Bank of America branch on August 24, 1930, during which Alvarado and Johnson were killed. The day following the last affair Egan and Turcott were arrested in a room together and Rogers at his home, and pictures were taken of the ever-present Oakland car, identified by various witnesses as being present at different jobs done by various members of the group. Evidence as to the holdup of the branch office of the Bureau of Water and Power, as well as the Bank of America branch, was limited by the court to defendant Turcott alone, although as stated the Oakland car was shown to be present at the Bureau of Water and Power job and the Turcott statement showed Rogers' participation as driver.

[2] With respect to appellant Rogers, so far as the evidence shows, his participation was as lookout man and driver of the car, in the robbery resulting in the murder mentioned here. The question of his motive and intent was material. In addition, this evidence would seem to show the existence of a continuing conspiracy to perpetrate robberies, and kill if necessary. Turcott made the statement that he was as guilty of the killing of Kirkpatrick as Egan, as he would have killed him if Egan had not, and the evidence shows that he shot a man in the robbery of the branch of the Bank of America. They were acts of the same kind and perpetrated with peculiar similarity, which in our opinion sheds light upon the offense here under consideration. The court properly admitted evidence of such other crimes. People v. Arnold, 199 Cal. 471, 486, 250 P. 168; People v. Lapierre, 205 Cal. 462, 468, 271 P. 497; People v. Wilson, 76 Cal. App. 688, 245 P. 781. Furthermore, the court instructed the jurors that evidence of similar offenses was to be considered by them only for the purpose of proving motive or intent on the part of defendants, or a possible conspiracy on their part to commit the crime charged, and that whether or not such other offenses were committed by either defendant was for their exclusive determination.

[3, 4] In view of the foregoing we see no merit in the contention of appellant Rogers (2) that the court erred in admitting the statements of Turcott and Lamey, which, in addition to showing participation in the crime charged here, may have shown similar participation in other like crimes of violence. Failure to deny such accusatory statements is indicative of "consciousness of guilt on the part of the accused by allowing an imputation opposed to the presumption of innocence to pass unchallenged." People v. Yeager, 194 Cal. 452, 229 P. 40, 54.

[5, 6] (3) Parties jointly charged cannot as a matter of right demand separate trials. Section 1098, Pen. Code. The section cited leaves the matter to the discretion of the court, and we fail to see where there was any abuse thereof. See People v. Wilson, supra.

[7-9] (A) At the time of Turcott's arrest he was shot, the bullet cutting the head of his penis and passing through his groin, lodging in his hip. At the hospital he made a statement to officer Burris, which was introduced in evidence against him, in which he admitted that he was in several of the "jobs" already mentioned, as well as others, that he was in the Bank of America holdup, and that he shot the banker with the gun found under his pillow at the time of his arrest.

The fact that the statement was made while under arrest did not take away its voluntary character, which the evidence clearly shows, or render it inadmissible; and the evidence showing that he was shot just before, and possibly not in full possession of his faculties, goes to the weight to be given such statement and not to its admissibility. People v. Miller, 135 Cal. 69, 67 P. 12. And the court left to the jury the question whether or not he was in such a mental and physical condition as to understand the questions and "knew what he was being asked and what he was saying." We see no error in admitting such statement, nor (c) in admitting the confession which Turcott later made to the officers at the hospital.

Nor do we see any merit in appellant Turcott's contentions (b) that the evidence was insufficient to justify the verdict against him and that the court erred (d) in admitting testimony of other crimes under the relationship shown by the evidence.

Judgments and orders affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

133 Cal.App. 231

### KELLNER et al. v. WITTE et al.

### Civ. 1214.

District Court of Appeal, Fourth District, California.

July 10, 1933.

Hearing Denied by Supreme Court Sept. 6, 1933.

**1. Negligence 🔑6.**

Violation of statute is negligence per se.

**2. Appeal and error 🔑1001(2).**

Where there is any substantial evidence sustaining implied finding of jury, it will not be disturbed, even though appellate court believes preponderance of evidence supports opposite conclusion.

**3. Automobiles 🔑245(78, 79).**

Whether motorist colliding with truck was contributorily negligent because of excessive speed, or in not driving as closely to right edge of highway as possible, or in not maintaining lookout, *held* for jury (St. 1923, p. 553, § 113 (d), as added by St. 1931, p. 2120, § 34; St. 1923, p. 557, § 122 (b), as amended by St. 1931, p. 2124, § 41).

**4. Appeal and error 🔑1050(1).**
**Evidence 🔑222(10).**

Admitting driver's statement made at coroner's inquest *held* error as to employer sued with driver for motorist's death, but not prejudicial, where same statements were used to impeach driver testifying for employer without objection and no limiting instruction was requested.

**5. Evidence 🔑241(1).**

Statements of employee not in presence of employer and not res gestæ are inadmissible against employer, though admissible against employee as declarations against interest.

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Appeal from Superior Court, Kern County; Allen B. Campbell, Judge.

Action by Lotta L. Kellner and another against August Witte and another. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Ray W. Hays, of Fresno, for appellants.

Willebrandt, Horowitz & McCloskey, of Los Angeles, for respondents.

MARKS, Justice.

Lotta L. Kellner is the widow, and Jessica R. Kellner is the daughter, of Louis Kellner, deceased. They brought this action to recover damages for his death which resulted from a collision between an automobile which he was driving in a southerly direction on the state highway and a truck belonging to the appellant August Witte and driven by his employee, Joseph J. Seale, in a northerly direction on this highway. The accident occurred about 18 miles north of the city of Bakersfield. The highway rises on a slight grade for several hundred feet northerly from the point of impact. At that place the paved portion of the road was 30 feet in width, with a dirt shoulder on each side.

The accident happened about 4 o'clock on the afternoon of August 25, 1931. The day was clear. J. A. Root was driving northerly on the highway with his wife and daughter in a coupé at a speed of between 25 and 30 miles an hour. His left wheels were about 4 feet easterly from the center line of the highway. The truck, driven by Seale, gradually overtook the Root automobile and tried to pass. It could not make a speed in excess of 35 miles an hour. During his attempt to pass the Root automobile, the Kellner car and the truck came into collision.

Appellants rely on two grounds for a reversal of the judgment: First, that Kellner was guilty of contributory negligence; and, second, that the trial court erroneously overruled their objections and admitted in evidence statements of Seale as to how the accident occurred, without instructing the jury that the statements could not be considered as evidence against Witte, who was not present when they were made.

They rest their claim of contributory negligence on the part of Kellner upon three grounds: First, that he was driving at a high rate of speed and in excess of 45 miles per hour; second, that he was driving near the center line of the road and not near his right-hand edge of the highway; and third, that he did not maintain a lookout for obstructions ahead.

As is usual in cases of this kind, the evidence and reasonable inferences to be drawn from it are conflicting. There is ample evidence in the record to sustain the conclusion that Kellner was guilty of negligence which directly and proximately contributed to his injury and death, had the jury so found in reaching its verdict. However, as the jury reached a contrary conclusion, it is only necessary for us to determine whether there is any evidence to support its implied finding that the negligence of Kellner did not contribute to the accident and his subsequent death. In discussing this phase of the case, we will only summarize such evidence as tends to support this finding of the jury.

We have studied the record, and are satisfied that it must be conceded that Kellner was driving his automobile considerably in excess of 45 miles per hour at the time of the accident and on his right-hand side of the road with his left wheels about 2 feet to his right of the center line of the highway until he reached a point between 25 and 50 feet from the place of impact. The evidence would justify the conclusion that during this last distance he swerved to his right in an effort to avoid the collision. When the truck and automobile came to rest after the collision, the right-hand wheels of the automobile were in the dirt shoulder of the highway westerly from the pavement. The truck was headed in a northwesterly direction, with its left rear wheel at about the center line of the pavement. Its left front wheel was on top of the Kellner car in front of the driver's seat, and about 2 feet easterly from the westerly edge of the pavement. The truck was about 22 feet in length, and had a bed a little over 7 feet in width.

[1] It is well settled in California that violation of a statute is negligence per se. However, since the addition of subdivision (d) to section 113 of the California Vehicle Act (Stats. 1931, pp. 2120, 2121, § 34), speeds in excess of those prescribed in subdivision (b) of the same section may not be considered negligence as a matter of law, but "the burden shall be upon the opposing party to establish that the operation of such vehicle at such speed constituted negligence." Before the adoption of this subdivision, it was held that the question of whether excessive speed amounting to negligence per se on the part of the driver of an automobile contributed to his injury was a question of fact to be decided by the jury in the ordinary accident case. Skaggs v. Wiley, 108 Cal. App. 429, 292 P. 132; Hepner v. Libby, McNeill & Libby, 114 Cal. App. 747, 300 P. 830; Shannon v. Fleishhacker, 116 Cal. App. 258, 2 P.(2d) 835; Blodget v. Preston, 118 Cal. App. 297, 5 P.(2d) 25; Morehead v. Roehm, 118 Cal. App. 312, 4 P.(2d) 995; Klemko v. Ryer, 118 Cal. App. 238, 4 P.(2d) 998.

Subdivision (b) of section 122 of the California Vehicle Act (as amended by St. 1931, p. 2124, § 41), provides that, under ordinary circumstances, the operator of a motor vehicle shall drive it as closely as practicable to his right-hand edge of the highway. Whether a failure to observe this provision is negligence that contributed to the injury of a driver in an ordinary accident case has been held to be a question of fact to be decided by the jury. McLellan v. Cocola (Cal. App.) 24 P.(2d) 200; Gayton v. Pacific Fruit Express Co., 127 Cal. App. 50, 15 P.(2d) 217.

[2, 3] There is ample evidence in the record supporting the contention of appellants that, had the deceased maintained a lookout, he would have seen the truck in his path and could have avoided the accident by reducing his speed and swerving his automobile to his right. However, the rule is well settled in this state that, where there is any substantial evidence sustaining an implied finding of a jury, it will not be disturbed on appeal, even though it seems to the appellate court that a preponderance of the evidence would support the opposite conclusion. There is evidence in the record which would support the conclusion that Seale turned his truck sharply to his left and onto his left-hand side of the center of the pavement and into the path of the Kellner car when it was within a distance of from 150 to 200 feet from him. J. A. Root testified that just before the collision another automobile passed the Kellner car several hundred yards to the north of the place of the impact. He further testified as follows:

"Q. Where was this truck when the first car passed you, how far behind you? A. He was right back at me.

"Q. He was right back of you when the first car passed you? A. Yes, sir. I should think that this man pulled out around him, he started to go around me and this car missed him.

"Q. You mean the truck had already pulled around you? A. I hadn't seen him.

"Q. You don't know where the truck was when the first car passed you? A. No.

"Q. Except that it was close behind you? A. Yes, the truck was.

"Q. Well, this is the picture. At the time the first car passed you or even with you, that the truck driven by Mr. Seale was right behind you and the car driven by Mr. Kellner was fifty or sixty yards to the north, that is right? A. Yes, sir. Coming down towards me.

"Q. Were you watching this truck at all when it pulled around you? A. Yes, sir."

From this evidence and from the other evidence indicating the positions of the two vehicles when they came to rest after the collision, we must conclude that the jury was of the opinion that, when Kellner was less than 200 feet from the Root car, Seale turned the truck sharply to his left to pass the Root automobile, and onto his left side of the road and into the path of deceased's automobile, and that this was the proximate cause of the accident and the death of Kellner. There being evidence to support this conclusion, we cannot disturb it on appeal.

[4, 5] Seale was not present in the court below during the time respondents were putting on their case in chief. They desired to call him for cross-examination under section 2055 of the Code of Civil Procedure, but were not able to do so. He had appeared as a witness at the coroner's inquest. Over the objection of appellant Witte that the evidence could not bind him, respondents were permitted to introduce in evidence statements made by Seale while a witness at the inquest. This ruling of the trial court was error. It is well settled that statements made by an employee not in the presence of his employer, and which are not part of the res gestæ, are not admissible in evidence against the employer,

though admissible against the employee as declarations against his interest. However, under the facts here presented, we do not consider this error sufficiently prejudicial to require a reversal of the judgment. Seale subsequently appeared as a witness and was cross-examined by respondents. Practically the same portions of the transcript of the coroner's inquest were used to impeach his testimony that had been referred to in the testimony introduced by respondents in chief. No objection was made by Witte to the use of the transcript on cross-examination nor did he request an instruction that the statements of Seale could not be considered as binding upon him when made out of his presence and not a part of the res gestæ. We have concluded this cured the former error.

Judgment affirmed.

I concur: BARNARD, P. J.

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133 Cal.App. 327

## PEOPLE v. KAUSEN.

Cr. 1271.

District Court of Appeal, Third District, California.

July 15, 1933.

**1. Homicide** ⚷257(8).

Evidence that defendant, with heavy flash-light, severely beat wife who had obtained interlocutory divorce decree, threatened intent to kill her, and attempted to choke her, supported conviction of assault with intent to murder.

**2. Criminal law** ⚷1173(1).

In prosecution for assault with intent to murder, that instruction on included offenses mentioned only simple assault and not battery *held* not reversible error, where, under evidence, verdict of mere battery or assault would have been unwarranted.

**3. Homicide** ⚷339.

In prosecution for assault with intent to murder, allegedly committed after defendant entered victim's apartment in stocking feet, exclusion of testimony showing cattlemen's custom to take off shoes before entering private residence *held* not prejudicial, in view of evidence that defendant entered without knocking or indicating approach.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Lloyd Kausen was convicted of assault with intent to commit murder, and he appeals.

Affirmed.

Thomas Cotter, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant was convicted in the county of Humboldt of the crime of assault with intent to commit murder. From the order denying the defendant's motion for a new trial, and the judgment entered upon such conviction, the defendant appeals.

Three informations were filed against the defendant charging him with the crime of assault with intent to commit murder upon three different persons. These informations were consolidated and one trial was had upon all three. The defendant was convicted of making an assault with intent to commit murder upon the person of Aileen Kausen, and this conviction is the only one involved upon this appeal.

The record shows that on or about the 25th day of December, 1932, the defendant entered the room occupied by Aileen Kausen, between the hours of 9 and 10 p. m., and severely beat Mrs. Kausen with a flash-light then in his possession. It appears from the testimony that the defendant and Aileen Kausen were husband and wife, but had been separated for some time, and that Mrs. Kausen had obtained an interlocutory decree of divorce. At the time of the assault Mrs. Kausen was living in an apartment situate in the rear of a house occupied by her parents, Mr. and Mrs. Davis, in the city of Eureka. Prior to entering the room occupied by Mrs. Kausen, the record shows that the defendant, who had been living on a farm situate several miles from Eureka, drove to Eureka on the afternoon of December 25th, and after arriving there, continued to drive about the streets of Eureka in the neighborhood of the Davis home, and after being satisfied that Mr. Davis was away from home, parked his car a block or two distant from the Davis residence, proceeded to the rear of the residence, removed his shoes, and entered the apartment of Mrs. Kausen. The apartment was entered without knocking and without any noise or disturbance being made by the defendant. At the time of the entry of the apartment, Mrs. Kausen was lying in bed. A noise of some sort arousing her, she made an exclamation, and upon discovering who was present, told the defendant to leave. The defendant claims he entered the apartment for a peaceful purpose, to wit, to induce Mrs. Kausen to give up her intention of securing a divorce and return to his home. The testimony, however, shows that immediately after being requested to leave, the defendant began beating Mrs. Kausen over the head with a heavy metallic flash-light. This beating continued with considerable intensity until in the struggle Mrs. Kausen was out of the bed and down upon the floor, at which time there is evidence that the defendant attempted to tie a piece of cloth around the neck of Mrs. Kausen. At about this juncture, Mr. Davis having returned to his residence, Mr. and Mrs. Davis came into the room for the purpose of protecting Mrs. Kausen. Following their entry, both Mr. and Mrs. Davis suffered a severe beating at the hands of the defendant. There is testimony to the effect that in this beating not only the flash-light but also a club was used. There is also testimony to the effect that at the time the defendant was beating Mrs. Kausen he said to her, "I'll kill you" (using some profane language which we omit). The testimony of Mrs. Kausen is further to the effect that she was dazed by the beating, and at one time was partly unconscious. Dr. Flemming, who visited the premises for the purpose of rendering medical aid shortly after the assault, described the place as looking like a slaughterhouse (photographs of Mrs. Kausen showing how severely she had been beaten).

[1] Upon this appeal it is contended that the evidence is not sufficient to warrant the verdict; that the court erred in its instructions to the jury, and also erred in its rulings concerning the admission or rejection of testimony.

In determining whether the defendant entertained an intent to commit the offense with which he was charged, the jury had a right to take into consideration not only the extent of the beating which the defendant administered to Mrs. Kausen; not only the fact that he used a metal flash-light, which might or might not be sufficient to inflict a death wound in the hands of a strong man, but they had also a right to take into consideration one part of the testimony which cannot, in the opinion of the court, be considered as any act except that which supports the verdict of the jury beyond all reasonable doubt, and that is the attempt made by the defendant to tie a bandage around the neck of Mrs. Kausen, followed by efforts to tighten the same. An attempt to choke a person goes beyond the boundary line of either assault or battery, and lays a foundation amply sufficient to support the conclusion that the one guilty of the act just mentioned entertains an intent to take life.

While case after case has been cited by the appellant having to do with assaults with a deadly weapon, attempts to kill, and battery, no useful purpose would be subserved by discussing these cases which the industry of counsel has collected, because in the face of what we have just stated, as shown by the testimony, no other conclusion could be fairly arrived at than that reached, if the jury believed the testimony of Mrs. Kausen, and which testimony they had a right to accept and act upon as stating the true facts.

[2] A number of instructions were requested by the defendant which the court refused to give to the jury, and this refusal, as we have stated, is assigned as error. A review of the instructions given by the court shows that no error was committed in this particular. We may here state that this case presents an instance where the instructions given by the court to the jury are clear and direct, covering the case fairly and fully, and above all, are commendable for their brevity and lack of tedious repetition. The jury was told that every element of the offense must be proven, and that they must necessarily find the intent on the part of the defendant, and that this intent might be shown by the surrounding circumstances and acts of the defendant. The jury was then further instructed in the following language: "You are instructed that the jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense. In this connection you are instructed that the offense of simple assault is included within the offense charged in the information, and should you find the defendant guilty beyond a reasonable doubt, of the crime of simple assault, but not guilty of the higher offense charged in the information, it will be your duty to return a verdict accordingly. In other words, if after a careful consideration of all the evidence in the case, you are not satisfied beyond a reasonable doubt that the defendant committed the assault alleged, your verdict should be not guilty. But if you are satisfied beyond a reasonable doubt that the defendant did commit the assault, and are not satisfied beyond all reasonable doubt that it was his intent to commit murder, your verdict should be guilty of assault. And if you believe and are satisfied beyond all reasonable doubt that he not only committed the assault alleged in the information on file herein, but that it was his intention at the time to murder the person whom you find he assaulted, then your verdict should be guilty, in the manner and form as charged in the information." While this instruction is charged as erroneous, the reasons assigned therefor by the appellant do not appear to us to be well founded. It is true that battery is not mentioned in the instruction, but in view of the record in this case and the items of testimony which we have cited, a verdict of battery only, and we may also add a verdict of assault, would have been unwarranted.

[3] The court refused to permit the appellant to introduce testimony to the effect of the custom of cattlemen to take off their shoes before entering a private residence.

We do not perceive how this ruling could possibly prejudice the appellant, in view of the fact that he thereafter entered the room occupied by Mrs. Kausen without knocking or making any noise indicating his approach.

In view of the record in this case and the testimony included therein, any errors of the court would have to be resolved in favor of the People under the provisions of section 4½ of article 6 of the Constitution, because we cannot say that there was any miscarriage of justice, but are fairly well convinced that any other verdict or judgment would have been a miscarriage of justice.

The evidence discloses a previous trouble apparently precipitated by the defendant several months preceding December 25, 1932, but we do not deem it necessary to lengthen this opinion by consideration of that occurrence.

Finding no errors justifying a reversal in this case, the order and judgment are affirmed.

I concur: PULLEN, P. J.

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133 Cal.App. 267

## DYER v. HUNTER et al.

Civ. 945.

District Court of Appeal, Fourth District, California.

July 13, 1933.

**1. Fraud 🔑50.**

Where complaint did not allege, evidence did not disclose, and findings did not determine, actual value of stock at time of sale or value it would have had had stock been as represented, buyer could not recover for alleged fraud inducing purchase notwithstanding stock subsequently became valueless.

**2. Fraud 🔑50.**

Proof of damage is necessary to establish cause of action for fraud.

**3. Fraud 🔑59(2).**

Measure of damages for fraudulent sale of corporate stock is difference between actual value of stock purchased and value it would have had had stock been as represented.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Edith F. Dyer against F. W. Hunter and another, individually and as copartners, doing business under the firm name of Hunter & Co. Judgment for plaintiff, and defendants appeal.

Judgment reversed, and new trial ordered.

Adam Thompson, Renwick Thompson, and Gordon Thompson, all of San Diego, for appellants.

Robert J. Donovan, of Santa Monica, for respondent.

TURRENTINE, Justice pro tem.

Plaintiff instituted this action against defendants as copartners, seeking to recover damages on account of certain alleged fraudulent misrepresentations made by defendants in the sale of corporate stock. The plaintiff and respondent has filed no brief, but, on account of the necessity of disposing of the case on the insufficiency of the evidence, we have nevertheless given careful consideration to the entire transcript on appeal.

The salient facts are that the Mission Beach Amusement Corporation was incorporated in October, 1925. Thereafter, on application, the commissioner of corporations of California issued a permit to said corporation to sell its preferred stock to the public at its par value of $10 per share. Thereupon R. E. Hicks was appointed fiscal agent to sell said stock. Said fiscal agent did then contract with defendants as his agents and brokers to sell said stock to the public.

On January 25, 1926, defendants sold to plaintiff 250 shares of said stock for $2,500 and on March 5, 1926, defendants sold plaintiff 500 shares of said stock for $5,000, which stock was duly delivered to plaintiff and for which she paid the total sum of $7,500. The corporation was formed to erect and operate an amusement center at Mission Beach. Out of profits from the operation of said business the corporation paid a regular quarterly dividend to plaintiff on said stock. At about this time the corporation encountered financial difficulties and did not pay its regular quarterly dividend on October 1, 1926. In 1928 the corporation went into bankruptcy.

When plaintiff did not receive the dividend due in October she first made complaint respecting the sale of the stock to her, claiming that the same was fraudulent on the following grounds: (1) That defendants represented that said stock was a safe investment; (2) that she would receive large dividends therefrom; (3) that defendants were her agents in the purchase and sale of said stock and as such agents had not made a thorough investigation of the financial condition of said company and were guilty of gross negligence amounting to fraud; (4) that defendants had represented said stock to be worth $10 per share; and (5) that said statements were knowingly and falsely made by defendants to plaintiff and that she relied thereon and would not have made said purchases except for said statements.

[1, 2] The complaint does not allege the actual value of the stock at the time of the sale, or the value it would have had, had the stock been as represented. The plaintiff produced no evidence whatever as to the actual value of the stock at the time of the purchase thereof or what value it would have had, had the stock been as represented. Likewise the findings fail to find the actual value of the stock at the time of the sale, or the value it would have had, had the stock been as represented. It follows that there were no pleadings, evidence, or findings before the trial court upon which to base a finding or conclusion that any damage had been suffered by plaintiff at the time of her purchase of the stock. Nor will the evidence that the stock subsequently became valueless supply this defect. It is elemental that proof of damage is necessary to establish a cause of action for fraud. Work v. Campbell, 164 Cal. 343, 128 P. 943, 43 L. R. A. (N. S.) 581; 20 Cyc. p. 10; 12 Cal. Jur. p. 724, par. 12.

[3] The measure of damages for fraudulent sale of corporate stock is the difference between the actual value of the stock purchased and the value it would have had, had the property been as represented. Divani v. Donovan, 214 Cal. 447, on page 454, 6 P.(2d) 247. Plaintiff should be permitted to amend her complaint if she is so advised.

The judgment is reversed and a new trial ordered.

We concur: BARNARD, P. J.; MARKS, J.

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133 Cal.App. 380

## GARLOCK et ux. v. SAN DIEGO TRUST & SAVINGS BANK et al.

Civ. 964.

District Court of Appeal, Fourth District, California.

July 20, 1933.

**Contracts** ⚷332(2).

Complaint in action for breach of contract to loan money for construction of buildings *held* insufficient.

> The complaint did not allege that defendants' representative recommended advance of portion of loan which defendants were authorized to retain until expiration of time for filing liens, as required by contract, and alleged that mechanic's liens for amount exceeding balance of loan were filed, though plaintiffs agreed to keep property free therefrom; that defendants credited balance on note for loan, as authorized by contract, instead of applying it on such liens; that note was assigned for only amount previously advanced, with interest, brokerage, and other expenses; and that plaintiffs paid off liens and used their own funds in building operations.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Wesley M. Garlock and wife against the San Diego Trust & Savings Bank and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

O. E. Mark, of San Diego, for appellants.

Stearns, Luce & Forward and Fred Kunzel, all of San Diego, for respondent San Diego Trust & Savings Bank.

Walter H. Hewicker, of Los Angeles, for respondent Meline Bond & Mortgage Co.

BARNARD, Presiding Justice.

The plaintiffs have appealed from a judgment in favor of the defendants entered after an order sustaining general and special demurrers to a fifth amended complaint without leave to amend.

The complaint alleges that on February 5, 1931 (apparently 1929 was intended), the first three named defendants agreed with the plaintiffs and with each other to loan to the plaintiffs the sum of $5,500 to be used in the construction of certain buildings upon described real property owned by the plaintiffs. Copies of the application for the loan, the escrow instructions, and the trust deed made and given in connection with said loan agreement are attached to and made a part of the complaint. It is alleged that by oral agreement among the parties, the trust deed securing the loan was executed in favor of the Metropolitan Guaranty Corporation; that this trust deed was assigned to the San Diego Trust & Savings Bank; that this bank advanced money to plaintiffs on said loan from time to time as construction progressed; that the plaintiffs recorded legal notice of completion on July 19, 1929; that the bank made advances according to the terms of the loan agreement until notice of completion was filed, at which time these advances totaled $3,789; that thereafter and before the time for filing mechanic's liens had expired these defendants orally repudiated said loan agreement and refused to advance any more funds thereunder; that the defendants wrongfully withheld and are withholding the balance of said loan in the sum of $1,711; that by reason of said refusal to make further ad-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

vancements mechanic's liens aggregating a total of $2,000 accrued and foreclosures thereof were filed against the property; that the plaintiffs were compelled to and have paid and discharged said claims; that on or about May 5, 1930, these defendants caused the $5,500 note and trust deed to be assigned to a third party for the sum of $4,125, which sum included interest, brokerage, and other items of expense; that this third party promptly began foreclosure proceedings; and that by reason of said foreclosure proceedings in connection with the said trust deed and the said liens, and by reason of the cloud upon the title to their property, the plaintiffs were unable to refinance their property and prevent a foreclosure, so that the same has become lost to them since the beginning of this action. It is alleged that the plaintiffs have been damaged in the sum of $2.000, which amount they were compelled to pay in order to discharge the mechanic's liens, and in the further sum of $1,848.33 by reason of money expended by them from their private funds in completing the building, and the prayer is for $3,848.33, with interest. In the application for the loan, which is alleged to be a part of the agreement and which is made a part of the complaint, the plaintiffs agreed as follows:

"* * * And do further agree that I will fully complete said building or buildings, as the case may be within 120 days from date hereof, free and clear of all claims of mechanic's and other liens; time being the essence of this agreement.

"I further agree that the said sum of $——— shall be advanced to me in such sum or sums as your appraiser or representative shall recommend as the work progresses, and not otherwise, and that in any event one-fourth (¼) of said sum may be retained by you until time for filing mechanic's liens has elapsed; and thereupon, no such liens having been filed, same shall be paid to me or my order. In the event that any such liens be filed, you are authorized to apply any part of said sum so held by you in payment of any such claim or liens, or, at your option, you may credit the sum upon any indebtedness I owe you, or upon the principal of the note secured by the trust deed hereinbefore referred to, and thereupon you are released from any and all obligation to lend me any such sum so applied."

It thus appears that the plaintiffs agreed to complete the building free and clear of all claims of mechanic's liens; that no particular portions of the loan were to be advanced at any fixed times, but that advances should be made only in accordance with the recommendation of the defendants' representative as the work progressed; and that, in any event, one-fourth of the amount might be retained until the time for filing mechanic's liens had expired. In the event any such liens should be filed the defendant had several options, including one to credit the balance of the loan upon the principal amount thereof, whereupon they should be released from any further obligation to loan such balance. There is no allegation of any breach upon the part of the defendants up to the time notice of completion was filed. Not only was it agreed that, in any event, the defendants might hold back one-fourth of the total sum until the expiration of the time during which liens could be filed, but under the terms of the agreement they were not required to advance all of the remainder unless the same had been recommended by their representative and there is no allegation that any such recommendation was ever made. While this situation obtained, with no allegations showing any breach of the contract on the part of the defendants, it is alleged that mechanic's liens to the amount of $2,000 and considerably in excess of the balance of the loan, were filed in spite of the fact that the plaintiffs had agreed to keep the property free from any such claims. Although the contract then gave the defendants the right, instead of applying the balance of the loan upon any such liens, to credit the same upon the principal sum of the note, not only is there no allegation that the defendants did not take this latter course, but the allegations of the complaint plainly indicate that this was done. The amount of the note was $5,500, of which $3,789 had been previously advanced, and it is alleged that the note was assigned for only $4,125 and that this amount included the advancements with interest, brokerage and other items of expense. Interest alone, at the agreed rate, would have amounted to nearly $300 and a simple computation plainly shows that the $1,711 was so credited. The fact that they paid off the liens filed and used some of their own funds in the building operations does not indicate any damage. The fact that nearly a year later they were unable to prevent a foreclosure in connection with an obligation for $4,125, by complying with the terms of a trust deed, fails to indicate that their position would have been any better had the obligation then been for $5,500. Not only do the allegations of the complaint show that the plaintiffs themselves breached the contract in permitting liens to be filed, but the facts alleged show neither a breach of contract on the part of the defendants nor any damage resulting from any act upon their part.

The judgment is affirmed.

We concur: MARKS, J.; TURRENTINE, Justice pro tem.

133 Cal.App. 270

## BURR v. PAGEL.

Civ. 8547.

District Court of Appeal, Second District, Division 1, California.

July 14, 1933.

**Appeal and error** ⚷110.

Order denying motion for new trial is not appealable.

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Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Valerie Burr against Herbert Pagel. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, defendant appeals, and plaintiff files a motion to dismiss the appeal or affirm the judgment.

Motion to affirm judgment granted. Appeal from order denying motion for new trial dismissed.

Kenneth J. Murphy and Elber H. Tilson, both of Los Angeles, for appellant.

S. S. Hahn and W. O. Graf, both of Los Angeles, for respondent.

CONREY, Presiding Justice.

This is a motion under rule V, section 3, to dismiss appeal or affirm judgment. The record upon appeal consists of a typewritten clerk's transcript and typewritten reporter's transcript. The appeal is from a judgment rendered upon verdict of a jury in favor of the plaintiff. There is not contained in the brief or in any supplement thereto any statement of "the nature of the action and the substance of the pleadings" as required by rule VIII, sections 3 and 4, of the rules of this court. By inference from the evidence quoted in the brief, we might assume that the action was brought to recover damages for personal injuries suffered by the plaintiff, and resulting from negligence of the defendant in driving an automobile at a time when the plaintiff was riding therein as a guest of the defendant. In this connection it further would be necessary to assume that the injury to the guest was an injury "proximately resulting from the intoxication, wilful misconduct, or gross negligence" of the defendant. California Vehicle Act, § 141¾ (as added by Laws 1929, p. 1580).

In the brief of appellant there is a statement of facts, including extensive quotations from the evidence. This is followed by a statement of the sole proposition relied upon by appellant for reversal of the judgment. This proposition is as follows: "Respondent was guilty of independent negligence, contributing proximately to her injuries, in riding, and in continuing to ride with appellant while he was driving the car, when she knew or should have known that he was intoxicated, which independent negligence would bar her right of recovery." But an inspection of the record reveals the fact that upon this issue of contributory negligence the evidence is very much in conflict, and there is evidence upon which the jury reasonably might have reached its conclusion that the plaintiff was not guilty of such negligence.

The motion to affirm judgment is granted, and the judgment is affirmed. The appeal from the order denying defendant's motion for a new trial, being an appeal from a nonappealable order, is dismissed.

We concur: HOUSER, J.; YORK, J.

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133 Cal.App. 284

## HANDLEY v. RANDOLPH.

Civ. 7805.

District Court of Appeal, Second District, Division 2, California.

July 14, 1933.

Hearing Denied by Supreme Court Sept. 11, 1933.

1. **Automobiles** ⚷168(9).

Where view at street intersection was obstructed, speed exceeding 15 miles per hour was unlawful (Gen. Laws 1931, Act 5128, § 113 (b) 2).

2. **Negligence** ⚷135.

Evidence showing excessive speed of automobile in which plaintiff, a small child, was riding, at time of collision at street intersection where view was obstructed, *held* to establish contributory negligence.

3. **Appeal and error** ⚷843(1).

Appellate court is not required to decide points likely to arise on new trial, where, on new trial, recovery is improbable.

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Appeal from Superior Court, Los Angeles County; Harry W. Falk, Judge.

Action by Barbara Y. Handley, by John T. Handley, Jr., guardian ad litem, against W. B. Randolph. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment reversed.

Hulme, Hastings & Bartlett and James C. Hyne, all of Los Angeles, for appellant.

Robert E. Austin and John N. Helmick, both of Los Angeles, for respondent.

WORKS, Presiding Justice.

Respondent is a small child who was injured in an automobile accident. She was traveling in a car driven by her father, when it collided with one driven by defendant. From a judgment in favor of plaintiff, defendant appeals.

The facts of the case are quite unusual. A caravan of automobiles—so it is called in the briefs—was in procession from Maywood to San Diego, the cars being occupied by members of several branches of a well-known fraternal organization, together with their families. The procession consisted of about 150 cars, with appropriate spaces between them. Mr. Handley was a member of the Maywood branch of the order, which headed the caravan; Handley's car being within a few cars of the head of the procession when it departed from Maywood. The caravan was to proceed through Long Beach, and, when the Handley car was within a little less than a mile of the intersection of American avenue and Wardlow road, in that city, Handley had some trouble with it, and was compelled to pull into the curb on American to rectify the difficulty. In this work he was aided by Officer Nelson of the Maywood police, who, together with other police, was convoying the caravan on its trip. The repairs to Handley's car delayed his party for four or five minutes, during which time the procession moved along American at a speed of from 25 to 30 miles an hour. When Handley's car was again in order, Nelson stopped that part of the parade which had not yet passed the point at which the repairs were made, allowed Handley to pass through the gap thus made, and attempted, on his motorcycle, to lead Handley ahead to his original place in the procession. During this attempt the motorcycle and Handley's car moved southward along American avenue, passing the left or easterly side of the cars composing the parade, moving more rapidly than they, and along a line a little to the right of the middle of the avenue. At all times which are of interest here the Handley car was at least from 100 to 150 feet to the rear of the motorcycle, and the two vehicles, according to the variations in the testimony of the many witnesses, proceeded, even up to the moment of the collision hereafter to be described, at a speed of from 35 to 50 miles the hour. During this strange race to place Handley in his original location in the line of parade, along an important artery of automobile traffic, Nelson constantly operated the siren on his motorcycle and Handley blew the horn on his car with less continuity but always, as he says, when he was about to cross street intersections. Randolph, the appellant, was in the meantime approaching American from the westward, along Wardlow and toward the point at which the two thoroughfares intersect at right angles. Wardlow is an unimproved street, and compared to American it is unimportant. At the intersection there is therefore located a "boulevard stop" sign, warning those temporarily to halt who are about to attempt the somewhat perilous passage across American. Randolph obeyed this mandate, and stopped his car before it reached the edge of the pavement, which marks the westerly line of American. The procession southerly along the latter thoroughfare was at the moment still in progress, and Randolph waited for some time for an opening in the line of cars. One witness said he waited four or five minutes, but it is hardly conceivable that he could have paused so long for the progress of a caravan, which under the law had no greater rights than he, the mandate of the "stop" sign having been heeded by him, unless the occupation of American by the caravan was such as not to admit of his breaking through. At any rate, Randolph finally saw an opening in the parade sufficient for his needs and moved his car forward. He got through the procession, which was apparently composed of two parallel lines of cars, without mishap, although the driver of the car heading the line next the curb almost ran into Randolph's car, for the reason that this driver's brakes, as he testified, were out of order. When Randolph had negotiated the crossing to the extent of getting past the two lines composing the procession and had gotten well into American, he heard Nelson's siren and stopped at once. After Nelson had passed by, Randolph proceeded at a leisurely pace across American, up to the moment when occurred the catastrophe out of which arose respondent's cause of action. Randolph did not hear the sound of a horn from the direction in which Handley was coming, his hearing being good. No witness fixed Randolph's rate of speed as he crossed at more than 10 miles the hour, while one witness, at least, placed it as low as 4. Handley's car, following the motorcycle at a distance of not less than 100 feet and possibly as great as 150 feet, or even more, collided with Randolph's vehicle in the intersection. At the moment of the collision Handley was traveling at the rate of not less than 35 miles the hour—he himself testified that it was between 40 and 50—and the effect of the impact of the two cars may be imagined. Randolph's car was seriously damaged and was overturned, Randolph himself being badly injured and rendered unconscious, in which state he remained for three or four days. The Handley car proceeded for a distance of about 100 feet after the collision, and then toppled over on its side.

[1,2] There are several other conditions surrounding this accident which must be described in order to understand the conclusion at which we have arrived. It was testified by some witnesses that Randolph, after he had waited until Nelson had passed by, apparently proceeded across the intersection without looking either toward the right or toward the left. This evidence must be taken as supporting the findings of the

trial court to the extent covered by it, although Randolph testified to the direct contrary. The circumstance makes no difference, however, in the result. If Randolph had looked north, toward the left, he could have seen nothing more than he swears he did see, that the Handley car was more than 100 feet from the intersection as he started anew to make the crossing. His glance would have shown him, incontestably, that he had the right of way over Handley. He was already well out into the intersection and had stopped because of the mad flight of Nelson, advertised by the shriek of the latter's siren. There was nothing to notify him that Nelson was conducting or leading Handley, although we think that, if he had known the circumstance, it would make no difference. Randolph was negotiating the intersection from Handley's right, while Handley was approaching it from Randolph's left. There were structures on the northeast and northwest corners of American and Wardlow which "obstructed" the view of the intersection, by both Handley and Randolph, within the meaning of that word as employed in subdivision (b)2 of section 113 of the California Vehicle Act (Deering's Gen. Laws, 1931, Act 5128). Under the section, a speed of more than 15 miles the hour in crossing the intersection was therefore unlawful. As we have seen, Randolph proceeded at a much less rate than that, while Handley crossed at a speed nearly, if not more than, three times the allowable rate. Handley saw Randolph's car standing in the intersection while Randolph awaited the passing of the siren-bearing motorcycle of Nelson, but did not look in that direction again as he approached, and never saw the Randolph car until near the moment of the impact. Handley testified, also:

"A. * * * I saw a car [Randolph's] had pulled out through the parade, and had stopped to allow Mr. Nelson to go by, and proceeded to get through Mr. Nelson and myself.

"Q. All right. About where were you when you first saw that car? A. I was approaching the intersection possibly 150 or 200 feet when I saw the car had stopped there for Mr. Nelson.

"Q. You saw Mr. Nelson go by? A. I did.

"Q. Then what did you do? A. I kept going, thinking this gentleman would still be there, taking into consideration I was following behind Mr. Nelson. * * *"

Meanwhile Randolph had started, and he proceeded in a right line across the intersection. He never had notice of the on-coming of Handley's car. As already noted, Randolph's car was hurled to the ground, Randolph was thrown out, was rendered unconscious, and remained so for a long time. So far as the record discloses, respondent, a minor aged about three and one-half years, was the only occupant of Handley's car who was injured, although four adults were in the machine at the time. The child, as the car sped to the point of impact, was sitting on her mother's lap. Handley testified that, after he saw Randolph's car standing in the intersection awaiting the passage of the fleeting Nelson, he (Handley) never saw it again until it was in front of him near the middle of the intersection. Handley then veered quickly to the left and proceeded thence at such an angle southeasterly that the right rear portion of his car came into violent contact with the left front part of Randolph's vehicle, with the result that both cars were seriously damaged, and that, as stated, both plaintiff minor and Randolph were injured. There was possibly sufficient testimony that the collision occurred at about the south middle of the intersection to uphold a finding to that effect, although the bulk of the evidence showed that it occurred in the southeasterly quarter of the intersection.

We cannot but perceive that the negligence of Handley was a contributing cause, if not the sole cause, legally, of the catastrophe. The conduct of Handley was not much, if at all, different from that of the defendant in the recently decided case of Nelson v. Westergaard (Cal. App.) 19 P.(2d) 867, although in that case the point was not decided whether the intersection in question was a "fifteen-mile" one. Here, however, respondent relies upon the impossible theory that Nelson, on his motorcycle, had the right to lead Handley at a headlong pace through the street intersections along American avenue, and that Handley had the right to follow his leader. No matter what the rights and duties of Nelson were as he crossed the intersection of American and Wardlow, either as a Maywood police officer acting outside his own territory or even if he had been a Long Beach officer, there is nothing in the law which authorized or permitted Handley to make the crossing at a speed which all the evidence shows he pursued.

[3] Various other points are made, but it is unnecessary to consider them. It is hardly conceivable that upon a new trial the evidence could be so changed as to entitle respondent to recover. We are not, therefore, under the mandate of the law requiring courts of review to decide points likely to arise upon a new trial.

Judgment reversed.

I concur: CRAIG, J.

I concur in the judgment: STEPHENS, J.

132 Cal.App. 683

## SECURITY-FIRST NAT. BANK OF LOS ANGELES v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SAN DIEGO COUNTY et al.*

**Civ. 1029.**

District Court of Appeal, Fourth District, California.

June 20, 1933.

Hearing Denied by Supreme Court Aug. 17, 1933.

**1. Equity 🔑72(1).**

To sustain plea of laches, there must be, in addition to unexplained lapse of unreasonable time, circumstances causing prejudice to adverse party.

**2. Appeal and error 🔑110.**

Order granting motion for new trial after trial before court without jury is not appealable and may be attacked only in special proceeding (Code Civ. Proc. § 963).

**3. Certiorari 🔑5(1).**

Writ of review is intended to supply remedy where none other exists by appeal.

**4. Certiorari 🔑41.**

Petition for writ of review to annul order granting new trial, although not filed until six months after entry of order, *held* not barred by laches.

> The defense of laches was not sustained and did not prevent appellate court from considering whether order granting motion for new trial was in excess of jurisdiction of superior court, because lapse of time between making of order granting new trial and application for writ of review had not affected rights of any interested party, and the delay had prejudiced no one, in view of fact that position of none of parties had been changed in slightest degree between the making of the order granting the new trial and the filing of the petition for a writ of review.

**5. Common law 🔑9.**

It is policy of law, whenever possible, to insure trial on merits.

**6. New trial 🔑6.**

Motion for new trial is addressed to sound discretion of trial judge.

**7. Appeal and error 🔑977(3).**

Appellate court will not disturb order granting new trial, except for abuse of discretion, or violation of some positive rule of law.

**8. Appeal and error 🔑1.**

Right of appeal is remedial, and doubt should be resolved in favor of right whenever substantial interests of party are affected by judgment.

**9. Judgment 🔑524.**

Opinion of trial judge and of counsel as to status of judgment may not change legal effect.

**10. Judgment 🔑527.**

Opinion of trial judge and statements of counsel as to status of judgment may be considered in determining whether judgment is interlocutory or final.

**11. New trial 🔑116(2).**

Plaintiff, in action to quiet title, where judgment was considered interlocutory and question was not raised until after time to move for new trial or appeal had expired, *held* estopped to assert judgment was final, as respects time to file motion for new trial.

> Plaintiff was estopped to assert judgment was final, and not interlocutory, as respects time to file motion for new trial, in view of respectable authority justifying belief that judgment was actually an interlocutory judgment, the apparent belief of the trial judge and all counsel that it was not final, and the fact that the question of the finality of the judgment was not raised until after the time to move for a new trial or appeal from it had expired. Furthermore, the court, subsequently, rendered another judgment in the same action in which the former judgment was referred to as an interlocutory judgment and it was decided that the case had been continued for the purpose of rendering final judgment.

**12. New trial 🔑13.**

In action to quiet title involving respective rights of mortgagees, granting of motion for new trial after judgment for plaintiff *held* not abuse of discretion.

Original petition for a writ of review by the Security-First National Bank of Los Angeles to annul an order of the Superior Court of San Diego County, C. N. Andrews, and Lloyd E. Griffin, judges thereof, granting a motion for a new trial.

Order affirmed.

Prior opinion, 19 P.(2d) 309.

Hamilton, Lindley & Higgins, of San Diego, and William M. Hiatt, of Los Angeles, for petitioner.

Stearns, Luce & Forward, Albert J. Lee, and Fred Kunzel, all of San Diego, for respondents.

MARKS, Justice.

Petitioner is the successor of the Pacific-Southwest Trust & Savings Bank. It does not appear when the change of name occurred. For the sake of brevity we will hereafter refer to petitioner and the Pacific-Southwest

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For opinion recalling remittitur, see 25 P.2d 234.

Trust & Savings Bank as the "Security Bank" as the change of name does not affect the merits of the controversy.

About March 17, 1927, Harry A. Clark offered to purchase certain real estate in San Diego from the Security Bank for $15,000. He deposited $1,000 with the Union Title Insurance Company to apply on the purchase price, together with an agreement to pay the balance within ninety days. This offer was not accepted by the Security Bank, but immediately after making deposit of the thousand dollars, and before any contract for the purchase was made, Clark took possession of the land and commenced the erection of a bungalow court upon it. By the 21st day of July, 1927, he owed $7,000 for labor and materials used and for which he was unable to pay. In July, 1927, he applied to the San Diego Trust & Savings Bank for a loan of $18,000 secured by a lien on the premises.

On August 12, 1927, the Security Bank sent a letter of instructions to the San Diego Trust & Savings Bank inclosing a deed to Harry A. Clark and Elizabeth Clark, his wife, and a note in the principal sum of $14,000, and deed of trust on the premises securing the payment of the note, both to be executed by Clark and his wife. Under the instructions finally given the $14,000 deed of trust was to be subject to a first deed of trust to secure the $18,000 loan to be made by the San Diego Trust & Savings Bank to the Clarks. The instructions of the Security Bank to the San Diego Trust & Savings Bank contain the following paragraph which is material to the issues before us: "Also it is a further condition of this escrow that the loan of $18,000 obtained by Mr. and Mrs. Clark from the San Diego Trust & Savings Bank be used only for the payment of material and labor claims existing vs. the property on this date and the balance for the completion of the Bungalow Court now in the process of construction to the extent of 32 cottages, under a contractor's bid and bond guaranteeing the completion of such project without further incumbrance."

The $1,000 was paid to the Security Bank, the deed to the Clarks was delivered and recorded, as were the two deeds of trust, the San Diego Trust & Savings Bank securing a first, and the Security Bank a second incumbrance upon the property.

The $18,000 loaned by the San Diego Trust & Savings Bank to the Clarks was expended as follows: $195.99, interest on the loan; $1,000, to repay a prior indebtedness of Clark; $10, interest; $16,794.01, "upon claims existing against the construction of said bungalow court on the property herein involved at the time of the making of said loan and for material and labor used in the further construction of said project." There was neither "contractor's bid" nor "bond guaranteeing the completion" of the bungalow court "without further incumbrance."

The Security Bank learned of the violation of the escrow instructions and instituted its action to quiet title to the real estate. The case was tried and all material facts in issue were found in favor of the plaintiff. The trial court in the exercise of its equity jurisdiction entered what it called an "interlocutory decree" in accordance with its findings of facts and conclusions of law, with the one exception that it was provided that the San Diego Trust & Savings Bank have until October 30, 1931, approximately three months after the rendition of judgment, in which to pay to the Security Bank the sum of $14,000 with interest; and, if the payment were made, then title to the real estate should be quieted in the San Diego Trust & Savings Bank; but if it were not made, then title would be quieted in the Security Bank. This decree continued the trial of the cause until 2 o'clock in the afternoon of October 30, 1931, for the sole purpose of receiving proof as to whether or not the payment had been made by the San Diego Trust & Savings Bank. A hearing was had on that day, and it then appearing that payment had not been made, judgment was rendered quieting the Security Bank's title to the property. This was denominated a "judgment quieting title." It was filed and entered November 16, 1931. Notice of entry of the "interlocutory judgment" was given on July 30, 1931, and the second judgment on November 17, 1931.

On November 19, 1931, the San Diego Trust & Savings Bank gave notice of its intention to move for new trial. The motion was made and argued on January 6, 1932. Counsel for petitioner objected to the hearing of the motion upon the ground that the notice of motion was given and filed too late and that the court had no jurisdiction to hear and pass upon it. The motion was continued until January 14, 1932, when the same objection was again made before another judge of the respondent court. On the following day this objection was overruled and the motion for new trial was granted. Nothing further was done in the case until July 15, 1932, when the petition for a writ of review was filed in this court seeking to annul the order granting the new trial.

It is the theory of petitioner that the so-called interlocutory judgment of July 28, 1931, was in fact and in law a final judgment in the case; that the time within which a motion for new trial could have been made had expired long before the notice of motion was filed on November 19, 1931, and that the respondent court and its judges exceeded their jurisdiction in hearing and granting the motion. This presents the question of whether the so-called interlocutory judgment of July 28, 1931, was in fact a final judgment.

Respondents urge: First, that as the petition for the writ of review was filed six months after the entry of the order granting a new trial it was barred by laches; second, that the so-called interlocutory judgment was in fact an interlocutory judgment and that the judgment entered November 16, 1931, was the final judgment; and, third, that since both parties, as well as the judges who tried the cause, treated and regarded the judgment of July 25th as an interlocutory and not a final judgment, petitioner should not now be permitted to question its being such an interlocutory judgment.

In support of their first contention respondents cite and rely upon three cases decided by the Supreme Court, namely, Keys v. Board of Sup'rs of Marin County, 42 Cal. 252; Reynolds v. Superior Court, 64 Cal. 372, 28 P. 121, and Smith v. Superior Court, 97 Cal. 348, 32 P. 322. In these cases it is flatly held that in the absence of a showing of some special reason for the delay, a writ of review will not be granted after the expiration of the time within which an appeal from the questioned order or judgment might have been taken.

[1] Where the defense of laches is presented it is *usually* held that in addition to the unexplained lapse of an unreasonable time there must be circumstances causing prejudice or injury to an adverse party in order to sustain the plea. Cahill v. Superior Court, 145 Cal. 42, 78 P. 467; Taber v. Bailey, 22 Cal. App. 617, 135 P. 975; Donovan v. Board of Police Commissioners, 32 Cal. App. 392, 163 P. 69; Carr v. Sacramento C. P. Co., 35 Cal. App. 439, 170 P. 446; La Shells v. Hench, 98 Cal. App. 6, 276 P. 377. If the general rule which we have stated be applied to the facts of the case before us, the defense of laches cannot be sustained because of the lack of any prejudice or injury to respondents and the San Diego Trust & Savings Bank from the mere lapse of time. The position of none of them has been changed in the slightest degree between the making of the order granting the new trial on January 15, 1932, and the filing of the petition for a writ of review in this court on July 15, 1932.

In the case of Diamond v. Superior Court, 189 Cal. 732, 210 P. 36, 39, a writ of review was granted by the Supreme Court annulling an order of the superior court granting a new trial because the order was made upon a ground not authorized by statute after the motion had been denied on all statutory grounds. An examination of such of the original files in this case as are available to us would indicate that the petition for a writ of review was filed in the Supreme Court more than sixty days after the superior court made the order which was there sought to be annulled. While the Supreme Court did not specifically refer to any of the three cases cited by respondents, the rigor of the rule established by them may be somewhat modified by language which it used, as follows: "Respondent resists this application upon the ground that jurisdiction to entertain and dispose of motions for new trials is vested in the superior court, and that therefore certiorari will not lie, the remedy of the aggrieved party being by an appeal from the order. It relies upon a number of cases so holding, but those decisions are no longer authority on the precise point which arises here. Since the amendment to section 963 of the Code of Civil Procedure (Stats. 1915, p. 209) an appeal is no longer allowed from an order granting a new trial in an action tried by the court."

In the case of Dolan v. Superior Court, 47 Cal. App. 235, 190 P. 469, 471, the petitioner sought a writ of review to annul orders made in the respondent court after the rendition of an interlocutory decree of divorce. The appellate court held that the orders were beyond the jurisdiction of the superior court to make and annulled them. In reaching its conclusion the following language was used: "A void order may be swept aside whenever it comes before a court, and the order vacating the judgment without directing what judgment should be entered was such an order. Upon the present state of the record the original judgment stands unaffected by the subsequent proceedings, unless it be modified or set aside on appeal or in some other way permitted by the statutes."

In Reid v. Superior Court, 44 Cal. App. 349, at page 355, 186 P. 634, 636, the rule was discussed as follows: "While there is no hard and fast rule by which to determine whether laches has barred the remedy by certiorari, yet under the facts as existing herein a sufficient excuse should be shown for the delay to justify the application for the writ. Reynolds v. Superior Court of the County of Los Angeles, 64 Cal. 372, 28 P. 121. The question is fully discussed in Donovan v. Board of Police Commrs., 32 Cal. App. 392, 163 P. 69. Therein it is said: 'While it is true, as counsel for the plaintiff contends, that mere lapse of time short of that prescribed by a statute of limitations in any given similar case will not in itself suffice to constitute laches so as to bar a remedy, nevertheless, if in addition it appears from all the circumstances of the case that prejudice must, or from the very nature of the case may, be reasonably expected to result, the remedy will be denied (Cahill v. Superior Court, 145 Cal. 42, 78 P. 467 [and cases cited]).'"

[2-4] After a careful study of the authorities we have reached the conclusion that the defense of laches should not be sustained and that it should not prevent us from considering whether the order granting the motion for new trial was in excess of the jurisdiction of the superior court. The lapse of time

has not affected the rights of any interested party and the delay has prejudiced no one. The order granting a motion for new trial was not appealable and could only be attacked by petitioner in a special proceeding. Section 963, Code Civ. Proc. The writ of review is intended to supply a remedy where none other exists (Valentine v. Police Court, 141 Cal. 615, 75 P. 336) and the right of appeal from the questioned order having been removed, the rigorous rule announced by the three early cases relied upon by respondents has lost the reason which supported it.

The second contention of respondents has received consideration by both the supreme and appellate courts of the state, with the result that there seems to be some difficulty in applying the established rule to varying facts. One line of authorities is relied upon by respondents to support the contention that the judgment of July 28, 1931, is strictly interlocutory and not final and is not an appealable judgment. Another line of authorities is relied on by petitioner to support the contention that the same judgment is not interlocutory but is final and must be attacked, if at all, on motion for new trial within the ten days permitted by statute.

Respondents have cited many cases involving dissolutions of partnerships wherein the courts have determined by interlocutory decrees that partnerships have existed and have appointed referees to take testimony in an accounting. In these cases it has been universally held that the interlocutory decrees were not final judgments. See Middleton v. Finney, 214 Cal. 523, 6 P.(2d) 938; Di Blasi v. Di Blasi, 209 Cal. 753, 290 P. 7; Gunder v. Gunder, 208 Cal. 559, 282 P. 794; Clement v. Duncan, 191 Cal. 209, 215 P. 1025; Doudell v. Shoo, 159 Cal. 448, 114 P. 579. It has been universally held that in cases of this kind there remained questions for judicial determination by the trial court and for this reason the decrees have been held to be interlocutory and not final.

The three cases which seem to lend support to the contention of respondents that the interlocutory judgment of July 28, 1931, is not a final judgment are Krotzer v. Clark, 178 Cal. 736, 174 P. 657; AAlwyn's Law Institute v. San Francisco, 39 Cal. App. 365, 178 P. 966, and Los Angeles Auto Tractor Co. v. Superior Court, 94 Cal. App. 433, 271 P. 363.

In the Krotzer Case the plaintiff made a written agreement for the sale of a parcel of land in Los Angeles county to Clark for the sum of $4,100. A cash payment of $50 was made and the balance was to be paid in installments. The contract contained the covenant that the land was to be free and clear of all roads, easements, or incumbrances and that title should be evidenced by an unlimited certificate of title made by a title insurance company. The action was brought upon the theory that the title was defective and not in a condition to be corrected. The plaintiff offered to restore to the defendant the $50 and prayed that the contract be annulled and his title quieted. During the pendency of the action the incumbrance upon the property was removed. Supplemental pleadings were filed and at the trial findings were made in plaintiff's favor. Upon these findings the trial court entered an interlocutory judgment decreeing that plaintiff should within a fixed time tender to the defendant a deed and a certificate of title, and if the defendant should for twenty days fail to make the payments specified in the contract, plaintiff would be entitled to a decree quieting his title. The tender of the deed and certificate was made and refused, whereupon the court entered a final decree quieting plaintiff's title. The defendant moved for a new trial, which motion was denied. He appealed from the interlocutory judgment and the order denying the motion for new trial. The Supreme Court held that the attempted appeal from the interlocutory decree was not effectual for any purpose, as it was not one of the interlocutory decrees from which an appeal may be taken under section 963 of the Code of Civil Procedure and "the court is therefore without jurisdiction of the attempted appeal. * * * The defendant did not appeal from the final judgment." This case supports the contention of respondents and if it is to be followed the motion for new trial was filed in time and the order granting it cannot be disturbed in this proceeding. The cases of AAlwyn's Law Institute v. San Francisco, supra, and Los Angeles Tractor Co. v. Superior Court, supra, seem to lend some support to the position of respondents.

We will now consider the authorities relied upon by petitioner as upholding the view that the so-called interlocutory judgment of July 28, 1931, was in effect a final judgment. Clark v. Dunnam, 46 Cal. 204; Zappettini v. Buckles, 167 Cal. 27, 138 P. 696; Guaranty Trust & Savings Bank v. City of Los Angeles, 186 Cal. 110, 199 P. 35; Olds v. Thorington, 47 Cal. App. 355, 190 P. 496. We have spent considerable time in an endeavor to analyze and harmonize the holdings in Krotzer v. Clark, supra, with those of Zappettini v. Buckles, supra, and have reached the conclusion that while some minor differences appear in the facts of the two cases, these differences are not of sufficient substantiality to enable us to distinguish and harmonize them without being hypertechnical. The facts in Zappettini v. Buckles, supra, and conclusions by the Supreme Court are clearly set forth as follows: "In this action judgment was given, decreeing that the partnership was dissolved, declaring what property belonged to the partnership, describing it, the same consisting of both real and personal proper-y, adjudging that all of said property be sold 'together, as a whole and in one parcel at public sale for cash,' by a receiver theretofore appointed by the court, and that said receiver, after deducting the costs and expenses of sale, pay the remainder of the proceeds into court 'to abide the further order of the court'; adjudging that the proceeds of the sale be paid and applied as follows: (1) To the payment of the fees and expenses of the receiver, 'the same to be fixed and determined by this court'; (2) to the payment of the fees and expenses of a referee theretofore appointed, the same 'to be fixed and determined by the court'; (3) 'to the payment of the debts of said copartnership upon the determination thereof by this court, and that the determination thereof be and is hereby reserved by this court until after the return upon the sale of said property'—adjudging that any money remaining after said payments be divided and paid over to the parties in the following proportions, viz.: To plaintiff, John Zappettini, 10.3484 per cent. thereof, and to defendant Joseph Arata, 89.6516 per cent. thereof; such payments to be made 'as ordered by the court, or upon the consent of the parties to this action'—and adjudging further that each party to the action shall pay his own costs. * * * There remains only the question whether the judgment appealed from is a 'final judgment,' within the meaning of those words in our statutes on appeal. Notwithstanding the deferring of the fixing of the compensation of the receiver and of the referee, and the reservation of the determination of the question of the debts of the firm to others, the judgment fully and finally determined all the rights of the parties as between themselves. The partnership was dissolved, all the property was ordered sold, and the manner in which the proceeds should be divided was finally adjudicated, including the respective proportions of the two partners in any money remaining after the payment of the costs of sale, fees of receiver, fees of referee, and the debts of the firm. Nothing remained to be done by the court except the mere ascertainment of the amounts due to others than the parties on account of fees for services in the action and debts owing by the parties as partners, and to see that the decree already made was properly executed. Upon the subsequent ascertainment of the amounts due to others by force of the judgment appealed from, the parties to this action will become entitled to the portions of the remainder adjudged to belong to them. It is sometimes very difficult to determine whether a decree is a 'final judgment,' within the meaning of that term as used in our statutes concerning appeals. We are of the opinion that the decree before us should be held to be such a final judgment. A somewhat similar decree was held to come within this term in Clark v. Dunnam, 46 Cal. 204, where the decree was one for the dissolution of the partnership, a sale of all its property and effects, the payment out of the proceeds of sale, first, of the expenses of sale; second, any balance due to the receiver; third, certain costs; fourth, a certain sum to a creditor; and, fifth, any balance remaining to the partners in certain proportions fixed by the decree. It was said that this determined the whole matter in litigation, and that nothing remained for the court to do except to see that the decree was duly executed. In this case it is true that we have a reservation by the court of the question of the debts due others from the partnership, with the result that some action is essential before it can be determined what the surplus will be for division between the partners. That the exact amount of surplus for division between the parties has not been ascertained does not, however, prevent the decree from being a final judgment within the meaning of the statute. In Clark v. Dunnam, supra, the balance due the receiver was not ascertained, and, of course, wherever the property to be divided consists of the proceeds of a sale to be had, the exact amount can be ascertained only after the sale is had. The general rule applicable in determining whether a judgment is final or merely interlocutory, as deducible from the authorities, is that if anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the judgment is interlocutory only. Mr. Freeman, in his work on judgments, says that if, after a decree has been entered, no further questions can come before the court except such as are necessary to be determined in carrying the decree into effect, the decree is final. Section 22. In section 24, he says that although other proceedings before the master are necessary to carry the decree into effect, yet if all consequential directions depending upon the result of the proceedings are given in the decree, it is final. He further says that it is none the less final because some future orders of court may be necessary to be carried into effect, nor because some independent branch of the case is reserved for future consideration, nor because an account is directed to ascertain what sum is due from one to the other as the result of the decision. In the case before us, nothing further in the nature of judicial action on the part of the court is essential to a final determination of the asserted rights of the respective parties. These rights are fully established by the judgment. Other proceedings required before the court are simply such proceedings as are necessary to carry the judgment into effect. They relate solely to the ascertainment of the amount of money to be paid from the net proceeds of the sale to other persons, to creditors of the partnership and for fees and expenses of the receiver and referee, the remainder, after such payment, to be divided between the partners in the proportions specified in the judgment. All consequential directions depending on the result of the subsequent proceedings are given in the decree. It seems to us that, under the general principles declared to obtain in such matters, the reservation by the court of the determination of these matters does not prevent the judgment before us from constituting a 'final judgment' as between the parties thereto, within the meaning of those words as used in our statutes relating to appeal. There appears to be some conflict in the authorities in the application of the well-settled rules bearing on the matter before us, but, so far as we have found, there is no decision of this court at variance with the views we have expressed, and what is said in Clark v. Dunnam, supra [46 Cal. 204], appears to be in line with those views." This rule was followed in Guaranty Trust & Savings Bank v. City of Los Angeles, supra, and also in Olds v. Thorington, supra.

More recent cases in which the rule announced in the case of Clark v. Dunnam, supra, has been applied, are Sondergard v. Breaum, 83 Cal. App. 352, 256 P. 580; People's Ditch Co. v. Foothill Irrigation District, 103 Cal. App. 321, 284 P. 514, and Orton v. Daigler, 120 Cal. App. 448, 8 P.(2d) 161. However, these cases are not direct authority supporting the position of petitioner.

It is our conclusion that Krotzer v. Clark, supra, and Zappettini v. Buckles, supra, and its supporting cases, present a sharp conflict of authority, with the weight in favor of the rule announced in the latter, which we would be required to follow were there no other controlling considerations in the case.

[5-7] It is the policy of the law in California, where possible, to insure a trial on the merits. A motion for new trial is addressed to the sound discretion of the trial judge. An appellate court will hesitate to disturb an order of a trial judge on such a motion, especially where the order grants a new trial of the issues, unless it is found there has been an abuse of discretion on the part of the trial judge, or unless compelled to vacate the order because of some positive rule of law. If any citations of authorities are needed to support this proposition they may be found in the notes in 20 California Jurisprudence, pp. 26, 27, and 28, and in the three supplements to this volume.

[8] A similar policy is announced in regard to the review of judgments on appeal in the case of People v. Bank of San Luis Obispo, 152 Cal. 261, at page 264, 92 P. 481, 482, where it is said: "The right of appeal is remedial, and in doubtful cases the doubt should be resolved in favor of the right whenever the substantial interests of a party are affected by a judgment." See, also, Anderson v. Standard Lumber Co., 60 Cal. App. 445, 213 P. 65; Wright & Hogan, Inc., v. Heide, 72 Cal. App. 16, 236 P. 219.

We are impressed by the fact as disclosed by the record before us that the judge who tried the cause and the attorneys for the Security Bank and the San Diego Trust & Savings Bank all regarded and treated the judgment of July 28, 1931, as an interlocutory and not a final judgment until long after it was entered and the time to move for a new trial or appeal from it had expired.

In the conclusions of law drawn from the findings of fact dated July 21, 1931, the following language was used: "That an interlocutory judgment should be entered herein providing," etc. The judgment of July 28, 1931, was entitled "Interlocutory Judgment" and contains the following: "The court having heretofore filed its written findings of fact and conclusions of law now makes this interlocutory judgment as follows: * * * It is also hereby ordered and adjudged, that hearing and trial of this matter is hereby continued to and until two o'clock p. m. on October 30, 1931, for the purpose of then and there hearing proof and determining whether or not payment has been made as herein provided for and for the purpose of rendering and entering final judgment herein and hereunder." Notice of entry of this judgment was given as follows: "You and each of you are hereby notified that on July 28, 1931, interlocutory judgment in the above-entitled case was signed, entered in Judgment Book 28, page 167, and docketed in Docket 18, page 408, a copy of which judgment is herewith served upon you."

In the judgment of November 16, 1931, the judgment of July 28, 1931, is referred to five times as an "Interlocutory Judgment." It is also recited there that the case had been continued to October 30, 1931, "for the purpose of rendering final judgment herein." The notice of entry of this judgment was given in the following form: "You and each of you are hereby notified that judgment quieting title in favor of the plaintiff was entered in the above-entitled matter on November 16, 1931, in Judgment Book 86 at page 254, and docketed on November 17, 1931, in Docket Book 19, page 56. Demand is hereby made upon you and each of you that you immediately deliver possession of said property to the plaintiff above named, and that you hereafter desist from asserting or claiming any right, title, estate or lien, ownership, possession or right of possession or interest of any kind in or to any of said property."

Another important circumstance which lends force to the conclusion that the trial judge and all counsel regarded the judgment of July 28, 1931, as interlocutory and not final is that the findings of fact contained no express description of the property in controversy, simply referring "to the property described in plaintiff's complaint." There is no description of the property in the judgment of July 28, 1931, it merely referring "to the real property here involved." While similar descriptions have been held sufficient in point of law to identify real property they have been referred to as "inexcusably circuitous." Kelly v. McKibben, 54 Cal. 192; Goatman v. Fuller, 191 Cal. 245–251, 216 P. 35. The judgment of November 16, 1931, contained a full and detailed description of the property to which the title was quieted. If the trial judge and counsel had regarded the judgment of July 28th as final, it is highly improbable that the "inexcusably circuitous" method of describing the property would have been used in that document and that the judgment of November 16th, which, under such circumstances, could have been little more than an order placing a former judgment in effect, would have been encumbered with a detailed description of the property.

[9, 10] It is true that the opinion of a trial judge and of counsel as to the status of a document may not change its legal effect, still there are expressions in several cases indicating that these opinions might have a bearing on the construction of the instrument. Clark v. Dunnam, supra; Etchebarne v. Roeding 89 Cal. 517, 26 P. 1079; Doudell v. Shoo, supra; Clement v. Duncan, supra; Middleton v. Finney, supra. In Wells v. Shriver, 81 Okl. 108, 197 P. 460, at page 479, cited with approval in Middleton v. Finney, supra, it is said: "Neither does the recital in the judgment 'that further order and final decree of the court await the result of said account' definitely fix the status of the judgment, however the view the court rendering the particular judgment takes of it, and the court's intentions may be considered in determining whether it is a judgment or interlocutory order. * * * It is evident that the court rendering this decision did not expect it to be a final judgment. It is evident that it was not so considered by plaintiff in error Shriver at the time of its rendition." In Clark v. Dunnam, supra, it is said: "The plaintiff in this action treated the decree as final when he prosecuted an appeal from it. If it was not final his appeal should have been dismissed on that ground. But we entertained the appeal and decided the cause, and in justice the plaintiff should now be estopped to deny the finality of the decree."

[11] In view of (1) the conflict of decisions in California with respectable authority justifying the belief that the judgment of July 28th was actually an interlocutory judgment, (2) the apparent belief of the trial judge and all counsel that it was not final, (3) the fact that counsel for the San Diego Trust & Savings Bank relied upon such authority (Krotzer v. Clark, supra) the statements in the findings of fact and conclusions of law and the judgment of July 28th, and more particularly the notice of the entry of this judgment served upon them by counsel for petitioner here, as well as the belief of all interested parties that this judgment was interlocutory only, and (4) the fact that the question of the finality of this judgment was not raised until after the time to move for a new trial or appeal from it had expired, we have concluded that petitioner should not now be permitted to question the fact that this judgment was interlocutory, and not final in its nature, especially as the order sought to be annulled gives the right of a retrial of the action.

In 4 California Jurisprudence, 1062, the following rule is announced: "Inasmuch as the writ of certiorari does not issue ex debito justitiæ, but only on application to the court, and for special cause shown, an application therefor ought not to be granted where substantial justice has been done, or where, if the proceedings are quashed, ruinous or very mischievous consequences would ensue, and where, upon such reversal of proceedings, parties cannot be placed in statu quo; and this is the rule even if the record, when returned, appears to be defective or informal. While it is true that mere lapse of time short of that prescribed by a statute of limitations in any given similar case will not in itself suffice to constitute laches so as to bar a remedy, nevertheless, if in addition it appears from all the circumstances of the case that prejudice must, or from the very nature of the case may be reasonably expected to, result, the remedy will be denied."

[12] A study of the record has satisfied us that a retrial of the action may be advisable so that complete equity may be done between the parties. If petitioner's escrow instructions had been carried out to the letter, it would have resulted in a bungalow court of thirty-two units being completed on the real property. The San Diego Trust & Savings Bank would have had a first encumbrance on the property to secure a loan of $18,000 and the Security Bank a second lien to secure $14,000. The bungalow court was not completed, but $16,794.01 of the money of the San Diego Trust & Savings Bank was invested in the building of the court. We are not informed whether it would take much or little money to complete the improvements. This fact was undoubtedly within the knowledge of the respondent judge who granted the motion for new trial. We are informed there are no liens upon the property or any suits pending to enforce a liability for labor or materials. Under the terms of the interlocutory decree the San Diego Trust & Savings Bank was required to pay $14,000 to the Security Bank, the balance of the pur-

chase price. This would leave the San Diego Trust & Savings Bank with liens upon the property to secure the total sum of $32,000, and the Security Bank with all of its money in cash instead of a second incumbrance securing a debt of $14,000 upon a completed bungalow court. The total detriment to the Security Bank resulting from the violation of its escrow instructions could not have been more than the cost of completing the bungalow court. The judge granting the motion for new trial was sitting as a chancellor in a court of equity and these considerations may have appealed to his conscience and caused him to grant the motion.

The order sought to be annulled is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

133 Cal.App. 177

## TAYLOR et al. v. BUNNELL.

Civ. 4874.

District Court of Appeal, Third District, California.

July 5, 1933.

Hearing Denied by Supreme Court Sept. 1, 1933.

1. **Appeal and error ⚷1012(1).**
**Trusts ⚷44(3).**
To prove trust by parol under conveyance absolute in its terms, evidence must be clear and convincing, and whether evidence is of such character is for trial court.

2. **Appeal and error ⚷1010(1).**
Unless appellate court can say that reasonable man could not reasonably have reached given conclusions from evidence, findings will not be disturbed, though appellate court might have reached different conclusions.

3. **Trusts ⚷59(4).**
Trustor could not revoke trust by oral direction to trustee (Civ. Code, § 2280).

4. **Trusts ⚷59(1).**
Concurrently with passing of title to trustee, beneficiary becomes vested with irrevocable equitable ownership or beneficial interest in trust property unless right to change is reserved by trustor (Civ. Code, § 2280).

5. **Evidence ⚷598(1).**
Trial court is not bound to decide in conformity with declaration of any number of witnesses who do not produce conviction in its mind, or against presumption or other evidence satisfying its mind.

6. **Trusts ⚷110.**
In action to establish constructive trust in land under deed alleged to have been made by defendant conveying remainder interest to plaintiff at time defendant's wife conveyed land to defendant, evidence *held* to show that defendant owned only life estate and held legal title to remainder in trust for plaintiff (Civ. Code, § 2280).

7. **Trusts ⚷110.**
In action to establish constructive trust in land, evidence *held* to show that language of trustor was not precatory, but conveyed direction and command (Civ. Code, § 2280).

Appeal from Superior Court, Glenn County; J. O. Moncur, Judge.

Action by Alma Taylor and husband against Edwin Bunnell. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Shelton, Gray & McWilliams and Robert L. McWilliams, all of San Francisco, Stephen W. Downey, of Sacramento, and George R. Freeman, of Willows, for appellant.

Casper A. Ornbaun and Everett H. Roan, both of San Francisco, and W. T. Belieu, of Willows, for respondents.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This case has been reviewed once by the District Court of Appeal (77 Cal. App. 525, 247 P. 240, 244) and once by the Supreme Court (211 Cal. 606, 296 P. 288) the law has been established, and the facts presented during the present trial being substantially the same as were adduced at the prior hearings, need not be again set forth in detail. Briefly, however, this is an appeal by the defendant from a judgment rendered in an action seeking to have a constructive trust impressed upon certain real property.

There is no dispute as to the fact that appellant Edwin Bunnell and Margaret Peterson were married and were husband and wife at the death of Mrs. Bunnell in May, 1921; that there were no children of this marriage, and the real property in question consisted of ranch property in Glenn county, which was the separate property of the wife. About a month prior to her death, Mrs. Bunnell, who was then very ill and had been suffering for some time with an incurable malady, executed and acknowledged a deed to Dr. Bunnell, appellant herein, in consideration of love and affection. At the same time Dr. Bunnell made, signed, and acknowledged a deed for the same land from himself as grantor to Alma Taylor, the plaintiff and respondent herein. Apparently no secret was made of the existence of these deeds and after the death of Mrs. Bunnell, plaintiff asked appellant about the deeds, and getting no information from him, brought this action

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

to have it decreed that appellant held title to the property in trust for her subject to a life estate in him.

The trial court, sitting without a jury, held with the plaintiff that she was the owner of the real property subject to a life estate in defendant.

The principal ground here urged by appellant for reversal is that the evidence does not sustain the decree of the trial court giving him a life estate only in the real property in question impressed with a trust in favor of plaintiff for the remainder.

[1] This contention by defendant is based partially upon an alleged lack of evidence of any legally binding promise, essential before a constructive trust can be found by the court, and also that the testimony established, at most, an incipient interest in plaintiff, which defendant might voluntarily have recognized, and which in the event of his breach of promise would only then give rise to a constructive trust. The Supreme Court in this case, upon the former hearing (211 Cal. 606, 296 P. 288, 291), said, however: "The rule is also well established that to prove a trust by parol under a conveyance absolute in its terms, the evidence must be clear, satisfactory and convincing. [Citing cases.] And whether the evidence in any case is of this character must be determined by the trial court."

And also in the same case said: "It must not be assumed that on the former appeal it was decided that, upon the mere showing of a confidential relationship between the grantor and grantee, a prima facie constructive trust was created and imposed on the grantee. * * * After the showing of the confidential relationship the burden was still upon the plaintiff to prove that the deed was not what it purported on its face to be; in other words, to prove that the transaction did not create a fee-simple interest in the defendant, but that the execution and delivery of the deed to him under all the facts and circumstances surrounding or pertinent to the transaction constituted the defendant a constructive trustee entitled to a life estate with the remainder in fee held for the benefit of the plaintiff. O'Brien v. O'Brien, 21 Cal. App. 620, 623, 624, 132 P. 612."

[2] The trial court found the existence of a constructive trust, and because of appellant's contention that the evidence does not justify such a conclusion, we must examine that evidence to discover if substantial evidence may be found in the record or any inference reasonably be inferred therefrom that will support such finding. It is not sufficient that this court, if sitting as a court of first instance, might have reached a different conclusion; but appellant must show that a reasonable man could not reasonably have reached the given conclusion from the evidence presented. Bedford v. Pacific Structural Welding Corporation, 121 Cal. App. 162, 8 P.(2d) 558.

[3] The contention of appellant that the deceased trustor had the power to revoke the trust once established merely by an oral direction to the trustee, does not seem to be the rule. Section 2280, Civ. Code.

This court at the former hearing said: "Prior to the time those declarations were made, Mrs. Bunnell had conveyed the land to defendant, either absolutely or impressed with a trust in favor of plaintiff. In either case she parted with all her pecuniary interest in the property upon the delivery of her deed to defendant. * * * Plaintiff is not claiming as successor to any interest remaining in Mrs. Bunnell after the execution of the deed to defendant, but she claims an interest conveyed by that deed. Her interest in the land if any, and that of the defendant, were created by the same instrument. * * *"

[4] Concurrently with the passing of title to the trustee, the beneficiary becomes vested with the equitable ownership of or beneficial interest in the property and unless the right to change is reserved by the grantor the beneficiary has an irrevocable right therein. The trial court held, and the evidence supports the finding, that Mrs. Bunnell conveyed the property to defendant upon his parol promise that he would hold it for the benefit of plaintiff, and immediately a trust arose.

Briefly, the testimony in support of the creation of the trust is given by certain witnesses who were personally acquainted with both Mrs. Bunnell and her husband and were frequently in the company of Mrs. Bunnell, both before and after the execution of the instrument in question.

One of the witnesses testified in regard to a conversation had with Mrs. Bunnell and Dr. Bunnell concerning the execution of the deed, as follows:

"Q. During her last illness, did she talk with you at any time about any desire on her part to dispose of her ranch in the case of her death? A. She often talked about her ranch, that she did not want it to go to the doctor's daughters. * * *

"Q. Just tell us what the doctor said to you about that. A. He told me that last night—this was the day after—she had called him into her room and told him that she wanted to fix up her affairs. He said, 'Tell me what you want to do, and I will tell you how to do it.' She said, 'I want to leave you my ranch for your lifetime, but in case of your death, I want it to go to Alma.' So he said, 'I told her what to do, to make out a deed to me, and that I would make out a deed to Alma leaving the ranch to Alma, and in case of her death, would immediately turn over the deed to Alma. She also wanted me to pay her mother $50.00 a month for life, and I told her I would do that; and explained that if she left the property in trust, that would make it difficult for me to pay this money to her mother because the trust would interfere; so she seemed perfectly satisfied with this, and it was all fixed up. I got Samuels up there and we signed the deeds.'"

The defendant denied having made the foregoing statement, but admitted, referring to the land, on the day after the execution of the deeds he said to a witness, "She has deeded it to me and I have deeded it to Alma to take effect at my death."

Defendant testified further in regard to the making and destroying of the deed as follows:

"Q. Was your wife dangerously ill at the time these deeds were made? A. She was.

"Q. Then why didn't you tell Alma about the deeds? A. It was none of her business, and the way she attacked me, nobody would tell her anything."

Witness continuing:

"Q. Now, when you said to your wife, 'I will make it to Alma,' why did you say, 'I will make it to Alma?' A. To get rid of the conversation, and have the conversation over with, and to stop talking about death before my sick wife.

"Q. Didn't you say to your wife, 'Alma is the best one of the bunch, anyway, and I will make it to her?' A. I did. * * *

"Q. And you did it because of the fact that you felt it ought to be in the hands of somebody who would hold the land and consecrate it to her memory, didn't you? A. Yes.

"Q. Now, with that interview in your mind, why didn't you tell Alma Taylor within the next two or three days or in the next week or so, when she came there, what you had done? A. I was instructed not to; and instructed to destroy the deed.

"Q. Didn't you see Alma Taylor there that very day or the next day afterwards? A. Yes, I presume I did.

"Q. Did you ever tell Alma Taylor you had destroyed that deed? A. No, sir.

"Q. Did you ever tell anybody you had destroyed that deed? A. No, sir."

The same witness proceeding:

"Q. Why didn't you tell them—after you had already told them that Marge had made a deed to you and you had deeded it on to Alma to take effect after your death—why didn't you tell them that your plan had changed? A. Because they didn't ask me, and it didn't enter my head to tell them, and why should I tell them?"

Further the witness said:

"Q. Well, when you made this deed of April 26, 1921, to Alma Taylor, when did you intend to give that deed to Alma Taylor? A. Never.

"Q. When did you intend to tell Alma Taylor that you had made that deed at that time? A. Never.

"Q. When did you intend to tell Alma Taylor that you were making that deed, or had made a deed to her, and that she should hold that land in consecration to your wife? A. Never. I expected her to find it in my safety deposit box at my death."

[5] Appellant conceding for the sake of argument that the testimony offered by plaintiff is sufficient to impress the property with a trust, contends that the obligation originally imposed upon Dr. Bunnell to make the conveyance was subsequently withdrawn by Mrs. Bunnell, but, as already pointed out, the trust having once been created could not be terminated in the manner suggested. Furthermore, the court was not bound to accept the statements of the witness as to the revocation as true, even admitting no witness contradicted him. Although a witness is presumed to speak the truth, a trial court is not bound to decide in conformity with the declaration of any number of witnesses who do not produce conviction in its mind, or against a presumption or other evidence satisfying its mind. Morris v. Morris, 84 Cal. App. 599, 258 P. 616.

"It is a wild conceit that any court of justice is bound by the mere swearing. It is swearing credibly that is to conclude its judgment." Zibbell v. S. P. Co., 160 Cal. 237, 116 P. 513, 515.

[6] A careful reading of the record convinces us that the conveyance in question was made to the appellant in reliance upon his promise to convey the remainder to respondent, and except for that promise, deceased would not have executed the conveyance.

Support for that conclusion is found in the testimony of the witnesses relative to the refusal of Mrs. Bunnell to follow the form of will submitted by Dr. Bunnell making him sole beneficiary.

[7] Appellant claims that the language of Mrs. Bunnell as to the deed was precatory only, but a reading of the entire record fully supports the finding that the language conveyed a direction and command rather than a mere request or suggestion.

We find no error in the conclusions reached by the learned trial court, and the judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

133 Cal.App. 209

## SCOTT CO., Inc., v. ROLKIN et al.

Civ. 8713.

District Court of Appeal, First District, Division 1, California.

July 8, 1933.

**1. Evidence** 🔑**444(2).**

Written proposal may be shown to have been accepted with conditions or qualifications, or that accompanying acceptance, and, in reality, forming part of it, additional terms were exacted by acceptor.

**2. Appeal and error** 🔑**1010(1).**

Court of Appeal is bound by findings of trial court, where supported by some evidence.

**3. Contracts** 🔑**282.**

Contract to perform to satisfaction of parties calls merely for such performance as should be satisfactory to reasonable person.

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Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Scott Company, Inc., against Edward Rolkin and another. Judgment for plaintiff, and named defendant appeals.

Affirmed as modified.

J. F. Riley, of San Francisco, for appellant Edward Rolkin.

Jefferson E. Peyser, of San Francisco, for respondent.

PER CURIAM.

This action is upon a contract for the installation of a boiler and automatic oil burner, with the necessary connections and equipment, in an apartment building owned by defendant Rolkin and occupied by defendant Getchell as lessee. Judgment was rendered in favor of plaintiff, and from this judgment defendant Rolkin appeals.

Appellant, desiring to renovate the heating plant contained in said building, entered into negotiations with respondent to perform said work. On October 7, 1929, respondent submitted to Rolkin, in writing, an offer to do the work for a specified sum. This offer, in substance, provided that respondent agreed, for the sum of $2,181, to install a new American Radiator Company's cast-iron sectional steam boiler with smoke and water connections, one Johnson automatic burner with all connections, one 1,500-gallon oil storage tank with all pipe connections, one steel stack outside of building, fire proof boiler room; also to construct a pit in the boiler room floor and to do the necessary excavating, backfilling, and concrete work in connection with the installation of the oil tank and its piping. On October 17, 1929, and before the work commenced, appellant and Getchell entered into an agreement in writing with each other which provided that Getchell would pay to respondent $681 for the work before its commencement, and that Rolkin should pay the remaining $1,500 upon the completion of the installation to the satisfaction of Getchell, and after its acceptance by the fire department of San Francisco. This agreement was delivered to respondent before the work commenced. Appellant contends that this agreement formed a part of the contract for the installation; that it was received and retained by respondent, without objection, before the work commenced. This contention is supported by the fact that on October 25, 1929, Getchell paid $500 on the contract price with his personal check, and by the further fact that after the work was completed respondent mailed to Rolkin the following statement: "Mr. Edward Rolkins, 44 Fourth Street, City. Heating system installed complete in Ruthland Apartments at 691 O'Farrell Street as per agreement $2,181.00 Payment due as per agreement between Mr. Fred W. Getchell and Edward Rolkins $1,500.00."

[1] We are of the opinion that the offer of respondent to perform the work of installing the said heating system was accepted by appellant and Getchell, but that this acceptance was with the conditions set forth in their said agreement which was delivered to respondent before the work was commenced, and received by it without objection. Where a proposal in writing is made and accepted, it is permissible to show that it was accepted with conditions or qualifications, or that accompanying the acceptance and in reality forming a part of it, terms in addition to those set forth in the proposal were exacted by the acceptor. Lawrence v. Premier Indem. Assur. Co., 180 Cal. 688–699, 182 P. 431.

[2, 3] The next contention of appellant is that the installation of the heating plant was not performed to the satisfaction of Getchell, nor placed in first-class running order. The evidence is that, after the completion of the work, it was approved and accepted by the San Francisco fire department. There is also ample evidence to the effect that the said work was completed in full compliance with the said offer of respondent. The trial court found that the work had been fully completed by respondent in a satisfactory manner, and, while there is some conflict in the evidence upon this point, it is well settled that this court is bound by the findings of the trial court when there is some evidence to support such findings. 2 Cal. Jur. 921 and authorities cited. A stipulation in a contract to perform to the satisfaction of the

parties calls merely for such performance as should be satisfactory to a reasonable person. Gladding, McBean & Co. v. Montgomery, 20 Cal. App. 276, 128 P. 790; Thomas Haverty Co. v. Jones, 185 Cal. 285, 197 P. 105; Bryan Elevator Co. v. Law, 31 Cal. App. 204, 160 P. 170.

It was provided in the offer made by respondent that the drip line piping and the air valves were in poor condition and that they should be removed and new air valves installed on each radiator; this to be done at an added cost of $53. It appears that this additional work was done by respondent and accepted by appellant without objection. The judgment is therefore modified by making appellant's liability thereunder the sum of $1,553, and as so modified the judgment is affirmed, respondent to recover costs of this appeal.

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133 Cal.App. 106

## HIRSCH v. D'AUTREMONT et al.

Civ. 7873.

District Court of Appeal, Second District, Division 2, California.

June 30, 1933.

**1. Trial 🔑168.**

Court's right to direct verdict is, with regard to evidence, same as its right to grant nonsuit.

**2. Trial 🔑142.**

Court may direct verdict when disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from evidence, result is that there is no evidence of sufficient substantiality to support verdict for plaintiff.

**3. Trial 🔑142.**

Where there is no conflict in evidence, but reasonable men may draw different conclusions therefrom, jury should determine whether conclusion should be drawn that plaintiff acted as ordinarily prudent person would act under same circumstances.

**4. Automobiles 🔑224(6).**

Guest *held* contributorily negligent in not leaving automobile when she knew that driver was intoxicated and was driving carelessly on strange road at 50 miles per hour.

**5. Automobiles 🔑245(87).**

Presumption that person takes ordinary care of his own concerns *held* not to make guest's contributory negligence question for jury, where facts showing contributory negligence were established by uncontradicted evidence of plaintiff under circumstances indicating that testimony was not product of mistake or inadvertence (Code Civ. Proc. § 1963, subd. 4).

Facts showed that plaintiff knew that driver was drinking; that driver was proceeding at rate of 50 miles per hour on strange road; that plaintiff cautioned driver not to speed; and that 3 miles before accident driver stopped in town, and left automobile, during which time plaintiff had ample opportunity to leave automobile.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Marie L. Hirsch against Maurice D'Autremont and others. Judgment for defendants notwithstanding the verdict, and plaintiff appeals.

Affirmed.

Mulroney, Murphy & Doherty and William Hinckle, all of Los Angeles, for appellant.

Joe Crider, Jr., of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Plaintiff, a guest passenger in an automobile driven by defendant, brought suit for injuries alleged to have been caused by the gross negligence, recklessness, and intoxication of defendant. A motion for directed verdict was denied and the jury returned a verdict in favor of plaintiff. Prior to the entry of judgment on said verdict defendant moved for a judgment notwithstanding such verdict, which motion was granted. From the judgment thereupon entered in favor of defendant, plaintiff has appealed.

[1-3] In granting the motion above mentioned the court ruled that plaintiff was guilty of contributory negligence as a matter of law. Appellant contends that it was a case for the jury and that the court erred in so ruling. If the defendant's motion for a directed verdict should have been granted, the court properly rendered judgment on defendant's motion, notwithstanding the verdict in plaintiff's favor; but otherwise not. The right of a court to direct a verdict is, "with regard to the condition of the evidence, absolutely the same as the right of a court to grant a nonsuit." Perera v. International Exposition Co., 179 Cal. 63, 64, 175 P. 454, 455. "It [the court] may grant a nonsuit only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff." Estate of Caspar, 172 Cal. 147, 150, 155 P. 631, 632. We are of the opinion also that even

where there is no conflict in the evidence, if reasonably minded men may draw different conclusions therefrom, it is still a matter for the jury to determine whether or not under such undisputed facts the conclusion should be drawn that plaintiff acted as an ordinarily prudent person would have acted under the same circumstances, or otherwise.

With these rules in mind we turn to the facts in the case. On September 28, 1929, between 8:30 and 9 o'clock p. m., plaintiff, together with her brother and his wife, visited the home of defendant Word's sister, Mrs. D'Autremont, at which Word resided. A late lunch was served, being preceded, however, by the service of a glass of "home brew" beer to each of the members of the party. The glasses were about five inches high, were poured full and the beer "had a kick in it." The lunch consisted of "rye bread, salami and beer," it being testified that each drank a second glass of the beverage with the lunch. During the repast a telephone call was received from Santa Ana, and those present were invited to visit the lady calling at Santa Ana. The invitation was accepted by Mrs. D'Autremont, defendant Word, and the plaintiff. Word went to a nearby drugstore and purchased several bottles of alcohol. He was accompanied by plaintiff, who testified, however, that she did not know what Word had purchased until later. After they returned to the home, Word took a bottle of alcohol out of the package, asked if those present "would like a highball" and proceeded to mix the alcohol with "Pomo" (grapefruit juice) and gave each a glass. The evidence does not show that plaintiff saw Word drink more than we have stated, but the latter's undisputed testimony shows that he consumed several more drinks before leaving for Santa Ana. Shortly after 11 o'clock plaintiff, Mrs. D'Autremont, and Word left for Santa Ana, Word driving. Soon thereafter, however, they stopped at a store, where Word purchased two bottles of ginger ale. Arriving outside the city limits of Los Angeles, Word again stopped the car, poured out about half the contents of one of the ginger ale bottles and filled it with alcohol. Miss Hirsch, the plaintiff, testified that she declined a proffered drink of this mixture but that Word and his sister each took one; that they then continued on their journey, her two companions consuming the contents of the bottle while driving two or three miles. Word then, without getting out of the car, mixed another bottle, half alcohol and half ginger ale, which was also consumed before they reached Anaheim. At Anaheim Word stopped at a store and purchased six bottles of ginger ale, which he put in the car. Shortly after they started again they stopped at a railroad crossing to let a "long freight train" pass. This was on a "detour from the main highway." On this detour plaintiff looked at the speedometer and saw that they were traveling 50 miles an hour, whereupon she said, addressing Word, "Foster, why do you go so fast; what is your rush?" to which the latter replied, "That isn't fast." About five or six seconds thereafter the detour on Vermont avenue ended in Placentia avenue, and in trying to negotiate the turn into the latter thoroughfare the car upset, killing Mrs. D'Autremont, and seriously injuring plaintiff.

No drinking was done after the party left Anaheim. Plaintiff frankly testified that at the time she spoke to Word he was "under the influence of liquor." Asked as to what she based such statement on, she said that "if he hadn't been under the influence of intoxicating liquor he wouldn't have been driving at that rate of speed on a strange road, and I would base it on the fact of the amount of liquor he drank, that I saw him drinking myself." Plaintiff further testified that before they left Los Angeles Word appeared to be sober and showed no evidence of having been drinking; that he had been doing 50 miles an hour before they were stopped by the freight train; that Word was intoxicated "all the way along when he was drinking"; and that she considered the ride dangerous under the circumstances of speed and the drinking.

[4] The evidence is conflicting as to whether Word was or was not under the influence of liquor when the party left Los Angeles and as to whether or not such fact was known to plaintiff; and the question whether or not she was guilty of contributory negligence in commencing the ride to Santa Ana was clearly for the jury. We are also of the opinion that the question as to whether or not plaintiff should have left the car when it stopped at the railroad crossing to let the freight train pass, considering that it was among orange groves and in the middle of the night, even though she then knew that the driver was under the influence of intoxicating liquor, is one upon which reasonable men might well differ and was in consequence one for the jury to determine. Under the testimony of plaintiff, however, all the drinking was done before they reached Anaheim, and under her evidence she knew that Word was at that time under the influence of liquor. In the light of these circumstances we fail to see how reasonable men could differ upon the proposition that ordinary care required, when the car stopped in Anaheim and Word, the driver, entered an open and lighted store to buy more ginger ale, that she should take steps to protect herself from danger that would then appear to be inevitable, by leaving the car or taking some steps to prevent an intoxicated person from operating it further. The accident occurred a few miles, at most, beyond this point, and it was testified that the point of the accident was within two or three miles of their destination. Furthermore, it is evident that the party whom they were to visit

had a telephone, as she had previously called the house in Los Angeles from which the three had started.

Appellant urges that by reason of the disputable presumption "that a person takes ordinary care of his own concerns" (section 1963, subd. 4, Code Civ. Proc.), a presumption exists that she exercised ordinary care, which is evidence of sufficient strength to make contributory negligence a question of fact for the jury. Counsel cites and quotes from the case of Smellie v. Southern Pacific Co., decided by the Supreme Court of this state and reported in 287 P. at page 343. In that case the decedent was a guest of the defendant Ireland, with whom he was riding. They were halted at defendant Southern Pacific Company's tracks by a passing freight train. When they later started across the tracks, after the freight train had passed, they were struck by a passenger train coming from the direction in which the freight train was proceeding, and which passenger train was obscured from the view of defendant Ireland and decedent by the freight train until it was right upon them. Ireland was examined by plaintiff under section 2055 of the Code of Civil Procedure, and stated during such examination that both he and decedent looked before starting the car after the freight train had passed, and did not see the approaching passenger train; that decedent said, "It's all clear; let's go." Such testimony stood uncontradicted by any witness. At the close of plaintiff's case a motion by defendants for directed verdicts was made and granted. It was contended there, as here, that the presumption mentioned created a conflict in the evidence which the jury had to determine. To this respondents answered that such testimony was overcome and dispelled as a matter of law by Ireland's testimony. The Supreme Court held that such presumption was not dispelled by the testimony of an adverse witness examined under the section above cited. A rehearing was thereafter granted and an opinion was handed down thereon which is reported in 212 Cal. at page 540, 299 P. 529. In this latter opinion the court draws a distinction between the effect of evidence contradicting the presumption, given by the party relying on such presumption, and evidence given by the party against whom the presumption is invoked. The court says (page 553 of 212 Cal., 299 P. 529, 534): "It is argued by the defendants that, since the statute itself (section 1963, Code Civ. Proc.), before enumerating the disputable presumptions, declares that said presumptions 'are satisfactory, if uncontradicted,' and that they 'may be controverted by other evidence,' it must follow that, if they are contradicted or controverted, they fade out and disappear from the case. As has been seen, *they do disappear when contradicted or controverted by the evidence of the party relying upon them*, with the qualification stated in the Mar Shee Case [190 Cal. 1, 210 P. 269], but it is not correct to say that, under the Code section and the effect given to it by the court, they vanish from the case as a matter of law *when contradicted or controverted by the party against whom they are invoked.*" (Italics ours.)

[5] The facts we have hereinbefore mentioned as showing contributory negligence on the part of plaintiff are established by the uncontradicted evidence of plaintiff, "under circumstances which afford no indication that the testimony is the product of mistake or inadvertence," and being "wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case." Mar Shee v. Maryland Assurance Corporation, 190 Cal. 1, 9, 210 P. 269, 273.

Judgment affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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133 Cal.App. 222

## HAUSER v. PACIFIC GAS & ELECTRIC CO.

Civ. 4846.

District Court of Appeal, Third District, California.

July 8, 1933.

**1. Electricity** ⚿13.

Electric company is not liable for injuries from electric shock, unless it could reasonably have anticipated danger.

**2. Pleading** ⚿8(17).

Allegations of complaint in action for injuries by electric shock that defendant's wires were "in dangerous proximity" and at "insufficient height" above ground *held* insufficient, averring pleader's opinion only.

**3. Pleading** ⚿34(7).

Presumptions being against pleader, appellate court must assume, in absence of contrary allegations in complaint, on appeal from judgment dismissing action for injuries by electric shock, that defendant's wires were over 25 feet above ground as required by law (Code Civ. Proc. § 1963, subd. 1).

**4. Electricity** ⚿19(2).

Complaint *held* insufficient to state cause of action for injuries by electric shock when boom of derrick plaintiff was moving across yard came near electric wire overhead.

The complaint alleged that plaintiff was moving derrick across yard when, because of defendant's negligence in maintaining uninsulated wires in dangerous proximity and at insufficient height from ground, boom came close thereto, that contact was caused solely by defendant's negligence in maintaining power line, and that plaintiff received severe electrical shock as result of defendant's carelessness.

**5. Appeal and error 🔑916(3).**

On appeal on judgment roll from judgment of dismissal on ground that complaint stated no cause of action, appellate court must assume that plaintiff was satisfied with complaint and proposed amendment, where he took no further steps to amend it, while court held matter under advisement for over two months.

**6. Pleading 🔑236(1).**

Permission to amend pleadings is within sound discretion of trial courts, who should be liberal in allowing amendments.

**7. Pleading 🔑243.**

Refusal to grant amendment of complaint stating no cause of action is not abuse of discretion, where facts alleged show that no such cause can be stated.

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Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by Joe Hauser against the Pacific Gas & Electric Company. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Alva A. King and E. Vayne Miller, both of Colusa, for appellant.

Thos. J. Straub, of San Francisco, W. R. Dunn, of Sacramento, and Clinton F. Stanley, of San Francisco, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment of dismissal. Plaintiff filed a complaint which defendant answered. Thereafter plaintiff moved for leave to file an amended complaint, and at the hearing thereof defendant asked for dismissal and judgment upon the ground that neither the complaint nor the proposed amended complaint stated facts sufficient to constitute a cause of action. The motion to file the amended complaint was denied, and the motion for judgment on the pleadings granted. It is the contention of respondent that the complaint and proposed amended complaint did not set forth a cause of action and under the facts alleged a cause of action could not have been stated.

Appellant maintains a cause of action existed and was properly alleged and the suit was improperly dismissed. The facts as gathered from the pleadings show that the Pacific Gas & Electric Company maintained a pole line carrying high tension wires along a certain lane and across a yard or corral. Plaintiff, with permission of the owner and lessee, went upon the lands to move a hay derrick; that he hitched his horses to the derrick, and was moving the derrick across the corral when the boom thereof came in close proximity to the electric wire, and the electricity arced across the intervening space and thus into the body of plaintiff.

The complaint alleges the negligence as follows: "* * * Was moving and conveying the same (derrick) across the aforementioned yard * * * toward the * * * power line when, because of defendant's carelessness, recklessness and negligence in maintaining aforesaid wires within dangerous proximity and at an insufficient height from the ground and failing to insulate same the boom came in close proximity * * * and as a result thereof. * * *"

It is further alleged that "the contact was caused solely and due to the negligence of the defendant in the maintenance of said power line" and "that as a result of defendant's carelessness * * * plaintiff received a severe electrical shock" and also, "as a further result of defendant's carelessness," etc., plaintiff required attendance of a physician.

It is obvious that all of the foregoing allegations are as to the cause of the injury, leaving the fact of negligence to inference and innuendo.

In Johnson v. Fletcher, 97 Cal. App. 153, 274 P. 1001, 1002, it was alleged that plaintiff was induced to purchase an apartment house "by reason of the defendants, and each of them, having falsely * * * stated and represented * * * with the intent," etc. In upholding the order sustaining the demurrer thereto, the court, commenting upon the complaint, said: "The above allegation is a recital of facts and not a positive allegation. All matters of substance should be alleged positively and may not be stated in the form of recitals. Philbrook v. Randall, 195 Cal. 95, 103, 231 P. 739. * * * This is true because the very object of drawing a complaint is to frame it in such manner that the defendant can admit or deny and thus form an issue."

In Joseph v. Holt, 37 Cal. 250, the court said: "A complaint should state expressly, that is to say, in direct terms, the facts constituting the cause of action, leaving no essential fact in doubt, or to be inferred or deduced by argument from other facts which are stated. As inference, argument, and hypothesis cannot be tolerated in a pleading, (Green v. Palmer, 15 Cal. 411 [76 Am. Dec. 492],) so material facts cannot be left to inference, argument, or hypothesis, but must be expressly and in terms affirmed."

In Stringer v. Davis, 30 Cal. 318, it was essential that plaintiff allege that certain furniture and upholstery were used in a hotel. The plaintiff alleged "that said furniture and upholstery were furnished for and used in the furnishing of the hotel, in the City and County of San Francisco, known as the Willows."

The court said: "It is not an allegation that the goods were used in a hotel, nor that they were used in a building called the 'Willows,' and that such building was a hotel. There is no direct averment that the 'Willows' is a hotel. If such is the fact, it appears inferentially only. Nor is there any direct averment that, assuming the 'Willows' to be a hotel, the goods were ever used in it, except inferentially. That 'they were furnished for and used in the furnishing of,' etc., is not an allegation that they were thereafter 'used' and non constat that they were."

Examining the present complaint further, we find no allegation of any duty owed by defendant to plaintiff, nor does it appear that defendant might reasonably have anticipated the danger nor that plaintiff unwittingly nor accidentally came in contact with wires negligently maintained.

[1, 2] The rule has ofttimes been expressed that defendant electric company is not liable unless it could reasonably have anticipated the danger. Fairbairn v. American River Elec. Co., 170 Cal. 115, 148 P. 788; Id., 179 Cal. 157, 175 P. 637; McCormick v. Great Western Power Co., 214 Cal. 658, 8 P.(2d) 145, 81 A. L. R. 678, and Anderson v. So. Cal. Edison Co., 77 Cal. App. 328, 246 P. 559. See, also, Sweatman v. Los Angeles, etc., Co., 101 Cal. App. 318, 323, 281 P. 677. If there were an allegation that the wires were maintained in violation of law or of a rule or regulation of the Railroad Commission, then the law would impose the duty. No such allegation is here found except by recital that the wires were maintained "in dangerous proximity" and at "an insufficient height" above the ground. Such words are meaningless as allegations of fact, and are averments of opinion of the pleader only.

[3] The presumptions are against the pleader (section 1963, subd. 1, Code Civ. Proc.), and we must assume, in the absence of the contrary, that the wires were more than 25 feet above the ground, and that the crossarms were painted a bright yellow, and at designated points bore high voltage signs as required by law.

[4] It appears the accident here was not the result of an accidental contact with the wire while plaintiff was engaged in a rightful occupation. The contact was the deliberate act of plaintiff with full knowledge of all of the consequences.

In 45 C. J. 931, it is said: "A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion. If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause. And if an independent negligent act or defective condition sets into operation the circumstances which result in injury because of the prior effective condition, such subsequent act or condition is the proximate cause."

From the complaint it appears that plaintiff knew of the dangerous character of the wires and their exact location and condition, and deliberately moved a derrick into them and was injured. From the foregoing, it appears the complaint and the amended complaint failed to set forth any cause of action.

[5] We now pass to the contention of plaintiff that the trial court abused its discretion in granting the motion to dismiss and refusing to permit further amendments and dismissing the action. Plaintiff maintains the motion for judgment on the pleadings was made without notice, that it came as a surprise to him, and he had no opportunity to meet the points presented. Here we have a judgment before us which recites that the motion of defendant was regularly made and that no sufficient amendment was offered.

We must assume that plaintiff was satisfied that his complaint and proposed amended complaint set forth all of the essential facts of the case, for the matter was argued and taken under advisement by the trial court on December 29, and held until March 9, and during that period plaintiff took no further steps to amend his complaint.

In the case of Morel v. Morel, 203 Cal. 417, 264 P. 760, the defendant objected to the hearing of the motion on the ground that previous notice had not been given. The court held that the making of the objection was a waiver of notice. "An appellate court will never indulge in presumptions to defeat a judgment. [Citation.] On the contrary, every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the orders and judgments of superior courts. [Citations.] It is the duty of a litigant complaining of errors committed by a trial court to produce a duly authenticated record affirmatively showing the alleged error, and, if matter relied on to show error has been stricken out by the trial court, he must embody it in a bill of exceptions." Philbrook v. Randall, 195 Cal. 95, 104, 231 P. 739, 742. This is an appeal on the judgment roll, and we are limited in our examination to that alone.

[6, 7] Although permission to amend pleadings is a matter within the sound discretion of the trial court, courts should be liberal in the allowance of amendments, but as here, where a cause of action is not stated and it is apparent from the facts alleged a cause of action cannot by amendment be stated, there is no abuse in refusing to grant the amendment.

The judgment appealed from is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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133 Cal.App. 243

## BAKER v. BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY (two cases).

Civ. 8864.

District Court of Appeal, First District, Division 1, California.

July 11, 1933.

Rehearing Denied Aug. 10, 1933.

Hearing Denied by Supreme Court Sept. 6, 1933.

**1. Charities 🔑45(2).**

Hospitals organized for charitable purposes are not liable to their patients for injuries resulting from employees' negligence, where reasonable care is used in selection and retention of employees.

**2. Charities 🔑45(2).**

Hospital had burden of proving that it was charitable institution, and therefore not liable to patient for injury caused by employee's negligence.

**3. Charities 🔑1.**

"Charity" is gift to be applied, consistently with existing laws, for benefit of indefinite number of persons.

[Ed. Note.—For other definitions of "Charity," see Words & Phrases.]

**4. Charities 🔑45(2).**

Where corporation, administering educational trust, operated hospital which charged customary rates and made no pretense of receiving patients unable to pay for services rendered except where payment was guaranteed by independent organization, hospital *held* not exempt as "charitable institution" from liability for employee's negligence.

[Ed. Note.—For other definitions of "Charitable Institution," see Words & Phrases.]

**5. Negligence 🔑121(1).**

Where duty exists to maintain property in safe condition, presence of conspicuous defect for considerable time creates presumption of constructive notice thereof.

**6. Hospitals 🔑7.**

If hospital or its agent had knowledge of defective condition of lamp from which patient received shock, or by exercise of reasonable care could have known of defective condition, hospital was negligent (Civ. Code, § 2332).

**7. Hospitals 🔑8.**

Where patient received shock from bedside lamp, whether hospital was negligent *held* for jury (Civ. Code, § 2332).

**8. Damages 🔑96.**

Amount of damages for personal injury is committed first to jury's and then to trial court's discretion.

**9. New trial 🔑157.**

In ruling on motion for new trial, trial judge may consider evidence anew and vacate unjust verdict for personal injuries.

**10. New trial 🔑77(2).**

Verdict for personal injuries will not be vacated unless it is so plainly excessive as to suggest at first blush passion, prejudice, or corruption on part of jury.

**11. Damages 🔑132(3).**

$10,000 damages for severe electrical shock seriously affecting plaintiff's nervous system and necessitating amputation of little finger and removal of bones in right hand *held* not excessive.

**12. Trial 🔑260(1).**

Refusing instructions *held* not error, where instructions given fairly submitted issues.

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Appeals from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Winifred M. Baker and by R. E. Baker, against the Board of Trustees of the Leland Stanford Junior University, a corporation. From judgment for plaintiffs, defendant appeals.

Affirmed.

George J. Presley, Redman, Alexander & Bacon, and Herbert Chamberlin, all of San Francisco, for appellant.

Edward J. Lynch, of San Francisco, for respondents.

PER CURIAM.

The plaintiffs in the above actions are husband and wife. Winifred M. Baker sues to recover damages for injuries sustained through the alleged negligence of defendant, and R. E. Baker for the loss of services of his wife and for medical expenses resulting from the said injury. The jury returned verdicts in favor of Winifred M. Baker in the sum of $10,000, and in favor of R. E. Baker for $1,000. Defendant filed motions for new trials, and, same being denied, judgments were rendered for plaintiffs for the aforesaid amounts, and from these judgments defendant appeals.

Appellant relies upon four points for reversal on this appeal: (1) That the Palo Alto Hospital was an eleemosynary institution and that appellant had exercised due care in selecting the hospital employees. (2) That appellant had no knowledge or notice of the defective condition of the lamp. (3) Erroneous instructions regarding charity doctrine and error of the court in refusing instructions requested by appellant. (4) The verdict in favor of Mrs. Baker is excessive.

**[1, 2]** "The courts of this country have almost unanimously arrived at the conclusion that hospitals organized for charitable purposes are not liable to their patients for injuries arising from the negligence of their employees, where reasonable care is used in the selection and retention of the employee" (citing authorities). Stewart v. California Medical, etc., Ass'n, 178 Cal. 418, 176 P. 46, 47. In that case the court held that the true doctrine was that, if a person accepts the benefit of a public or private charity, he exempts, by implied contract, the benefactor from liability for the negligence of the servants in administering the charity if the benefactor has used due care in the selection of those servants. To the same effect, is, Thomas v. German Gen., etc., Soc., 168 Cal. 183, 141 P. 1186, and the burden of proving that said hospital was a charitable one rests upon appellant. Lewis v. Young Men's Christian Ass'n, 206 Cal. 115, 273 P. 580; Inderbitzen v. Lane Hospital, 124 Cal. App. 462, 12 P.(2d) 744, 13 P.(2d) 905.

E. S. Erwin testified that he was the assistant comptroller of Stanford University; that the number of students was about 3,500; that their tuition fee ranged from $115 to $130 per semester, of which there were three during each year; that $5 of this fee was turned over to the Students' Guild for the purpose of paying the expenses of conducting the hospital; that, when a student becomes ill and needs hospital attention, he enters the hospital and he pays part of the hospital expense, and the balance is paid out of this fund; that the regular rates of that hospital range from $5 per day for a ward, and from $6 to $8.50 per day for a room; that during the fiscal year of 1931 the operating profit of the hospital was $13,909.77. After paying bond interest and sinking fund payments, a balance of $8,959 remained. He further testified that there were no rules or regulations that permit service to be rendered free.

Miss M. Hindman, the assistant superintendent of the hospital, testified that the capacity of the hospital was 35, and that it was filled to capacity all of the time; that at times they received into said hospital patients who were not able to pay for the services rendered them, but were repaid for these services by a charitable organization, composed of ladies in Palo Alto, known as the Palo Alto Hospital Auxiliary; that the hospital furnished no free beds for which it stood the expense itself.

**[3, 4]** While the appellant corporation was created for the purpose of administering an educational trust, there is nothing in the acts of the Legislature relative to the trust, or creating the corporation, or in the trust itself, which provides that any trust fund shall be used for the said hospital, nor were such funds ever so used. A charity, in the legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons. Estate of Dol, 182 Cal. 159, 187 P. 428; Estate of Sutro, 155 Cal. 727, 736, 102 P. 920; Jackson v. Phillips, 14 Allen (96 Mass.) 539, 556. The city of Palo Alto was the owner of said hospital, and on July 1, 1921, by agreement it delivered possession of said hospital and its equipment to the Leland Stanford Junior University. It was provided in said agreement that during the month of July in each year a statement of the receipts and expenditures of said hospital should be made, and that, after deducting the operating expenses and any working fund that might be agreed upon, the remainder of the receipts should be turned over to the said city. We are of the opinion that the Palo Alto Hospital was not formed and maintained for charitable purposes. No charity was dispensed by it; on the contrary, the usual and customary rates charged by other hospitals were charged by it. It made no pretense of receiving patients unable to pay for the services rendered, except in some instances where the payment was guaranteed by the ladies of Palo Alto under the name of the Palo Alto Hospital Auxiliary, an independent organization. In Stewart v. California Medical, etc., Ass'n, supra, it was held that a corporation organized for a public charity may also conduct an enterprise for gain and be liable for the negligence of its employees in such enterprise, although the profits derived therefrom are devoted to the general purpose of the charity.

Appellant next contends that it had no notice or knowledge of the defective condition of the lamp. Mrs. Baker testified that she was brought to the hospital on April 1, 1931, for an operation; that on April 2 the operation was performed; that for a few days after the operation she had a night and a day nurse, but on the advice of her physician she dispensed with the services of the night nurse; that about midnight of April 6 she awakened and, desiring the services of the floor nurse, pushed the button which was pinned to her pillow and which when pushed caused a red light to appear in the hallway occupied by the floor nurse; that for the convenience of the patient a heavy metal lamp was placed upon a table that stood against the bed; that she reached over with her right hand to turn on the light and received such a shock that she was powerless to release her hand from the lamp; that the floor nurse came into the room shortly thereafter and seeing her condition severed the connection between the lamp and the electric current and thereby released Mrs. Baker's hand from the lamp.

Dr. Wilbur testified that he was connected with the University and that he was one of the staff of the hospital; that he was one of the physicians who attended Mrs. Baker when she was brought to the hospital; that she was placed in room No. 208. On his direct examination he testified that two or three days before the accident he saw the lamp in this room and at that time observed that a portion of the insulation on and surrounding the key which served to turn on the light was broken off, and in answer to a question of the court he stated that he knew this of his own personal knowledge. He further stated the break exposed the metal on the key and that this condition had existed for two or three days before the accident; that he was called a short time after the accident and at that time examined the lamp and found it in the same condition relative to the break that existed before. On cross-examination he testified that he did not personally examine the lamp in room 208 before the accident, that he saw a defective lamp in room No. 212 two or three days before the accident and that he called the attention of a nurse to it and requested her to have it repaired. On redirect examination he testified the insulation on the defective lamp in room No. 212 was broken in the same way as was the lamp in room No. 208, and in every way it appeared to be the same lamp. He further stated that at times the nurses brought lamps from one room to another. There was also evidence that the said broken insulation was plainly visible and that no defective lamp was repaired until after the said accident.

T. Collins, a witness for defendant, testified that he was custodian of the hospital; that he was called to room No. 208 the night of the accident and saw the lamp; that the insulation was broken off of the switch that turned the light on; that a person attempting to turn the light on would receive a terrible shock.

[5-7] Where the duty exists to inspect and maintain property in a safe condition, the presence of a conspicuous defect or dangerous condition of the appliances which has existed for a considerable length of time will create a presumption of constructive notice thereof. Roberts v. Pacific Gas & Electric Co., 102 Cal. App. 422, 283 P. 353; Linforth v. S. F. Gas & Electric Co., 156 Cal. 58, 103 P. 320, 19 Ann. Cas. 1230. Section 2332 of the Civil Code provides that: "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of. * * *" 1 Cal. Jur. 847. Therefore, if appellant or its agents had knowledge of the defective condition of the lamp, or by the exercise of reasonable care would have known of such defective condition, appellant was guilty of negligence. Ocean Steamship Co. v. Matthews, 86 Ga. 418, 12 S. E. 632; Paine v. Eastern R. Co. of Minnesota, 91 Wis. 340, 64 N. W. 1005; Illinois Central R. R. Co. v. Behrens, 208 Ill. 20, 69 N. E. 796. There is evidence from which the jury could conclude that this defect in the lamp existed for two or three days before the accident, and that the defect was patent and obvious. Ordinarily the question of whether or not due care has been exercised to inspect electric equipment to discover defects in the appliances is a matter to be determined by the jury. Roberts v. Pacific Gas & Electric Co., supra; 9 R. C. L. 1218; 1 Joyce on Electric Law, p. 726. We are of the opinion that there was sufficient evidence to support the verdict of the jury finding appellant guilty of negligence.

[8-11] Appellant also contends that the verdict in favor of Mrs. Baker is excessive. She was 51 years of age at the time of the accident, and had an expectancy of life of nineteen years. She received a third degree burn to her right hand. It was necessary to amputate her little finger and remove some of the bones in the hand, which has impaired its usefulness one-half to three-fourths. She also received a very severe electric shock which has resulted in seriously affecting her nervous system. Prior to receiving the injury, she did her household work and her own sewing, played the trombone, accordion, and piano, and did designing and painting. Since the accident she has been unable to do any of these things, nor will she be able to do them in the future. At the time the injury was inflicted, she suffered great pain and still suffers pain to an extent. The amount of damages is committed to the sound discretion of the jury, and, next, to the discretion of the judge of the trial court who, in ruling upon the motion for new trial, may consider the evidence anew and set aside the verdict if it is not just. Upon appeal the decision of the trial court and the jury on the subject cannot be set aside unless the verdict is so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury. Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 P. 83; Lahti v. McMenamin, 204 Cal. 415, 268 P. 644. We cannot say under the conditions shown to exist in this case that the verdict is excessive.

[12] Appellant complains of the action of the trial court in refusing to give certain instructions asked by it. We have examined the instructions and are of the opinion that those given by the court fully and fairly submitted the issues to the jury, and that no error was committed by the court in refusing to give the said instructions asked by appellant.

The judgments are affirmed.

133 Cal.App. 333

## HALE v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

Civ. 1073.

District Court of Appeal, Fourth District, California.

July 17, 1933.

**Prohibition 🔑10(1).**

Writ of prohibition to prevent issuance of commitment for disobeying order of court which admitted that it exceeded its jurisdiction was granted.

Application by Frank Hale for a writ of prohibition prayed to be directed to the Superior Court in and for San Diego County, the Honorable Lloyd E. Griffin, as Judge thereof, to prevent the issuance of a commitment.

Peremptory writ of prohibition granted.

James F. Armstrong and Edgar B. Hervey, of San Diego, for petitioner.

Shreve & Shreve, of San Diego, and Ray Miller, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an application for a writ of prohibition to prevent the issuance of a commitment requiring the confinement of petitioner. The petitioner alleges that he appeared before the respondent court and judge on May 13, 1933, in response to an order to show cause why he should not be punished for failure to comply with the terms of a previous order of the court requiring him to pay certain sums of money at certain named dates. It is alleged that a hearing was had on the date named, and the petition purports to set forth the evidence received at this hearing, all of which is to the effect that the petitioner was then entirely without funds and without ability to meet the terms of the previous order; it being also alleged that this evidence was uncontradicted. After alleging that at the conclusion of this hearing the court found the petitioner to be in contempt and ordered him confined in the county jail until such time as he paid the sum of $50 on account of the previous order, the petition alleges that said court and judge will, unless restrained, issue a commitment based upon said order of May 13, 1933, requiring the confinement of petitioner until such time as he pays the sum of $50 on account of said previous order.

An alternative writ was issued prohibiting the respondents from issuing, until the further order of this court, the commitment referred to in the petition. When the matter came on for hearing, the respondents appeared and admitted that in making the order of confinement on May 13, 1933, the court acted in excess of its jurisdiction, and consented that a peremptory writ issue herein.

A peremptory writ of prohibition will issue prohibiting the respondents from issuing the commitment above referred to.

We concur: MARKS, J.; TURRENTINE, J. pro tem.

133 Cal.App. 272

## FIRST NAT. BANK OF VENICE v. CITY OF LOS ANGELES.

Civ. 8286.

District Court of Appeal, Second District, Division 1, California.

July 14, 1933.

**Appeal and error 🔑781(2).**

City's appeal, claiming execution against it upon judgment was invalid on ground that city could not legally pay claim voluntarily incurred in one fiscal year out of income of subsequent year, was dismissed as not raising substantial question, where it appeared that if execution issued right to levy would be limited to property subject to execution (Rules for Supreme and District Court of Appeals, rule 5, § 3).

Appeal from Superior Court, Los Angeles County; Lester R. Roth, Judge.

Action by the First National Bank of Venice against the City of Los Angeles, substituted for the City of Venice. From an order defendant appeals. On motion to dismiss appeal or affirm the order.

Motion granted, and judgment affirmed.

Erwin P. Werner, City Atty., of Los Angeles, for appellant.

Crouch & Crouch and Roscoe R. Hess, all of Los Angeles, for respondent.

CONREY, Presiding Justice.

In this action the plaintiff obtained judgment against the city of Venice for balance due on a contract for a municipal improvement constructed for the city by plaintiff's assignor. The judgment was entered October 28, 1925. Thereafter, in accordance with the provisions of law governing such matters, the city of Venice was consolidated with the city of Los Angeles. On December 1, 1931, the court made and entered its order granting a motion of the plaintiff for the substitution of the city of Los Angeles as defendant instead of the city of Venice; and further provided that the judgment be enforced and carried into execution against said substituted defendant and said judgment revived; and the clerk was directed to issue a writ of execution on the judgment as so revived. From this order the defendant appealed.

Briefs having been filed on behalf of appellant and on behalf of respondent, now comes respondent and presents this motion asking that the appeal be dismissed or in the alternative that the order be affirmed upon the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, and upon the further ground that the appeal was taken for delay only. In other words, the motion is presented under rule V, section 3.

The brief for appellant contains no assignment of error or statement of points relied upon by appellant, except that under the general heading, "Argument," it is contended that a municipality may not legally pay a claim or indebtedness which was voluntarily incurred in one fiscal year out of the income and revenue of any subsequent year, except in the manner provided in section 18 of article 11 of the state Constitution. For this reason it is contended that any order of the court directing the county clerk to issue execution against the city of Los Angeles for the purpose of levying upon and selling property held by the city of Los Angeles in its proprietary capacity for the purpose of satisfying said judgment is clearly erroneous. It seems clear, however, that the rule of law thus relied upon by appellant is not applicable to this appeal. If execution issues on the judgment, the right of levy thereunder will be limited to property which is liable to execution. If the levy shall be made on property exempt by law, appellant will have available the legal remedies for its protection.

The motion is granted and the judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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## KIMBALL v. GENERAL ELECTRIC CO.

Civ. 4673.

District Court of Appeal, Third District, California.

July 15, 1933.

Hearing Granted by Supreme Court Aug. 15, 1933.

**Master and servant 🔑354.**

Master must exercise good faith toward servant and make full disclosure of matters affecting servant's financial welfare, arising out of, and dependent upon, relationship.

Appeal from Superior Court, Shasta County; W. E. Herzinger, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 23 P.(2d) 295.

Charles A. Christin, of San Francisco, and Carr & Kennedy, of Redding (John E. Manders, of San Francisco, of counsel), for appellant.

Jesse W. Carter and Glenn D. Newton, both of Redding, for respondent.

PER CURIAM.

Appellant apparently admits that the following authorities, to wit: Hemenway v. Abbott, 8 Cal. App. 450, 97 P. 190, and cases there cited; and 12 California Jurisprudence, 421, and cases there cited, support the statement of this court that the relationship existing between master and servant is confidential, but insists that such relationship imposes a duty only upon the servant of good faith and full disclosure to the master as to all matters affecting the financial welfare of the master arising out of such relationship, but does not require a like good faith and full disclosure on the part of the master toward the servant in transactions or occurrences affecting the financial welfare of the servant arising out of, and dependent upon such relationship. This reasoning does not appear to us to be sound. A one-way application of the rule does not accord with our views of what the law requires in ascertaining and declaring the duties and obligations attendant upon the relationship of master and servant, employer and employee. If an obligation rests upon the servant of good faith toward and of making full disclosure to the master as to all matters affecting the financial welfare of the master, arising out of such relationship, it seems to us clear that a like duty rests upon the master of good faith toward and of making full disclosure as to all matters affecting the financial welfare of the servant, arising out of, and dependent upon such relationship. It is unnecessary to cite authorities to the effect

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

that where one occupying such a relationship makes any disclosure, it must be full and complete. That a duty to make full disclosure rests upon one occupying such relationship is succinctly stated in 12 California Jurisprudence, p. 772.

By reason of an error in typing the opinion of this court, the following correction is necessary:

The paragraph beginning with the word "Irrespective" on the last page of the opinion heretofore filed in this case on the 16th day of June, 1933, should be stricken therefrom, and the following inserted in lieu thereof: "Irrespective of the cases which hold that a right of action for the death of one caused by the negligence of another, given to heirs, is conditioned upon the action being begun within a certain length of time, the argument of appellant is unsound based upon any of the cases involving the death of the injured person, for the simple reason that the right of action for personal injuries inherent in the individual himself who is injured, *is a common law right of action and is not given by the statutes.*"

A reconsideration of the issues involved in this cause leads us to the conclusion that the judgment should stand as affirmed.

The petition for rehearing is denied.

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133 Cal.App. 65

## STATE v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.

Civ. 1261.

District Court of Appeal, Fourth District, California.

June 28, 1933.

Hearing Denied by Supreme Court Aug. 24, 1933.

**1. Escheat** ⚷8(1).

Order directing payment of estate to county treasurer on ground heirs are unknown *held* not decree of distribution to county treasurer (Code Civ. Proc. § 1272a; Probate Code, §§ 1064, 1148).

**2. Escheat** ⚷8(1).

Superior court, after ordering payment of estate to county treasurer on ground heirs were unknown, had power and duty to order money transferred to state treasurer (Code Civ. Proc. § 1272a; Probate Code, §§ 1064, 1148).

**3. Courts** ⚷472(3).

Superior court of San Diego county, which ordered county treasurer to pay over estate to state treasurer, *held* without jurisdiction of proceedings by alleged heirs to recover estate; superior court of Sacramento county having exclusive jurisdiction (Code Civ. Proc., §§ 1272a, 1737; Probate Code, §§ 237, 1064, 1148).

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Original application by the State for a writ of prohibition prayed to be directed to the Superior Court in and for San Diego County, Clarence Harden, Judge, to restrain respondent from determining certain claims of heirship in an estate.

Peremptory writ of prohibition issued.

U. S. Webb, Atty. Gen., Lionel Browne, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and Edward W. Goodman, Deputy Dist. Atty., both of San Diego, for the State.

Hillyer & Boldman and F. L. Richardson, all of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an application for a writ of prohibition to restrain the respondent court from taking proceedings to determine heirship and the right of certain claimants to the money of an estate after the same has been paid into the state treasury.

The facts are not disputed, and are as follows:

In passing upon the final account of the public administrator in the estate of John C. Kelly, deceased, then pending before it, the respondent court on June 6, 1930, entered what the respondents denominate a final decree, which contained, among other things, the following:

"It is further ordered that the final account be approved and settled as presented; that the names, residences and respective shares of the heirs of said deceased cannot at this time be ascertained.

"It is further ordered that the residue of said estate, consisting of Fourteen Thousand, Nine Hundred Eighty-four and 61/100 Dollars ($14,984.61) in cash be paid to the County Treasurer of San Diego County, California, to be held and disposed of according to law."

Pursuant to said decree, the money therein referred to was paid to the treasurer of San Diego county on August 11, 1930. On December 13, 1930, one Patrick Kelly filed a petition in the respondent court in the matter of this estate, alleging that he was a nephew of the decedent and his only heir at law, and praying for an order requiring the county treasurer to pay to him the money in his hands belonging to said estate. An order to show cause why the prayer of this petition should not be granted was issued, but the record discloses neither a hearing thereon nor any continuance. On May 7, 1932, Marie Kelly, Edward John Kelly, and Julia E. Kelly filed a petition in this same estate alleging that they were the widow, son, and daughter, respectively, of the said John C. Kelly, deceased, and praying for an order adjudging them to be his only heirs at law and for an order requiring the county treasurer to pay to them the money referred to. An order was issued requiring all persons to show cause on May 20, 1932, why the prayer of said petition should not be granted. While the record does not show that a hearing in response to this order was ever had or any continuance ordered, the respondents, in their brief, state that a hearing thereon was continued from time to time until the proceedings hereinafter mentioned. On December 30, 1932, pursuant to an order made by the respondent court, the treasurer of the county of San Diego paid the money in question to the treasurer of the state of California. On January 17, 1933, a motion for an order vacating and setting aside the prior order directing the county treasurer to pay the money to the state treasurer, which motion was made on behalf of the four claimants above named, came on for hearing before the respondent court and judge. While the decision upon this motion was held in abeyance, the court, over an objection that it was without jurisdiction in the matter, proceeded to take testimony and receive evidence relating to the right of the claimants to receive said money. The court later denied a motion made by the district attorney to strike out all of the testimony and evidence received on the grounds that the court had no jurisdiction; that the decree of June 6, 1930, had become final, no appeal having been taken and no proceedings having been undertaken to obtain relief under section 473 of the Code of Civil Procedure; that the res is now in Sacramento county, the money having been transferred there pursuant to the order of the court; and that under the provisions of the Code the superior court of Sacramento county now has exclusive jurisdiction of the matter. The matter having been again set for trial, this proceeding was begun; the petition alleging that the court will proceed to determine the issues referred to unless restrained from so doing.

The question to be here decided is whether, under these circumstances, jurisdiction to determine these claims of heirship in this estate is in the superior court of San Diego county or whether such jurisdiction is now exclusively in the superior court of Sacramento county.

[1] It is the position of respondents that the decree of June 6, 1930, was a decree of distribution to the county treasurer, although not to the heirs of the estate, who were at that time unknown; that under section 1274a of the Code of Civil Procedure it was the duty of the county treasurer to hold this money for one year after he received it; that, under section 1148 of the Probate Code, the court may order such money paid by the county treasurer to the state treasurer only when no heirs or claimants have appeared; and that the respondent court still has jurisdiction since these claimants appeared before the court ordered the money paid by the county treasurer to the state treasurer. Reliance is also placed upon section 1064 of the Probate Code, providing that "when any person appears and claims the money paid into the treasury, the court making the distribution must inquire into such claim, and if satisfied of his right thereto must grant him a certificate to that effect."

It may first be observed that no distribution was ordered in the decree of June 6, 1930. In this respect this case is similar to Estate of Miner, 143 Cal. 194, 76 P. 968, where it is pointed out that the court did not order a distribution, but simply directed the payment of the money remaining in the hands of the public administrator into the county treasury and later ordered it paid by the county treasurer into the state treasury. Not only does the order of June 6, 1930, fail to conform to the requirements of a decree of distribution, but it does not purport to distribute the money to the county treasurer or to any one else.

[2] The statutory provision relating to the deposit of moneys of an estate in the county treasury, and later in the state treasury, when the estate is ready to be closed, and the provisions to enable any one entitled thereto to thereafter withdraw the same from such public depository, fall into two groups, namely, those governing in cases where distribution is made and the distributee for some reason does not appear, and those applying where no distribution is made for the reason that the heirs are unknown at the time the affairs of the estate are settled. Section 1064 of the Probate Code, corresponding to the former section 1696 of the Code of Civil Procedure, section 1274a of the Code of Civil Procedure, and section 1060 of the Probate Code, which is somewhat similar to the former section 1691 of the Code of Civil Procedure, relate in general to property distributed to definite persons who are at the time absent or who cannot be found, or who do not appear and sign a receipt so that the administrator may be discharged. In such cases, it is provided that the money shall remain in the county treasury for one year before being transferred to the state treasury. No such a provision is found with reference to a case where the heirs are unknown when the estate is ready to be closed, and where the money is deposited in the county treasury for that reason. In such a case the only provision is that the county treasurer must transfer the money to the state treasurer on the order of the court.

The situation with which we are here concerned is one of those special cases where the heirs are unknown at the time of the final settlement of the estate, and where, instead of entering a decree of distribution, the court orders the money deposited with the county treasurer. At the time the decree of June 6, 1930, was entered, the Probate Code had not been adopted, and the corresponding provisions in the Code of Civil Procedure were in effect. At that time section 1272a of the Code of Civil Procedure provided, and it still provides, that, when any portion of the estate of a decedent has been received by or deposited with the state treasurer pursuant to section 1737 of that Code, the superior court of the county of Sacramento shall have full and exclusive jurisdiction to determine the title to said property and all claims thereto. It further provides for the filing of a petition by any such claimant in the superior court of Sacramento county, or, where the amount claimed is less than $300, for the presentation to and passing upon the claim by the state board of control. Section 1737 of this Code then provided: "After a final settlement of the affairs of any estate, if there are no heirs, or other claimants thereof, the county treasurer must pay into the state treasury all moneys and effects in his hands belonging to the estate, upon order of the court; and if any such moneys and effects escheat to the state, they must be disposed of as other escheated estates."

While section 1737 of the Code of Civil Procedure was repealed upon the adoption of the Probate Code, almost the identical language just quoted is now contained in section 1148 of the latter Code. Section 1737 having been in effect at the time the order of June 6, 1930, was made, the court then had the power, and it was its duty, to order the money transferred to the state treasurer. While such an order was not made until after section 1737 was repealed, the same provisions were continued in section 1148 of the Probate Code, and it could well be held that the court was authorized to complete the order previously made and carry out the provisions of the law existing at the time the affairs of the estate were settled, or that the court could act under section 1272a in conjunction with section 1148 of the Probate Code, then in force.

[3] In any event, we are unable to see that any different result would obtain if the Code provisions in force at the time of the order made in December, 1932, transferring the money to the state treasury, be taken as applying. Section 231 of the Probate Code provides that the proceeds of any estate which has been deposited in the state treasury, either after a final decree of distribution or after a judgment of the superior court, by reason of the failure of heirs to make claim thereto, may be recovered upon judgment of the superior court or order of the state board of control, as provided in the Code of Civil Procedure. While there was no decree of distribution here, there was a judgment of the superior court ordering the money paid to the county treasurer by reason of the failure of the heirs to make claim thereto, and thereafter the proceeds of the estate were deposited in the state treasury. The only provision of the Code of Civil Procedure for recovering money deposited in the state treasury under these circumstances is contained in section 1272a thereof, which provides for a proceeding in the superior court of Sacramento county or, if the claim be for less than $300, for a proceeding before the state board of control.

Nor do we think the situation is changed here because these claimants appeared before the order of transfer to the state treasury was made. If it be conceded that the respondent court had jurisdiction to determine the persons entitled to the money of this estate while the same remained in the county treasury, and if it be further conceded that the court erred in ordering the money transferred to the state treasury after these claimants had filed their petitions, the fact remains that the order was made and the money was paid into the state treasury, where it now is. It can now be withdrawn only in the manner provided by the statutes which, under such circumstances, is by a proceeding over which the superior court of Sacramento county is given jurisdiction. Estate of Miner, supra; In re Kehr, 190 Cal. 401, 212 P. 913. When the money was received by the state treasurer, the probate court in San Diego county lost jurisdiction over the same and over the question of ownership thereof. In effect, the situation is somewhat similar to a case where a probate court loses jurisdiction where money is distributed to a wrong heir. While proper proceedings may be brought to obtain the same by a person in fact entitled thereto, a different proceeding is required. Likewise, a different proceeding is required, when money of this nature is paid into the state treasury, to establish the right of the parties who may be legally entitled thereto to withdraw the same. This proceeding is authorized by section 1272a of the Code of Civil Procedure and takes the place of the equitable remedy available in an ordinary case where an erroneous distribution has been made.

The state has a right to fix the place where it may be sued and whether or not the proceedings provided for such a case as this be considered as a suit against the state, they, like all probate proceedings, are purely statutory, and the Legislature has placed the exclusive jurisdiction thereof in the superior court of Sacramento county. The question of heirship is inseparably connected with the right to receive the money. If the superior court of San Diego county were to attempt to determine whether these claimants were the rightful heirs of the deceased, it could make no effective order because the money has been placed where it can only be reached in the manner provided by law. The respondents urge that these claimants have the right to establish their claim in San Diego county and thereafter look to the county treasurer or his bondsmen for wrongfully transferring the money. Not only does it appear that this officer has transferred the same by order of court, but, if successful in that court, these claimants would then be under the necessity of repeating their showing in a similar proceeding in Sacramento county in order to obtain the money. No such double jurisdiction can exist and, in our opinion, the superior court of San Diego county is now without jurisdiction in the premises. We conclude, therefore, that the prayer of the petitioner should be granted.

Let the peremptory writ issue as prayed.

We concur: MARKS, J.; JENNINGS, J.

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## SECURITY TRUST & SAVINGS BANK OF SAN DIEGO v. NEW YORK INDEMNITY CO.*

Civ. 974.

District Court of Appeal, Fourth District, California.

June 24, 1933.

Rehearing Denied July 24, 1933.

Hearing Granted by Supreme Court Aug. 22, 1933.

**1. Indemnity 🔑6.**

Indemnity contracts are governed by rules applying to other written contracts, and should be considered as a whole and, if possible, various provisions given effect.

**2. Insurance 🔑146(3).**

Where ambiguities in policy may be solved by either of two reasonable constructions, one most favorable to insured and which will give effect to policy should be adopted.

Insurer having prepared policy and documents used in connection with its issuance should not be heard to put such construction upon ambiguity, caused by it, as will defeat policy and take from beneficiary very object of insurance, if reasonable construction upholding insurance can be had which is not contrary to clear intention of parties.

**3. Insurance 🔑146(3).**

Words in bankers' blanket bond should be construed most strongly against insurer, and any ambiguities in conditions, provisions, and exceptions should be construed against insurer.

**4. Insurance 🔑425.**

Bankers' blanket bond covering loss by theft and excepting loss through forgery or loan *held* to cover loss resulting when bank in good faith made loan to alleged agent on basis of forged writings (Pen. Code, §§ 484, 490a; Civ. Code, § 1652).

Bank made loan to alleged agent on basis of letter and instructions authorizing agent to borrow moneys, which letter was forged, and which forgery was not known to bank. Loan was established in form of credit which alleged agent withdrew by several checks drawn upon his account. Alleged agent under California laws could have been prosecuted for theft.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by the Security Trust & Savings Bank of San Diego against the New York Indemnity Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Mathes & Sheppard and W. C. Mathes, all of Los Angeles, for appellant.

Hamilton, Lindley & Higgins and F. M. Downer, Jr., all of San Diego, for respondent.

MARKS, Justice.

The facts in this case were stipulated and are not in dispute. The sole question is whether a recovery against appellant can be sustained on the terms of the "Super Blanket Bond" or "Bankers' Blanket Bond," as it was denominated by the policy, and under the facts here presented.

The facts pertinent to this appeal may be summarized as follows:

At all times material to this action Gordon L. Eby and Lewis H. Homer were attorneys in fact for the Indemnity Insurance Company of North America, which for brevity we will refer to as the Indemnity Company, and each was authorized to execute, acknowledge, and deliver in the name of the company indemnity and fidelity bonds and undertakings including those similar to the one here involved. Homer had offices with and was employed by Eby. He acted as solicitor and salesman for the Indemnity Company and inspected and supervised the work of contractors for whom the Indemnity Company had written indemnity or fidelity bonds and represented the Indemnity Company in cases where such contractors had failed or were about to fail or had abandoned the per-

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*For subsequent opinion see 31 P.2d 365.

formance of their contracts. These facts were all known to respondent and its officers.

P. C. Kelley was a vice president of the Security Trust & Savings Bank of San Diego and was authorized to and did act for it in all the transactions involved in this action. R. W. Forsyth was the Pacific Coast manager of the Indemnity Company. Blanche P. Matson was a notary public in and for San Diego county, and was employed in the office of Eby up to about November 17, 1928, on which date her employment terminated. Respondent and its officers knew she was a notary public and that she was employed in the office of Eby, but had no knowledge of the termination of her employment until after March 4, 1929.

On or about December 24, 1928, Homer represented to Kelley that a contractor named R. T. Dawson had obtained two public improvement contracts, one known as the Sweetwater bridge contract and the other as the Dulzura conduit contract, with the Indemnity Company as surety on his labor, material, and completion bonds; that Dawson was unable to complete the contracts, and that the Indemnity Company would be compelled to take over and complete them at a cost to it of $15,000; that the completion would require about six months; that the Indemnity Company had instructed Homer to take charge of the completion work and to borrow money in his own name from the respondent to complete the contracts; that the Indemnity Company would guarantee the repayment of the loan by giving a bond in the penal sum of $16,500. Homer gave Kelley an unexecuted bond which would serve as the form of the bond to be executed to secure this loan. This application for a loan was referred to the loan committee of respondent. Kelley reported the representations made to him by Homer and gave the committee the blank form of bond. While the application was under consideration by the loan committee, and for the purpose of inducing it to approve the loan, Homer presented to respondent the following letter:

"Gordon L. Eby & Co.,

"Gentlemen: Re: Robert T. Dawson S. A. 15148 Sweetwater Bridge. S. A. 14194 Dulzura Conduit. Your wire received. You are hereby authorized to sign Indemnity Bond $16500.00 favor of Security Trust & Savings Bank of San Diego securing note of Lewis H. Homer issued for six months.

"Very truly yours,

"R. W. Forsyth

"RWF/AM R. W. Forsyth. Manager."

Homer represented to the officers of respondent that the foregoing letter was genuine and bore the genuine signature of R. W. Forsyth. The loan committee and officers of respondent believed Homer's representations and authorized the making of the proposed loan, which was to be evidenced by the promissory note of Homer, due in six months and secured by the written guaranty of the Indemnity Company.

On or about December 27, 1928, Homer executed and delivered to respondent the required promissory note in the principal sum of $15,000 and the written guaranty purporting to have been executed by the Indemnity Company and having attached to it the signature of the Indemnity Company by Gordon L. Eby, its attorney in fact. This guaranty bore the acknowledgment of Eby before Blanche P. Matson, a notary public. Homer represented that the guaranty bore the genuine signature of Eby and was in fact duly acknowledged by him. Respondent and its officers did not question the truth of these representations, made the loan upon the security mentioned, and placed $15,000 to the credit of Lewis H. Homer in a checking account subject to his check. All of this money was withdrawn by checks signed by Homer prior to March 1, 1929, except the sum of $28.49. Homer disappeared on this last date and has not since been apprehended.

It is stipulated that respondent would not have advanced the money to Homer had it not believed all the representations made by him and that the letter and guaranty were the genuine acts of Forsyth and the Indemnity Company.

All the representations made by Homer were false and fraudulent except that there was a contractor named R. T. Dawson who had two contracts for public improvements which we have mentioned, that the Indemnity Company had written a labor, material, and completion bond for him, and that the signature and seal of Blanche P. Matson on the certificate of acknowledgment were genuine. The signature of Forsyth on the letter was forged, as was the signature "Indemnity Company of North America by Gordon L. Eby, attorney in fact," on the guaranty. The signature of Blanche P. Matson on the certificate of acknowledgment was her genuine signature. It had been attached to the certificate in blank before it was attached to the indemnity guaranty bond. It was her custom to sign acknowledgment certificates in blank for convenience. These were left in her desk in the office of Eby. The certificate of acknowledgment was filled out by Homer or some other person without her knowledge or consent and the notarial seal attached after she left Eby's office and was attached to the guaranty bond by Homer before its delivery to the respondent. Security Trust & Savings Bank v. Matson, 116 Cal. App. 616, 2 P.(2d) 1001. Neither Forsyth, Eby, or the Indemnity Company had any knowledge of the execution and delivery of the forged letter or of the forged guaranty bond, and neither respondent nor its officers had any knowledge of these forgeries nor of the falseness of the representations made by Homer until after March 1, 1929.

The trial court rendered judgment against appellant in the sum of $14,971.51, the amount of the $15,000 loan less the $28.49 recovered, together with accrued interest and costs.

The only paragraphs of the "Bankers' Blanket Bond" pertinent to this case are as follows: "The losses covered by this bond are as follows: * * * (B) Any loss of property through robbery, larceny (whether common-law or statutory), burglary, theft. * * * Whether effected with or without violence or with or without negligence on the part of the employees while the property is within any of the Insured's offices covered hereunder. * * *" "The foregoing agreement is subject to the following conditions and limitations: * * * This bond does not cover: (a) Any loss effected directly or indirectly by means of forgery, except when covered by Insuring Clause (A) or (D) hereof. * * * (d) Any loss resulting from any loan made by the Insured. * * *" It is admitted that insuring clauses A and D do not apply to the facts of this case.

The grounds upon which appellant attacks the judgment are clearly set forth in its brief as follows: "First: Even if exception clauses (a) and (d) of 'Section 2' had been entirely omitted from the bond, the bank's loss still would not be covered, either by Insuring Clause 'B' or by any other provision in the bond; Second: The bank's loss was admittedly 'effected * * * indirectly by means of forgery,' and is for that reason expressly excluded from coverage by exception clause (a) of 'Section 2' of the bond; and Third: The bank's loss clearly 'resulted from a loan', and for that reason is expressly excluded from coverage by exception clause (d) of 'Section 2' of the bond." The arguments advanced under the first and third contentions are so closely connected that it will not be necessary to consider them separately.

It cannot be successfully denied that Homer's conduct in obtaining the loan from the Security Trust & Savings Bank of San Diego and in using the money thus made available to him made him guilty of theft as it is now defined by section 484 of the Penal Code. See, also, 490a, Pen. Code. Every element of the offense is presented in the facts stipulated to by the parties. People v. White, 124 Cal. App. 548, 12 P.(2d) 1078.

Appellant seeks to avoid the results of this conclusion by urging that Homer secured "credit" in the bank by his fraud, and that, as the term "credit" is not included within the definition of "property" in the bond, there is no liability under its terms. We must confess that we cannot follow the refinements of this reasoning. It is true that he did obtain "credit" with the bank by his fraud. It is also true that he turned this credit into money which he used for his own purposes. It was stipulated that "all of said money, except the sum of twenty-eight dollars and forty-nine cents ($28.49) was withdrawn from said account by checks drawn and signed by said Lewis H. Homer prior to March 1, 1929." The argument of appellant stops with one of the steps taken by Homer in the consummation of his scheme. He was given a credit on the books of the bank, was paid the amount of the credit, except $28.49, in money, and decamped with it. It was his ultimate purpose to obtain money by his fraud. He received this money, and "money" is specifically included within the definition of "property" in the bond. Appellant has confused one of the steps employed in accomplishing the purpose with the purpose accomplished—the means with the result.

It is self-evident that, had the bond contained no exceptions or reservations and only the insuring clause B from which we have quoted, there would have been no defense to the action and the judgment would have to be affirmed.

It is also equally true that, if full force and effect be given to the literal language of the exception clauses (a) and (d), from which we have quoted, judgment should have gone in favor of appellant. The loss was certainly effected "indirectly by means of forgery" for without forgery there would have been no loan and no loss. The loss also resulted from a loan, for again, if there had been no loan, there would have been no loss.

We are therefore confronted with this dilemma. Under the insuring clause, literally applied to the facts, the respondent should recover. Under two exception clauses equally literally applied appellant should recover. The bond could have been rendered harmonious in all its terms by adding to the insuring clause B the following: "Excepting from liability hereunder any loss by theft 'effected directly or indirectly by means of forgery' and theft 'resulting from any loan made.'" It could have been rendered equally harmonious by adding to the exception clauses (a) and (d) the following: "But not excepting any loss caused by 'theft.'"

When the exact language of the entire policy is applied to the facts of this particular case, we are forced to the conclusion that insuring clause B and the excepting clauses (a) and (d) are in direct conflict. There are innumerable cases and states of facts which might arise where there could be no conflict in the provisions of the policy. It is only under the facts of this case or one similar to it that the contradictions appear. In a case of loss by theft, where neither forgery nor a loan was involved, there could be no conflict. In a case of loss from forgery or a loan where there was no theft, there again would be no conflict. It is only where a loss resulted from theft in which either forgery or a loan or both occurred that the provisions of the bond become inconsistent. For this to appear it is necessary to read the instrument with facts in mind similar to those of the instant case.

Appellant confidently relies upon the following cases as supporting its contention that a recovery cannot be had because the loss was indirectly occasioned by means of forgery: Century Bank of the City of New York v. Mountain, (Lloyds) 112 Law T. (Eng.) 484 (1914); Trade Bank of New York v. United States Fidelity & Guaranty Co., 249 N. Y. 546, 164 N. E. 578; World Exchange Bank v. Commercial Casualty Ins. Co., 255 N. Y. 1, 173 N. E. 902. A study of these cases has satisfied us that they strongly support the position of appellant.

[1-3] Well-settled rules of construction of indemnity contracts have been announced by the courts of this state and are helpful to us in solving the question presented. Generally speaking, the construction of these contracts should be governed by the rules which apply to other written engagements. They should be considered as a whole and the various provisions read together and, if possible, harmonized and given effect. Burr v. Western States Life Ins. Co., 211 Cal. 568, 296 P. 273. "Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract." Section 1652, Civ. Code; Kelly v. Great Western Acc. Ins. Co., 46 Cal. App. 747, 189 P. 785. "It is a well-recognized rule of law that if any uncertainties or ambiguities appear in an insurance policy which may be solved by either one of two reasonable constructions, the one which is most favorable to the insured and which will give life, force, and effect to the policy should be adopted. The insurance company, having prepared the policy and all documents used in connection with its issuance, should not be heard to put such a construction upon an ambiguity, caused by it, as will defeat the policy and take from the beneficiary the very purpose and object of the insurance, if a reasonable construction upholding the insurance can be had that does no violence to the language used and the clear intention of the parties." Narver v. California State Life Ins. Co., 211 Cal. 176, 294 P. 393, 395, 71 A. L. R. 1374. Since the language in the bond was furnished by the insurer, it is in accordance with the principles of common justice that its own words should be construed most strongly against it, and such language should be used so that the conditions, provisions, and exceptions are made clear to the ordinary mind. Pacific, etc., Co. v. Williamsburgh City Fire Ins. Co. of Brooklyn, 158 Cal. 367, 111 P. 4. In the event it fails to do so, any uncertainty or ambiguity should be construed against it. Goorberg v. Western Assurance Co., 150 Cal. 510, 89 P. 130, 10 L. R. A. (N. S.) 376, 119 Am. St. Rep. 246, 11 Ann. Cas. 801. "All doubts or ambiguities must be resolved against the insurance company." Dibble v. Reliance Life Ins. Co., 170 Cal. 199, 149 P. 171, 175, Ann. Cas. 1917E, 34. Where a policy of insurance contains exceptions and provisos purporting to relieve the insurer from liability, these provisions will be strictly construed against the insurer and in favor of the insured. Goorberg v. Western Assurance Co., supra. " 'This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of insurance companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy.' " Berliner v. Travelers' Ins. Co., 121 Cal. 458, 53 P. 918, 920, 41 L. R. A. 467, 66 Am. St. Rep. 49. It is established that an exception which would avoid the policy should be construed against the insurer to prevent such a result if the language employed permits such an interpretation. Summer v. New York Life Ins. Co., 186 Cal. 789, 200 P. 621.

[4] By applying these rules of construction to the facts before us, we believe that any person of ordinary mind, including bankers and members of the legal profession, when reading the bond in question without the particular facts of this or a similar case in mind, would conclude (1) that the bond insured against any loss by theft; (2) that exception clause (a) was intended to relieve the insurer from liability occasioned directly or indirectly from the numerous varieties of forgeries against which a bank must guard and in which theft is not an element; and (3) that the same construction would be applied to exception clause (d). As the insuring clause B and the excepting clauses (a) and (d) are conflicting when considered under the facts of this case, and are not conflicting under the facts of innumerable other cases, we must construe them most strongly against the insurer and conclude that they do not relieve it from liability for loss occasioned by theft.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

## PEOPLE v. McGEE.*

Cr. 153.

District Court of Appeal, Fourth District, California.

July 17, 1933.

**Criminal law** 🔑998.

Motion to set aside judgment of conviction of rape where statute of limitations had run before information was filed would lie on ground court had no jurisdiction to pronounce judgment (Pen. Code, § 800).

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

John McGee was convicted of rape, and he subsequently filed a motion to vacate the judgment. From an order denying the motion, defendant appeals.

Reversed, with directions.

W. C. Dorris, of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

TURRENTINE, Justice pro tem.

On November 3, 1930, an information was filed charging the defendant with the crime of rape alleged to have been committed on or about March 30, 1926. Section 800 of the Penal Code, requires that an information must be filed within three years after the commission of the crime. Nothing appears in the information which would bring the case within the exceptions of the rule in Penal Code, § 802. To the information the defendant pleaded guilty, and was by the judgment of the court sentenced to imprisonment in state's prison on November 5, 1930. No objection to the information or any proceedings based thereon were urged until March 18, 1933, when the defendant filed a notice of motion to annul, vacate, and set aside the judgment. Said motion was presented, submitted, and by the court denied. From this ruling defendant appeals.

Respondent calls attention to the case of Ex parte Blake, 155 Cal. 586, 102 P. 269, 270, 18 Ann. Cas. 815, which we cannot distinguish in principle from the case at bar. Appellant relies on the case of People v. Hoffman (Cal. App.) 22 P.(2d) 229, wherein the facts are identical. Ex parte Blake, supra, holds: "That the statute of limitations is mere matter of defense, and is not a ground for discharge of a prisoner on habeas corpus * * * upon the fundamental rule that habeas corpus will not lie for the correction of mere errors which may be reached by motion or on appeal."

People v. Hoffman, supra, holds that a motion to set aside the judgment on the grounds that the court had no jurisdiction to pronounce the judgment would lie on the facts stated.

The statement of law in the two cases directly contradict each other. We feel that the correct principle is laid down in People v. Hoffman, supra, and that it is supported by the greater weight of authority as well as our Supreme Court, when it denied a hearing in the Hoffman Case, supra.

On the authority of People v. Hoffman, supra, the order denying the motion is reversed, with directions to the trial court to grant the motion.

We concur: BARNARD, P. J.; MARKS, J.

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 36 P.2d 378.

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# CALIFORNIA REPORTER

## IN VOLUME

## 24 PACIFIC REPORTER
## SECOND SERIES

218 Cal. 581

### GIST et ux. v. SECURITY TRUST & SAVINGS BANK et al.

L. A. 13092.

Supreme Court of California.
July 29, 1933.

Rehearing Denied Aug. 28, 1933.

**1. Vendor and purchaser 🔑44.**

Evidence in purchasers' action for rescission supported findings that purchasers entered contract under mistaken belief that lot described therein was property they had inspected and intended to purchase.

**2. Vendor and purchaser 🔑119.**

Purchasers' rescission of realty purchase contract *held* not barred by laches where they promptly protested on discovery of mistake, entered negotiations for peaceful settlement, and filed notice of rescission when advised settlement could not be effected (Civ. Code, § 1691).

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

24 P.(2d)—10½

**3. Vendor and purchaser 🔑43(1).**

Purchasers' payment of storm drain assessment *held* not affirmance of purchase contract, or waiver of right of rescission where payment was to enable them to reconvey to vendors should restoration be required.

**4. Vendor and purchaser 🔑118.**

Vendors *held* estopped to assert alleged default of purchasers in not continuing payments on purchase contract, or to complain that vendors would suffer because of decline in realty values where purchasers seeking rescission were lulled into security by vendors' acts indicating peaceful settlement.

**5. Evidence 🔑258(1).**

In purchasers' action for rescission of realty purchase contract, admitting evidence of conversations with defendants' agent *held* not error, where evidence showing that mistake involved justified rescission was clear and agent's connection with all defendants having interest in transaction was established.

**6. Vendor and purchaser 🔑42.**

Contract provision that purchasers had purchased realty wholly as result of inspection did not estop them from procuring rescission, where contract failed to describe property they inspected and intended to purchase.

**7. Trusts 🔑201.**

Trustee executing purchase contract to realty held in trust, as result of negotiations conducted through beneficiaries' selling agents on behalf of all beneficiaries, *held* liable on rescission only in its representative capacity as trustee for return of money purchasers paid.

**8. Judgment 🔑240.**

Joint and several judgment for sums paid by purchasers rescinding purchase contract *held* warranted against beneficiaries sharing jointly and severally in fruits of transaction by which realty held in trust was sold.

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In Bank.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by C. Wooster Gist and wife against the Security Trust & Savings Bank and others. From a judgment for plaintiffs, defendants appeal.

Modified, and, as modified, affirmed.

Chapman & Chapman and L. M. Chapman, all of Los Angeles, for appellants.

Hewitt, McCormick & Crump, C. Forbes Ridland, and Guy Richards Crump, all of Los Angeles (Philbrick McCoy, of Los Angeles, of counsel), for respondents.

PRESTON, Justice.

Action for rescission of a contract for the purchase of real property. Judgment for plaintiffs. Appeal by defendants.

About December, 1925, the Los Feliz Hills Tract in Los Angeles was opened for subdivision and sale to the public. Defendant bank, as trustee, held title to the property to secure an indebtedness to it, under the terms of a trust agreement whereby one Dickson was named as trustor and defendants Edwards & Wildey Company, Cooper, Williams, Laack, and Cotton were named as beneficiaries. Edwards & Wildey and Laack and Williams were selling agents for the tract, and the latter firm employed a licensed real estate salesman, Louis G. Wurtz, through whom the transaction with plaintiffs was consummated.

Plaintiff, Mrs. Gist, had known Mr. Wurtz for many years. For many years also she had coveted, for a home site, one particular knoll, or portion of land in the tract, from which could be had a wide valley view of surrounding territory, which she considered superior to that obtainable from any other point. Shortly after the opening of the tract, she noticed that the land was to be subdivided. She immediately sought Mr. Wurtz, told him of her desire for said certain parcel of land, and later she inspected the territory with him and pointed out the exact spot upon which she wished to build a home. He assured her that the lot was for sale, whereupon she consulted her husband, plaintiff C. Wooster Gist, and the following day again visited the place with him and with Mr. Wurtz. The lot was situated on a steep hillside, fan-shaped and narrowing toward the rear. The front stakes were not visible. There was some conversation as to the location of the side boundaries. The salesman picked up a stone, threw it roughly down the hill toward a tree, and told plaintiffs that the course of the stone marked the approximate border line of the lot: that the tree itself would not be on their property but that the spread of it would extend over the boundary.

A day or two later plaintiffs, a brother-in-law, an architect, and the salesman again inspected the lot; their main object being to determine the cost and feasibility of building on the steep slope. At this time the rear boundary was marked by corner stakes, but the widening of the lot to the front was only estimated as on the previous day. Plaintiffs felt satisfied with their inspection of the property, and soon thereafter, and on March 1, 1926, they made a down payment of $1,187.50 on the $4,750 purchase price thereof, agreeing to pay the balance in three equal yearly installments, with quarterly interest on deferred payments. A document entitled "Purchaser's receipt," setting forth the terms of the sale, was executed by Mr. Wurtz and indorsed "accepted" by Mr. Murray Brophy on behalf of Edwards & Wildey Company. On the same day, March 1, 1926, the formal contract of purchase and sale was executed by plaintiffs and by defendant bank.

Plaintiffs kept up their interest payments and also made the payments of $1,187.50 due on the principal in March, 1927, and March, 1928, but they did not visit the property again until April, 1928, when for the first time they noticed that the laying out of streets and subdivision work had been completed and front stakes marked the property line of their lot. They were surprised at this time to discover that the land they had intended to purchase, and thought they were purchasing, described as "lot 26" in the contract, was in fact a part of lot 26 and a part of lot 27, that lot 26 would not afford them the full view they desired, and that its side boundary line, instead of being some four or five feet west of the above-mentioned tree as estimated, was in fact approximately twenty-five feet from it.

Plaintiffs immediately informed Mr. Wurtz, who was still employed by Edwards & Wildey Company, though not on the tract, that there must be some mistake; he promised to consult his superiors, and, after a number of conversations, a conference was had with Mr. Brophy, who had accepted the contract for Edwards & Wildey. Plaintiffs asked for a delivery of the property they thought they were purchasing, or for a return of the money paid by them. They were told from time to time that the matter was being taken up with the various beneficiaries. The illness of Mr. Gist caused further delay in the negotiations, but Mr. Wurtz later reported that his efforts toward adjustment had been unsuccessful. The matter was then brought before the real estate commission (in November, 1928), and Mr. Brophy, on behalf of defendants, asked for further time to consider an adjustment. Other proceedings were had over a period of weeks, and it was not until about January 18, 1929, that plaintiffs were finally and authoritatively advised that a settlement could not be effected. Their notice of rescission was served the next day, and this action was commenced on March first thereafter.

The court made findings upholding the facts as reflected in the above statement; that is, the court found that said contract was entered into by plaintiffs under the mistaken belief that the lot therein described was the property they had inspected and intended to purchase; otherwise they would not have made the purchase; that, when the mistake was discovered by them, about April 1, 1928, they promptly notified defendants; made no further payments of principal or interest, and refrained from taking direct action toward rescission only until they finally learned from defendants that the controversy could not be settled amicably.

[1, 2] The findings and conclusions of the court below and the judgment have abundant support in the evidence. Indeed, the several contentions of appellants do not merit extended consideration. Their claim that plaintiffs are precluded from recovery because of delay and lack of diligence, the record shows to be without foundation. Immediately upon discovery of the mistake, plaintiffs sought an adjustment from defendants; there was no cessation of their efforts in this direction, and the evidence clearly shows that the lapse of time before formal rescission was made was due to the attitude of defendants themselves in indicating that a settlement without litigation could probably be effected and in asking for extensions of time in which to consider the matter. Section 1691 of the Civil Code provides that a party must rescind promptly upon discovery of the facts which entitle him to rescission, but no definite period is provided, and the question of laches is one for the trial court. Where, as here, a party protests promptly upon discovery of the facts entitling him to rescind, and then immediately enters into negotiations for peaceable adjustment, a rescission made within a reasonable time after failure of compromise or settlement is not barred by laches. Sherratt v. Hellman, etc., Bank, 112 Cal. App. 542, 297 P. 582, and cases cited; Hunt v. L. M. Field, Inc., 202 Cal. 701, 262 P. 730. In this cause the evidence fully supports the findings of the court below on the issue of laches.

[3] The payment by plaintiffs on July 28, 1928, of a storm drain assessment of $47.84 against the property did not constitute an affirmance of the contract or waiver of the right of rescission, in view of the findings of the trial court, well supported by the evidence, to the effect that said payment was made solely for the purpose of protecting and preserving the property so plaintiffs might be in a position to reconvey it to the vendors should restoration ultimately be required.

[4] Appellants contend that, as plaintiffs made no payments of principal or interest after discovery of the mistake, and as time was of the essence of the contract, plaintiffs were in default at the time of rescission and cannot prevail. Had plaintiffs made any payment, appellants would doubtless rely upon the very claim they assert with respect to the storm drain assessment payment, to wit, that such act, being an act of dominion over the property, would constitute an affirmance of the contract or waiver of the right of rescission. However, as above set forth, the evidence shows that plaintiffs were lulled into a sense of security by the acts of

defendants; hence defendants are estopped to assert the delay or alleged default of plaintiffs. For the same reason defendants are estopped to complain that they will suffer loss because of a decline in real estate values over the period in question.

[5] The evidence showing that the mistake here involved was such as to justify a rescission is clear and convincing, and the authority of Mr. Wurtz to negotiate the sale and his connection with the other defendants is well established. There was no error on the part of the court below in admitting evidence of conversations had with Mr. Wurtz during the course of the entire transaction.

[6] The contract of purchase contained a provision to the effect that the buyer had inspected the property and purchased it "wholly as a result of said inspection and not upon any representation by the seller, or its agent," and that the buyer therefore waived all claim for damages by reason of any representation other than the covenants of the written contract. Appellants claim that this provision should estop plaintiffs from recovery herein. But plaintiffs have claimed no more at any time than the property they actually inspected. They are not seeking to enforce any representation outside the written contract. They claim that, through mistake, the contract failed to describe the property they inspected and purported to buy. The mistake dates from the inception of the transaction, and plaintiffs could not have ascertained the lot number from their inspection of the land.

[7, 8] It is contended that the court erred in rendering a joint and several judgment against all of the defendants for return of the sums paid by plaintiffs, upon reconveyance by them of the property to defendant bank. Defendant bank was trustee and held the legal title to the property. The other defendants, by their pleadings, admitted a beneficial interest in the trust; in addition, some of them were also selling agents for the tract. Defendant beneficiaries are asserted to have participated proportionately in the distribution of payments made by plaintiffs. Appellants argue that, as the trustee disbursed the payments before any question was raised as to the validity of the contract, it should not be held liable for return of said money, and that the respective beneficiaries should be held liable only for the proportionate amount of the distribution made to each of them. The evidence shows, however, that the bank executed the contract as the result of the negotiations conducted through defendant selling agents on behalf of all the defendants. It should therefore be held liable in its representative capacity, as trustee, only. Defendants, having shared jointly and severally in the fruits of the transaction, are in no position to deny their liability in the matter of rescission. The evidence supports the findings of the court as to the relationship of the parties defendant, and warrants the entry of a joint and several judgment against them.

Paragraph 3 of the judgment is hereby amended to read as follows: "That plaintiffs have and recover of and from defendants and each of them, the sum of $4071.45 principal; the further sum of $1131.37 interest to March 1, 1931; making in all the sum of $5202.82, together with interest on said total sum of $5202.82 from March 1, 1931, at the rate of seven per cent (7%) per annum until paid. The liability of defendant Security Trust & Savings Bank, a corporation, is limited, however, to a judgment against it in its representative capacity as trustee." As so modified, the judgment is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; LANGDON, J.; SEAWELL, J.; CURTIS, J.

218 Cal. 494

## LE CLERG et al. v. CITY OF SAN DIEGO et al.

S. F. 14761.

Supreme Court of California.

July 13, 1933.

Rehearing Denied Aug. 10, 1933.

1. **Municipal corporations** ⚿1038.

Judgments against municipalities are not enforceable until after levy and collection of annual taxes for payment thereof (St. 1901, p. 794, § 3).

2. **Mandamus** ⚿3(8).

Judgment creditors' remedy against city, funds in treasury of which were not raised for payment of judgments, is under statutory provision for collection of judgments, not mandamus (St. 1901, p. 794, § 3).

3. **Municipal corporations** ⚿1038.

City properly refused to pay judgments against it before levy of tax for purpose, though its charter authorized appropriations to satisfy its debts in annual ordinance or auditor's account (St. 1901, p. 794, § 3; St. 1931, p. 2889, § 74).

4. **Mandamus** ⚿102(1).

Peremptory writ of mandamus to compel issuance of warrants for full amount of judgments against city *held* inappropriate, where alternative writ was returnable too late to afford relief for current tax year and before time for levy of ensuing year's tax (St. 1901, p. 794, § 3).

In Bank.

Petition by Vernon Charles Le Clerg and others for a writ of mandate against the City of San Diego, G. F. Waterbury, and others, to compel the last-named respondent, as auditor and comptroller of the city, to issue warrants to petitioners for the full amount of judgments held by them against the city.

Peremptory writ denied.

Prior opinion, 20 P.(2d) 313.

Sanders & Jacques, of San Diego, for petitioners.

C. L. Byers, City Atty., and Gilmore Tillman and H. B. Daniel, Asst. City Attys., both of San Diego, for respondents.

PER CURIAM.

Petition for mandate to compel the auditor and comptroller of the city of San Diego to issue warrants to the petitioners for the full amount of judgments held by them against said city. It is alleged in substance in the petition that on or about the 19th day of December, 1927, the San Diego common council duly passed an ordinance numbered 11497, providing for the employment of special deputy engineers in the operating department of said city, prescribing their duties and fixing their compensation; that this employment was created in order to perform a large volume of street improvement work. The ordinance creating these positions provided that the appointments be made from the eligible civil service list. The petitioners were thereafter duly appointed and certified to the positions held by them by the common council, and their duties were designated by resolution of said council. It is then alleged that they performed the preliminary work leading up to the improvements, but, before the same had progressed to award of contract therefor, the city, through its council, abandoned all of the proceedings. Thereafter the petitioners filed actions against the city for their compensation. Their complaints were demurred to, and the demurrers were overruled. The city then answered.

Thereafter the council passed a resolution wherein it was recited that the total amount sought to be recovered in said actions was $125,000; that the superior court had decided that the plaintiffs were entitled to recover the reasonable value of their services; that the further defense by the city of said actions would entail great additional costs, and probably result in judgments against it in excess of $67,500; that the city deemed said sum to be a reasonable amount to pay the special engineers for their services. This resolution directed the city attorney to consent to the entry of judgments against the city for said sum of $67,500. It is then alleged that, pursuant to said resolution, the city attorney entered into a stipulation in said actions, consenting to the entry of judgments against the city in favor of the petitioners herein, in respective sums aggregating the above amount. This stipulation provided that the judgments so entered should be as binding and effective as though entered by the court after a full trial of each of the actions on the merits, and that any right of the parties to appeal therefrom should be deemed waived. All the judgments were thereupon made and entered, and they have become final.

The petitioners allege that the clerk of the court then filed with the council and the auditor of the city a certificate and audit of said judgments. Further allegations are to the effect that there is sufficient money in the city treasury to pay the judgments, but, notwithstanding this fact, the city refuses to pay and the auditor refuses to issue his warrant therefor. The petition also recites that, in incurring the obligation to pay the petitioners compensation for their services out of the city treasury in conformity with the terms of the ordinance, the city did not incur any indebtedness or liability exceeding the income and revenue provided for the year in which said obligations were incurred. The judgments here involved are based upon obligations accruing variously in the fiscal years 1929–1930 and 1930–1931. Furthermore, the petitioners advance the theory that the obligations upon which the judgments are based are statutory in character, and that section 18 of article 11 of the Constitution, limiting the power of legislative bodies of municipalities to incur indebtedness or liability in any manner or for any purpose exceeding in any year the income provided for such year, has application to contractual obligations alone, and has no reference to obligations statutory in character.

Even if this be true, and assuming for the purposes of this case that the obligations are statutory, it does not follow that the petitioners are entitled to the specific relief sought, viz., the issuance of warrants on existing funds of the city for the full amount of said judgments.

**[1, 2]** It is the position of the respondents that a writ of mandate will not lie to compel the municipality to pay a judgment prior to the levy of a tax for that purpose pursuant to the provisions of the act of the Legislature, approved March 23, 1901, entitled: "An act to provide for the payment of judgments against counties, cities, cities and counties, and towns." St. 1901, p. 794. Section 3 provides: "It shall be the duty of the auditor to examine and audit the final judgments so reported by the county clerk, and to certify the amount of such final judgments to the treasurer within five (5) days from the day on which such list of final judgments is filed with him. Thereupon, the board of supervisors, city council, town trustees, or other board of officers, as the case may be, having authority to levy taxes upon the taxable property of such county, city and county, city, or town, must include in the tax levy for the next fiscal year a rate or sum sufficient to pay all final judgments existing against such county, city and county, city, or town. The omission to include the amount of any existing final judgment in the tax levy for any year, shall not of itself invalidate the tax levy as made, but such omission or omissions must be included in the next tax levy; provided, that the board of supervisors or other board or officers having authority to levy taxes may provide for the payment of such final judgments when so audited by including in the tax levy for the next fiscal year an aliquot part or fraction of the amount of such judgments, and thereupon the treasurer shall pay to each judgment creditor a like aliquot part or fraction of the amount of the judgment of the creditor, and thereafter a like aliquot part or fraction of the amount of such judgments shall be levied and paid each successive year until the whole thereof shall be fully paid; but such fractional levy and payment shall in no case be less than one tenth (1/10) of the whole amount of such judgments."

The plain intent of the statute is that the municipality after the rendition of a judgment shall have a proper time in which to raise the money by taxation for its payment. Prior thereto the funds of the city are to be used to pay statutory, necessary, and usual charges provided for in the budget. A writ issued during the fiscal year, compelling the payment of judgments out of the operating funds on hand, might impair the operation of the city, for it is conceivable that a municipality might incur a liability far in excess of the amount of funds of the city's income during the year in which the judgments were obtained. The case of the City of Long Beach v. Lisenby, 180 Cal. 52, 179 P. 198, affords an example of just such a situation. The statute clearly contemplates that judgments against municipalities are not enforceable until after an annual tax has been levied and collected therefor. Frederick v. City of Gloversville, 112 App. Div. 146, 97 N. Y. S. 1105. Where the funds in a city treasury are raised for other purposes, the remedy of a judgment creditor against the city is to proceed under the statutory provision for the collection of judgments. Griswold v. Common Council of City of Ludington, 117 Mich. 317, 75 N. W. 609. This has been the practice followed in this state. Cary v. Long, 181 Cal. 443, 184 P. 857; Cook v. Supervisors, 99 Cal. App. 169, 277 P. 1064; Palace Hotel Co. v. Supervisors, 58 Cal. App. 742, 209 P. 256; Metropolitan Life Ins. Co. v. Deasy, 41 Cal. App. 667, 183 P. 243.

[3] A petition for a rehearing after an order denying the peremptory writ was granted because of the insistence of the petitioners that the method prescribed by law for the payment of debts of the municipality is set forth in the charter of the city, that such a matter is a municipal affair, and that the act of 1901 is not controlling nor even available to the city in the premises. It is pointed out that section 74 of the charter (St. 1931, p. 2889) provides a method for appropriations to satisfy debts of the city by the inclusion thereof in the annual appropriation ordinance, or, in the absence thereof, by an appropriation account set up by the auditor and controller. It is insisted that the method thus provided is exclusive and uncontrolled by the general law. Assuming that the term "debt" as employed in section 74 of the charter would include a judgment debt, and that the method therein provided for making an appropriation to satisfy the same is a municipal affair, it does not necessarily follow that such method is exclusive. It is true that by that portion of section 2 of the charter which is quoted by the petitioners the city has, in general terms, availed itself of the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in the charter. But the concluding part of the section provides that "nothing herein shall be construed to prevent or restrict the City from exercising, or consenting to, and the City is hereby authorized to exercise any and all rights, powers and privileges heretofore or hereafter granted or prescribed by General Laws of the State."

By the enactment of the charter provisions just quoted, the city has been placed in position to avail itself of the rights and privileges extended by general laws. The act of 1901 is such a law, and the attitude of the respondents in this proceeding must be held to constitute an election on the part of the city to be governed thereby in the matter of the payment of said judgments. It is unquestionably the right of the city so to do. Under these circumstances, the most that the petitioners may lawfully demand is that the city proceed to levy a tax for the purpose of satisfying said judgments as provided in the statute. All of the steps preliminary to the levy of the tax for that purpose have been taken. The last step to that end was the audit and certification, on July 19, 1932, by the auditor and controller to the city treasurer of the amounts of said judgments. The common council adopted the tax ordinance on or before the last Tuesday in August, 1932, as provided in section 75 of the charter, but failed to include therein a levy for the payment of said judgments or an aliquot part thereof. Assuming that the common council should have done so, the petition does not disclose that any request was made by the petitioners that such be done, and for the obvious reason that the petitioners were then demanding that the full amount of the judgments be paid by warrants on existing funds in the city treasury.

[4] When the alternative writ herein was made returnable, to wit, December 6, 1932, it was too late to afford the petitioners any relief for the tax year 1932–1933 under their prayer for general relief, and the time for the levy of the tax for the year 1933–1934 has not arrived. The respondents insist that it may not be assumed that they will not perform their duty in the premises in fixing a tax levy in accordance with the act of 1901 and on or before the last Tuesday in August, 1933. This attitude of the respondents renders the issuance of the peremptory writ at this time inappropriate and unnecessary.

The peremptory writ is therefore denied without prejudice.

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218 Cal. 526

## In re LEWIS' ESTATE.

Sac. 4683.

Supreme Court of California.
July 18, 1933.

**1. Appeal and error 🔑931(1).**

Evidence must be construed favorably to decree where conflicting.

**2. Husband and wife 🔑264.**

Regarding extent to which land was husband's separate property rather than community property, evidence showed that husband acquired no interest in land under deed given merely to clear up cloud on title.

**3. Husband and wife 🔑273(1).**

In ascertaining accumulations to community funds on deposit at wife's death, probate court's adding thereto 7 per cent. interest annually until husband's death *held* not error.

> This was particularly true in view of evidence that husband, both before and after death of wife, was continuously engaged in lending money, and usually at rates of interest from 8 to 10 per cent.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the estate of Thomas L. Lewis, deceased. From a decree of distribution, heirs of the deceased appeal.

Affirmed.

Elliott, Atkinson & Sitton, of Sacramento, for appellants.

Evan J. Hughes, of Sacramento, for respondents.

CURTIS, Justice.

This appeal is from a decree of distribution in the estate of Thomas L. Lewis, deceased, by the two sisters of said deceased. The controversy is between the heirs, or blood relatives of said deceased, and the heirs at law of the wife of said deceased, whose death occurred some eighteen years prior to the death of the deceased, Thomas L. Lewis. The point involved is whether certain property left by the deceased was his separate property, or the community property of himself and his predeceased wife, Melvina Maxfield Lewis. The property involved is an eighty-acre tract of land and $6,233.31 in money. Other property, both real and personal, was owned by said deceased at the time of his death, but it was of only slight value, and by decree it was distributed in the same manner as the court distributed the sum of $3,103.31, hereinafter mentioned. If the court made a legal distribution of said sum of $3,103.31, then the decree, in so far as it relates to this miscellaneous property, should not be disturbed.

[1] The court found that 32 per cent. of said eighty-acre tract of land was separate property, and that 68 per cent. thereof was common property of Thomas L. Lewis and his deceased wife. This property was conveyed to Lewis by Robert Maxfield by deed dated March 27, 1893, after his marriage and during the lifetime of his wife, who died May 7, 1910. The evidence shows that Lewis purchased for $2,500 said land, and that he contributed $800 of his separate property toward the purchase price thereof, and borrowed the balance from a man named Jackson. The sum of $800 is 32 per cent. of $2,500. Evidently the trial court concluded that this loan was paid off by Lewis from community funds. Appellants make no direct contention that it was not, except that they do contend that Lewis had between $1,200 and $1,500 in money at the time of his marriage, and this sum may have gone into the purchase price of said land. There is some evidence that years after Lewis' marriage he made certain statements which might bear out appellants' contention that Lewis possessed in the neighborhood of $1,250 in money at the time of his marriage. On the other hand, there is evidence in the record to the effect that Lewis was practically without any money or property at the time of his marriage. A brother-in-law of the deceased so testified, and he is corroborated by Annie Maxfield, who testified that, when Lewis returned from his honeymoon, he had but $40. As the evidence as to Lewis' possession of any substantial sum of money

or property at the time of his marriage is conflicting, it must be construed in favor of sustaining the decree. The trial court evidently was of the opinion that Lewis was without funds at the date of his marriage, and the evidence amply supports such a conclusion.

[2] Appellants further contend that the finding of the court regarding the community character of said eighty-acre tract was erroneous, as the trial court in reaching such conclusion disregarded the effect of a deed of said eighty-acre tract made to Lewis by his mother at or about the time Lewis acquired said property from Robert Maxfield. The theory of appellants appears to be that Lewis only acquired a one-half interest in said eighty acres by his deed from Maxfield and that the other one-half interest in said real property came to him by deed of gift from his mother. If this theory could be sustained, then the separate interest of Lewis in said land would be 66 per cent. thereof instead of 32 per cent. as found by the trial court. But the contention of appellants that Lewis received one-half interest in said real property, or any interest therein, through the deed from his mother, cannot be sustained. The evidence shows that this tract of land was formerly owned by Thomas Morris, Lewis' grandfather. On the death of Morris, Lewis was the administrator of his estate. He returned the whole of this eighty-acre tract of land in the inventory as property of the estate, appraised at $3,000. As administrator of the estate, he sold it to Robert Maxfield for $2,400, and subsequently purchased it from Maxfield for $2,500. In all the proceedings of the estate, and in the two deeds through which he acquired said property, it was described as the full eighty acres, and not as any lesser interest. It does appear that there was possibly a cloud upon the title to said real property caused by a confusion in a prior deed by which Thomas Morris acquired title thereto, and Lewis' mother, who was the daughter of Thomas Morris, acquired title to an adjoining eighty-acre tract. Evidently the deed from Lewis' mother to Lewis was given simply to clear up this cloud on the title to said land, and no interest in said land passed from her to Lewis by said deed. This disposes of appellants' contention that the court erroneously found that only 32 per cent. of said eighty-acre tract of land was the separate property of said deceased.

[3] We will now direct our attention to the sum of $6,233.31 distributed by the decree of distribution. The court found that $3,130 of this amount was "community property of said decedent and Melvina Maxfield Lewis," and that of the balance (or $3,103.31) 32 per cent. was "the separate property of Thomas Lewis, and 68 per cent thereof was the common property of said Thomas Lewis and Melvina Maxfield Lewis." At the date of the death of Melvina Maxfield Lewis, Thomas L. Lewis had on deposit the sum of $1,385. This money the court found was at that date the community property of Lewis and his wife. The probate court computed interest on this sum from the date of the wife's death to the date of the death of Lewis, eighteen years, at 7 per cent. per annum, the principal and interest amounting at the death of Lewis to $3,130, which sum the court distributed as community property. We see no objection to this method of the probate court in ascertaining the accumulations to said original sum of $1,385. Especially is this true in view of the undisputed evidence in the case that Lewis during his lifetime, both before and after the death of his wife, was continuously engaged in loaning money, and usually at rates of interest from 8 per cent. to 10 per cent. Appellants call to our attention the state of Lewis' bank account after the death of his wife, which shows that frequent withdrawals therefrom were made by Lewis, and as a result thereof said account was reduced in September, 1911, to $80. But the fact that Lewis made these withdrawals is no proof that the money so withdrawn was spent or otherwise dissipated by Lewis. It is more than likely, judging from the business habits of Lewis, that the money withdrawn from the bank was loaned out by him at rates of interest even higher than 7 per cent. per annum. We find no justification for disturbing the finding of the court regarding said sum of $3,130.

As to the balance of the money on hand for distribution, that is, the sum of $3,103.31, it will be noted that the probate court followed its finding regarding the eighty-acre tract of land, and found that 32 per cent. of this money was separate property and 68 per cent. was community property, and distributed it accordingly. The only theory upon which this finding of the court can be sustained is that Lewis, after the death of his wife, engaged in no gainful occupation, and that during that period of time, from 1910 to 1928, Lewis' sole income was from the property owned by him at his wife's death. There is evidence to sustain this theory of the case. It is not uncontradicted, but it is substantial and is sufficient to justify the implied finding of the trial court that there were no accumulations to Lewis' property during this period due to his own personal efforts. While some of the witnesses for the appellants testified that Lewis after his wife's death was seen to be performing manual labor, the preponderance of evidence was to the effect that, after Mrs. Lewis' death, Lewis to all intents and purposes led a retired life. He rented his farm to Japanese, and lived off of the income of his property. The evidence on this point may be summed up in the testimony of Charles F. Maxfield, his brother-in-law. This witness was a lifelong acquaintance of Lewis, and the two lived near each other during practically the lifetime of Lewis. Maxfield testified in answer to a question as to what work Lewis did after the death of Mrs. Lewis: "Just rented the vineyard out to Japanese—just chored around the house—done a little garden work about the trees and flowers—that is about all. He said he never would work."

This disposes of all questions raised by the appellants.

The decree is affirmed.

We concur: WASTE, C. J.; SHENK, J.; IRA F. THOMPSON, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.

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218 Cal. 505

## RAPP v. RAPP.

S. F. 14707.

Supreme Court of California.
July 14, 1933.

**1. Husband and wife 🔑279(1).**

Where husband, in agreement for settlement and division of property rights, accepted certain sum as his share, of which stated portion was paid on execution of agreement, and balance was payable on sale of apartment property owned by community, but standing in wife's name, agreement *held* to imply covenant of wife to sell property within reasonable time (Civ. Code, §§ 1655, 1657).

**2. Husband and wife 🔑279(1).**

Where agreement between spouses for settlement and division of property rights contemplated sale, by wife, of apartment property from proceeds of which husband was to receive certain amount, wife's failure for approximately six years to make sale *held* unreasonable delay, warranting judgment for husband (Civ. Code, § 1657).

**3. Limitation of actions 🔑13.**

Where, under agreement, wife was to sell property and pay portion of proceeds to husband, and wife, by repeated assertions that she was endeavoring to sell property, induced husband to forbear suing until six years had elapsed, wife *held* estopped to set up statute of limitations.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Hjalmar A. Rapp against Edith Rapp. Judgment for plaintiff, and defendant appeals.

Affirmed.

Gerald C. Halsey and Frederic T. Leo, both of San Francisco, for appellant.

Walter H. Robinson, of Los Angeles, for respondent.

WASTE, Chief Justice.

On May 1, 1924, the plaintiff and defendant, who were then husband and wife, entered into a written agreement for the settlement of their property rights. Among other things, the written agreement provides "that said second party [Hjalmar Rapp, plaintiff herein] does hereby accept and receive from first party [Edith W. Rapp, defendant herein] in full settlement of his right, title, interest, claim or demand in and to said property, community or separate, and whether the same consists of real property, money or other securities, the sum of Seven thousand four hundred ($7,400) dollars, payable as follows: One thousand ($1,000) dollars upon the execution of this agreement, the receipt whereof is hereby acknowledged, and the sum of Six thousand four hundred ($6,400) dollars upon the sale of the premises situate in the City and County of San Francisco and known and designated as No. 1650 Jones Street, but, and provided, that on the sale of said property, said second party agrees to accept the sum of Six thousand four hundred ($6,400), but should the sum of $14,800 cash be not obtained from said sale then the second party agrees to accept on account one-half of the cash received, after first deducting the aforesaid sum of One thousand ($1,000) dollars to be paid to first party, and to accept jointly with first party a mortgage on said property for any balance that may be due second party; said mortgage when executed and delivered by the purchaser to be deposited with the Wells Fargo & Union Trust Company of San Francisco, the costs of said escrow to be borne equally, and said escrow to provide that thereafter all payments made on account of said mortgage, principal and interest, to be equally divided between the parties hereto until second party shall have been paid said balance in full with interest on said balance and to be paid to them by said Trust Company."

The present controversy concerns itself with the rights of the plaintiff under the quoted provision. The court below found and concluded that the apartment property, though standing in defendant's name alone, was community property; that at the time of the execution of the property settlement agreement it was mutually understood that it would be sold without unreasonable delay; that more than a reasonable time has elapsed since the execution of the agreement without any sale having been made; that one year following the execution of the agreement was and is a reasonable time within which the defendant could and should have sold the apartment property; that plaintiff is entitled to judgment against defendant in the sum of $6,400, with interest; that he is entitled to a lien on the property to secure the same; and that, if the judgment remain unpaid three months from entry, the property is to be sold by a designated referee subject to confirmation by the court. Judgment was accordingly entered, and this appeal followed.

[1] Defendant contends that the written agreement does not contemplate a sale of the apartment property at any particular time, and contains no provision, express or implied, requiring her to sell. We are of the opinion that the court below has properly construed the agreement. It was intended by the parties to effect a settlement and division of their property rights. The plaintiff accepted as his share the sum of $7,400, of which $1,000 was paid upon execution of the agreement, the balance to be paid upon the sale of the apartment property. Such an agreement necessarily implies a covenant on the defendant's part to sell the property within a reasonable time. Especially is this true under Civil Code, §§ 1655 and 1657. Section 1655 provides that stipulations which are necessary to make a contract reasonable are implied in respect to matters concerning which the contract manifests no contrary intention. Section 1657 provides that, if no time is specified for the performance of an act required to be performed, a reasonable time is allowed. To adopt defendant's construction of the agreement would be to place it within her power to indefinitely delay the sale of the premises, thereby defeating plaintiff's rights under the agreement.

We find nothing in Foley v. Euless, 214 Cal. 506, 6 P.(2d) 956, contrary to our conclusion herein. Plaintiff testified that at the time the agreement was executed nothing was said as to the time within which the property would be sold, but that on divers subsequent occasions defendant stated she would sell it "as fast as she can." It was within the province of the trial court to accept this testimony as against defendant's contradictory evidence.

[2] At the time of the commencement of this action, the defendant had permitted approximately six years to elapse without having made the sale contemplated by the agreement. This was an unreasonable delay and warranted the judgment entered by the court below. In reply to the defendant's contention that she had in good faith attempted to dispose of the property during this six-year period, suffice it to say that examination of the record satisfies us that, had a determined effort been made, the property in all probability could have been sold for a reasonable price. One of defendant's witnesses testified that in his opinion the property at the time of trial had a market value of approximately $25,000, and that for about a year following the execution of the agreement had a reasonable value of $33,500. The evidence tends to indicate that defendant had several times listed the property with real estate agents at a figure considerably higher than its reasonable market price. Of course, this tended to preclude the consummation of a sale.

We have examined the entire record, and find no merit in the contention that the evidence and findings fail to support the judgment. Nor do we think there was a failure to find on material issues. The trial court very properly concluded that the issue of fraud had been abandoned and that the cause therefore resolved itself into a proposition of law having to do with the reasonableness of defendant's conduct in failing to sell the property over a period of years.

Defendant next urges that plaintiff's theory of the case fluctuated throughout the trial. Defendant was not prejudiced thereby. A reading of the complaint and the written agreement upon which it is based immediately suggests the material issue to be as found by the court below. The relief granted is well within the pleadings and warranted by the evidence.

[3] In view of the trial court's finding that one year constituted a reasonable time within which to sell the property, defendant contends that the statute of limitations commenced to run at the expiration of such period, and that plaintiff's cause of action is therefore barred. With this we cannot agree. Repeatedly during the six-year period which elapsed between the execution of the contract and the commencement of this action the defendant verbally stated to the plaintiff that she would sell the property "as soon as she could." There is evidence to the effect that in 1927 defendant stated in response to plaintiff's query that "she wou.d do her best to sell the house," but that "she could not sell it." Plaintiff testified that he "would always write, and all the answer I would get was that it could not be sold." There was also introduced in evidence a letter bearing date December 17, 1928, addressed by defendant to plaintiff, in which she states: "Have been to every real estate office in town they won't even list a twenty year old house." The present action was commenced on September 5, 1930, within two years after defendant's written statement that she was exerting every effort, though unsuccessfully, to sell the property. In view

of the foregoing evidence, we are of the opinion that defendant is estopped to set up the bar of the statute. Phillips v. Phillips, 163 Cal. 530, 535, 127 P. 346; Perry v. Magneson, 207 Cal. 617, 621–622, 279 P. 650; Roper v. Smith, 45 Cal. App. 302, 305, 187 P. 454; Quanchi v. Ben Lomond Wine Co., 17 Cal. App. 565, 567, 120 P. 427. Defendant's repeated assertions, both oral and written, that she was endeavoring to sell the property, induced the plaintiff to forbear suing until 1930. Under the circumstances, plaintiff is not to be penalized. To hold otherwise would permit the defendant to take advantage of an omission induced and caused by her own conduct.

In conclusion, we find no error in the trial court's order overruling the demurrer to the complaint.

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; IRA F. THOMPSON, J.; SEAWELL, J.

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218 Cal. 510

## ALAMEDA COUNTY TITLE INS. CO. v. PANELLA et al.

S. F. 14784.

Supreme Court of California.

July 18, 1933.

**1. Pleading 🔑214(1).**

On demurrer, allegations of answer must be deemed true.

**2. Evidence 🔑444(6).**

Lender's alleged oral agreement when borrower executed note and trust deed, to carry note until borrower sold land, *held* inadmissible under parol evidence rule (Code Civ. Proc. § 1856; Civ. Code, §§ 1625, 1640, 3399).

**3. Evidence 🔑434(8).**

Fraud in execution or inducement of written contract may be shown and revision sought where mistake or imperfection of writing is pleaded (Code Civ. Proc. § 1856; Civ. Code, §§ 1625, 1640, 3399).

**4. Contracts 🔑245(2).**

Negotiations or stipulations concerning subject-matter, preceding or accompanying written contract, are superseded thereby, in absence of fraud or mistake (Code Civ. Proc. § 1856; Civ. Code, §§ 1625, 1640, 3399).

**5. Evidence 🔑433(9).**

If, through mistake, note and trust deed failed to embody parties' agreement, maker should have pleaded mistake and sought reformation (Code Civ. Proc. § 1856; Civ. Code, § 3399).

**6. Estoppel 🔑83(1).**

Rule that representations may constitute estoppel if relating to intended abandonment of existing right means intended abandonment by person sought to be estopped, not person claiming estoppel.

**7. Estoppel 🔑83(5).**

By subsequent oral agreement or representation, promisor may be estopped to contend that only written contract or executed oral agreement can modify written contract.

**8. Evidence 🔑444(6).**

Borrower could not successfully invoke doctrine of constructive trust against lender purchasing at trustee's sale in alleged violation of contemporaneous oral agreement to carry note secured by trust deed until borrower could sell land (Civ. Code, § 1625).

**9. Pleading 🔑225(1).**

That order sustaining demurrer is silent regarding leave to amend is not error without showing request for such leave.

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In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by the Alameda County Title Insurance Company against Joseph Panella, R. Perrott, and others. Judgment for plaintiff, and the last-named defendant appeals.

Affirmed.

Molkenbuhr & Molkenbuhr, of San Francisco, and R. O. Bordner, of Oakland, for appellant.

McKee, Tasheira & Wahrhaftig, of Oakland, and Henry H. Irwin, for respondent.

SEAWELL, Justice.

This action was brought to quiet title to three parcels of real property situate in the city of Piedmont, county of Alameda, this state. In addition to denying plaintiff's title, possession, and right to possession, defendant R. Perrott set up an affirmative defense as to parcels 1 and 2. The court below sustained plaintiff's demurrer to said affirmative defense, and the cause went to trial on plaintiff's allegations of title and possession and defendant's general denial thereof, resulting in judgment for plaintiff as to all three parcels. On this appeal defendant does not attack the judgment as to parcel 3, but his sole contention is that the court erred in sustaining the demurrer to his affirmative defense as to parcels 1 and 2, and excluding evidence based thereon.

Appellant in said affirmative defense alleges that plaintiff title company claims title in fee as purchaser at a trustee's sale held under a deed of trust executed by appellant to said title company as beneficiary. He further alleges that said trustee's sale and the declaration of default in pursuance to which it was held were wrongful and fraudulent and in violation of an alleged oral agreement had between him and plaintiff at the time of execution of said deed of trust, in consequence of which he prays that it be decreed that plaintiff holds parcels 1 and 2 in trust for him to abide said alleged oral agreement. If proof of said oral agreement is inadmissible under the parol evidence rule, the court below acted in accordance with law in sustaining plaintiff's demurrer to the affirmative defense.

[1] It sufficiently appears from the allegations of the answer, which must be taken as true in passing on the demurrer thereto, that in March, 1927, defendant asserted a claim against plaintiff title company based on a policy of title insurance issued to him in December, 1926, on parcels 1 and 2 involved in the action herein. He had purchased said property, which included a number of lots, from one Ruth E. Mathews. The policy of title insurance showed Parkside drive, upon which the lots fronted, to be a public street, when in fact the city of Piedmont had not accepted it as a public street and refused to improve it. In adjustment of this claim, defendant alleges plaintiff title company, in July, 1927, agreed to acquire and pay the purchase price for an additional five-foot strip to meet the width requirements of the city of Piedmont for public streets. It is alleged that plaintiff did in fact acquire said strip, but the answer is silent as to whether the city of Piedmont thereafter accepted Parkside drive as a public street.

Plaintiff company also "orally specifically agreed," following the allegations of the answer, to "take over and carry" the three existing incumbrances against the property, including a purchase money deed of trust executed by defendant to the seller, Ruth E. Mathews, and two deeds of trust, in the aggregate amount of $6,550, to which the property was subject when defendant acquired it. Plaintiff was "to take over and carry" said incumbrances until defendant was able to sell the property advantageously, at which time the proceeds of sale were to be apportioned to the incumbrances. It is not alleged whether plaintiff company made any payments to the holders of said incumbrances for the account of defendant between July, 1927, when the alleged oral agreement was made, and September 15, 1927. On that latter date, it is alleged, defendant and his wife executed a note and deed of trust for $4,350 in favor of plaintiff company, "in substitution" for the balance due upon two of the three deeds of trust to which the property was subject. It is to be inferred that plaintiff title company advanced funds with which said deeds of trust were paid and discharged, and took therefor the note of defendant and his wife, secured by deed of trust on said property. It does not appear from the answer whether the remaining deed of trust lien, which was a first lien originally for $1,750, had been paid before defendant's execution of the $4,350 note to plaintiff. As to said note for $4,350, defendant alleges that plaintiff "orally specifically agreed" at the time of execution thereof "to hold and carry" it until defendant should be able to sell the property advantageously, and that defendant and his wife relied on this agreement at the time they signed the note and deed of trust, and upon the faith of said oral agreement thereafter expended $3,300 in improvements on the property.

On June 20, 1930, it is alleged, plaintiff company, in violation of said oral agreement, wrongfully and fraudulently recorded notice of default, and thereafter purchased the property at trustee's sale for $3,000.

[2-4] The terms and conditions of the note and deed of trust for $4,350 do not appear upon the face of the answer either in hæc verba form or by description, but it is inferable from the answer as a whole that said note provided for certain payments which defendant has failed to make, and that plaintiff company became the purchaser at trustee's sale in full compliance with the provisions of the trust deed. To defeat the title of plaintiff, defendant relies solely on the alleged oral agreement of plaintiff, made prior to and at the time of execution of the note and deed of trust and admittedly resting entirely in parol, "to hold and carry" said note and deed of trust. Defendant construes the agreement, as he alleges it, to mean that plaintiff company should receive no payments due by the terms of the note until he sold the property, and should have no right to exercise the power of sale conferred by the deed of trust. Plaintiff company's demurrer to the answer averred that the allegations of the agreement "to take over and hold" the note and deed of trust for $4,350 were uncertain, unintelligible, and ambiguous. Aside from any question of uncertainty, the admission in evidence of the alleged oral agreement would be in direct violation of the parol evidence rule. Fraud in the execution or inducement of a written contract may be shown, and revision of a written contract may be sought where mistake or imperfection of the writing is put in issue by the pleadings. Section 1856, Code Civ. Proc.; sections 1625, 1640, 3399, Civ. Code. With these qualifications the execution of a contract in writing supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument. Pacific States Sec. Co. v. Steiner, 192 Cal. 376, 220 P. 304; Thomson v. Langton, 45 Cal. App. 415, 187 P. 970; College Nat. Bank v. Morrison, 100

Cal. App. 403, 280 P. 218; Wright v. Shoenhair, 100 Cal. App. 163, 280 P. 174; Rottman v. Hevener, 54 Cal. App. 474, 202 P. 329; McArthur v. Johnson, 216 Cal. 580, 15 P.(2d) 151; Murphy v. Craig (C. C. A.) 28 F.(2d) 963.

[5] If through mistake the note and deed of trust for $4,350 as executed failed to embody the true agreement of the parties, defendant should have put the mistake in issue by the pleadings and sought reformation. Harding v. Robinson, 175 Cal. 534, 541, 166 P. 808; section 1856, Code Civ. Proc.; section 3399, Civ. Code. He has not adopted such a course. Nor does he charge plaintiff company with fraud. He makes no claim that he was induced not to read the instruments, or that he did not fully understand their import and perceive that they were at variance with the alleged oral agreement. He offers no suggestion as to why, if the oral agreement was made as alleged, it was not embodied in the note and deed of trust.

Defendant's main contention is that the answer states a good defense based on the doctrines of equitable estoppel and constructive trusts. He contends that, in reliance on the alleged oral agreement of plaintiff company, made at and prior to execution of the note for $4,350, "to hold and carry" said note, he forebore to prosecute his claim on the policy of title insurance, and instead signed said note and thereafter expended $3,300 in improvements on the property. Defendant relies on cases holding that a party sought to be charged on an oral contract required by the statute of frauds to be in writing may be estopped to raise the defense of the statute where the other party, in reliance upon the oral agreement, has changed his position or prejudiced himself to such an extent that if the oral agreement were not enforced he would suffer irremediable injury. The leading California case on this subject is Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154, where plaintiff gave up his position as a captain of detectives on the San Francisco police force in reliance on an oral promise of defendants to employ him for ten years at a stated salary, and served several years before he was discharged. The court held that defendants were estopped to plead the statute of frauds. Vogel v. Shaw, 42 Wyo. 333, 294 P. 687, 75 A. L. R. 639, with note; Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418.

The statute of frauds and the parol evidence rule are distinct, although both aim to secure purity of evidence. In the statute of frauds cases there is no written contract which it is sought to vary and contradict by parol evidence. It is one thing to permit proof of an oral agreement required by the statute of frauds to be in writing on the basis of estoppel and another to permit contradiction of a written contract to which the parties have reduced their agreement by proof of oral agreements made prior to and contemporaneously therewith. The oral negotiations are merged in the written contract, which is conclusive in the absence of a plea of actual fraud or mistake.

In Union Mutual Life Ins. Co. v. Mowry, 96 U. S. 544, 549, 24 L. Ed. 674, a case frequently cited on this phase of the doctrine of estoppel, Mr. Justice Field declared: "But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine carried to the extent for which the assured contends in this case would subvert the salutary rule, that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent."

[6] Defendant relies strongly on statements in certain of the cases cited by him to the effect that an estoppel may be based on an intended abandonment of an existing right, which statements, he contends, are precisely applicable to the facts alleged, in that he abandoned his right to proceed against the company for breach of the title insurance policy issued to him. This pronouncement has been made where it was contended that the representations to constitute the basis of an estoppel must relate to existing facts rather than to a mere promise of future performance, and it has been held that an estoppel may arise as well where the representations relate to an intended abandonment of an existing right. These statements have reference to an intended abandonment of a right by the person sought to be estopped, and do not relate to a person in the position of defendant, who is the party relying on the estoppel. Banning v. Kreiter, 153 Cal. 33, 94 P. 246; Rottman v. Hevener, supra; Faxton v. Faxton, 28 Mich. 159; Vogel v. Shaw, supra.

[7] A case for application of this doctrine would be presented had plaintiff title company subsequent to execution of the note and deed of trust, by representations that it would waive payments due on the note pending sale of the property and forbear to exercise its right of sale for default, induced plaintiff to make valuable improvements and otherwise irrevocably alter his position. The promisor may be estopped to raise the defense that a written contract can be modified only by a contract in writing or an executed oral agreement, in like manner as he may be estopped to plead the statute of frauds upon

an original contract required to be in writing. In this situation there is a subsequent oral agreement or representation. In the statute of frauds cases there is no written contract. But in the instant case an attempt is made to contradict a contract reduced to writing solely by alleged oral representations made prior to and contemporaneously with the written contract. The answer contains no allegations as to a subsequent waiver. There are absolutely no allegations as to what took place with reference to the note and deed of trust between their execution on September 15, 1927, and June 20, 1930, when the notice of default was recorded. It does not appear whether or not any payments were made. It is not alleged that with the consent of plaintiff company no payments were made.

[8] The doctrine of those cases which raise a constructive trust upon a conveyance by deed absolute in reliance on the oral promise of the grantee to hold for the benefit of the grantor or a third party cannot properly be extended to permit proof of a contemporaneous oral agreement that no payments should be made on a promissory note expressly providing for payments, or proof that an unconditional power of sale in the deed of trust securing said note should not be exercised pending sale of the property.

The rule as restated in Rottman v. Hevener, 54 Cal. App. 484, 202 P. 329, 331, is as applicable to the instant case as it was to that case. It may therefore be said in the instant case: "It is not claimed that by reason of fraud, accident, or mistake there was any failure to cause the written instrument to express the intention of either of the parties. There is no allegation * * * that defendant was induced by fraud or mistake to agree to the insertion of the clause making the note payable one day after date. * * * What he [defendant] did he did with his eyes open. And he is charged with knowledge that under the law of this state (Civil Code, § 1625) a written contract supersedes all preceding or accompanying oral negotiations or stipulations. In the absence of fraud or mistake, the time of payment as fixed by the written terms of the note cannot be varied by any contemporaneous oral agreement. The rule that a writing which purports to be the complete contract of the parties is deemed in law to be the full repository of the agreement or contract, that the whole contract is expressed by it, and that evidence of oral stipulations is not admissible to incorporate other elements in it or to alter or enlarge its terms, is applicable to negotiable as well as to nonnegotiable instruments"—citing cases.

[9] The demurrer was properly sustained. The fact that an order sustaining a demurrer is silent as to leave to amend does not constitute reversible error where the record fails to show that leave to amend was requested. Haddad v. McDowell, 213 Cal. 690, 3 P.(2d) 550; Consolidated Reservoir, etc., Co. v. Scarborough, 216 Cal. 698, 16 P.(2d) 268; Philbrook v. Randall, 195 Cal. 95, 231 P. 739.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; IRA F. THOMPSON, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

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218 Cal. 484

## PEOPLE v. SMITH.

Cr. 3651.

Supreme Court of California.

July 12, 1933.

**1. Criminal law** ⚿1023(12).

"Substantial rights" which, if affected by order after judgment, authorize appeal, do not include justiciable questions foreclosed by appeal (Pen. Code, § 1237, subd. 3).

[Ed. Note.—For other definitions of "Substantial Right," see Words & Phrases.]

**2. Homicide** ⚿314.

Defendant in first-degree murder prosecution where jury was not waived, *held* subject to statute making punishment within jury's discretion (Pen. Code, § 190; Const. art. 1, § 7).

**3. Criminal law** ⚿1206(1).

Murder statute *held* not unconstitutional because exempting persons under 18 from death penalty, though statutes governing other crimes imposed death penalty irrespective of offender's age (Pen. Code, § 190).

> It was contended that Pen. Code, § 190, withholding death penalty for murder committed when under age of 18, was void because not having uniform operation and because violating granting of privileges and immunities clauses and because being in other respects in conflict with constitutional provisions for protection of life and liberty.

**4. Criminal law** ⚿1208(1).

Under police power, Legislature may classify crimes and prescribe severer punishment for one class than for another as deterrent against commission of more heinous crimes.

In Bank.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

George Smith was convicted of murder of the first degree, and the judgment of conviction having been affirmed, defendant filed a motion to set aside the indictment and annul the judgment. The motion was denied, and defendant appeals.

Appeal or proceeding dismissed, with directions.

Ernest Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., for the People.

PER CURIAM.

The defendant and appellant herein, George Smith, and John Kazarin were jointly tried and convicted in the superior court of the county of Alameda of murder of the first degree, and sentenced to suffer the death penalty for having murdered Reinhold A. Frey. Both appealed to this court. Pending said appeal Kazarin committed suicide. Smith's appeal, after a lengthy review of the facts and the law applicable to his case by this court, resulted in the judgment of conviction being affirmed. People v. Smith, 215 Cal. 749, 12 P. (2d) 945. It appeared from the evidence by the testimony of a large number of eyewitnesses and other incontrovertible facts that the defendants, both making their headquarters in the city of San Francisco, had planned to apprehend the deceased, who was a frail man in stature and past fifty years of age, as he was returning to his place of business from a nearby bank in the city of Oakland carrying a satchel containing moneys, which he had deposited the evening before for safekeeping, as was his custom, and to rob him and escape by means of an automobile which they were operating under a license plate which they had stolen from another automobile. As Smith assailed Frey, at about the hour of 9 o'clock in the forenoon, and was using force and violence in an attempt to wrench the satchel from Frey's possession, the latter by outcries attracted the attention of passersby. Smith, thwarted in his attempt, backed away from Frey, who was close to the building line, to the edge of the sidewalk, drew his pistol and wickedly fired the shot which proved fatal. He then escaped from the scene in a waiting automobile operated by his accomplice, Kazarin. Both were in due time apprehended and convicted, as herein set forth. The appeal taken by Smith resulted in an affirmance of the judgment, filed June 30, 1932. A petition for a rehearing upon due consideration was denied.

After said judgment had become final and at the time judgment was to be reimposed on said Smith, as provided by law, Ernest Spagnoli, attorney for said Smith, appeared before said superior court of the county of Alameda in presentation of a motion for an order striking the indictment from the files and for an order vacating, annulling, and setting aside the judgment of conviction. People v. Smith (Cal. Sup.) 18 P.(2d) 329, 330. The trial court denied the motion, which possessed not a semblance of merit, and an appeal was taken to this court from the trial court's order denying defendant relief by reason of his unwarranted proceeding. This court upon the matter presented said:

"We have examined the proceedings and say unhesitatingly that there is not a scintilla of merit in the showing made on the delayed motion to set aside the indictment or annul the judgment. We would be justified in dismissing the proceedings, but have concluded that in the circumstances of the case we should affirm the order." In the face of what we there said the attorney for appellant Smith again prepared and filed in the court in which Smith was convicted another proceeding of like character, which is equally as devoid of merit as was the first motion. In fact this is but another attempt, fashioned after the same theory as the first, to set aside the indictment and annul the judgment of conviction. Every objection which appellant attempts to make specifically upon this appeal could and should have been presented before or during the trial of appellant, and doubtless would have been presented if counsel believed that it possessed any real merit. Many of the objections here made were necessarily involved in the general propositions of law which are so well settled as to become axiomatic. Appellant has pursued a course of attacking by piecemeal the judgment which has foreclosed every issue included in his motion.

[1] We are forced to the conclusion by the history of the matter before us that appellant, in again coming to this court on an appeal which involves nothing of substance, has done so either from a lack of understanding of substantive criminal law and procedure, or else he is moved by a willful purpose to obstruct by unwarranted methods the enforcement of judicial decrees and orders. If the appellant may assign as grounds for separate appeals specific questions which he may have presented upon his appeal, and in some instances which he did actually raise, upon the denial of a motion to set aside the indictment and annul the judgment after said judgment has become final, under the guise that said denial is an order made after judgment affecting the substantial rights of the parties (section 1237, subd. 3, Pen. Code), there would scarcely be a procedural finalty to criminal cases. In certain cases execution of the judgment would practically be blocked by the employment of dilatory tactics. Of course, it was not intended that section 1237, Penal Code, should be turned to any such purpose. The substantial rights of the defendant therein referred to do not include justiciable ques-

tions which have been foreclosed by an appeal taken in the law's forms. Substantial rights are not denied where the person charged had a full and fair opportunity to invoke every privilege or right which the law accords to the accused, and where no deceit or fraud has been practiced upon him. Certainly no substantial right was violated by the trial court's disposal of appellant's motion.

[2] Appellant challenges by his unusual proceeding the constitutionality of section 190, Penal Code, on the ground that it contravenes article 1, § 7, California state Constitution, as amended in 1928, permitting the accused in criminal cases to waive a trial by jury. Appellant contends that section 190, Penal Code, is unconstitutional, and, if not in conflict with it, it has been repealed by said constitutional amendment of 1928. This argument is based upon the phrasing of said section 190, which omits to provide that the court is empowered to impose the penalty in first degree murder in case a jury is waived. The statute provides for the fixing of punishment at the discretion of the jury trying the case, but makes no mention of the power of the trial court sitting without a jury to fix punishment. The section does empower the court to fix the penalty in case the accused pleads guilty to a charge of murder of the first degree. Said section has not been amended since the adoption of said constitutional amendment of 1928, and as a matter of course trial of felony cases by the court upon a waiver of a jury trial was not permitted by the Constitution prior to said amendment. The proposition whether the power given to courts by the Constitution to try criminal cases without the aid of a jury upon a waiver of a jury trial by the accused, and also to determine guilt in all such cases, does also, by necessary implication, confer upon said trial courts the power to determine and impose the penalty of the law—as favorably as the proposition may appeal to us—is not necessarily involved herein, inasmuch as the defendant in this case did not offer to waive a jury trial, or in any way indicate that he desired to waive a trial by jury and be tried by the court. His conviction in no wise involves the waiver of a jury trial, or the power of the court to pronounce sentence in waiver cases. He was convicted by a jury in the usual way, and there is no foundation for the claim that the procedure did not literally conform with both the statute and the Constitution, or that it violated either. Even if there was no provision expressly authorizing a court to fix the penalty in cases tried by the court upon waiver of trial by jury, appellant would still come within the ample provisions of section 190, as all murder cases have come since it was first adopted many years ago.

[3, 4] It is finally claimed that section 190 is void as not having a uniform operation, and as violative of the granting of privileges and immunities clauses, and as being in other respects in conflict with constitutional provisions enacted for the protection of life and liberty which are usually cited in criminal cases. One specific ground urged is that it exempts youths under eighteen years of age from suffering the extreme penalty of the law for murder committed when under the age of eighteen years, while other sections of the criminal code provide, without regard to the age of the offender, for the infliction of the death penalty for the commission of certain crimes, such as the derailment or wrecking of trains; setting fire to railroad bridges; perjury or subornation of perjury in procuring the conviction and execution of an innocent person; assault by a person undergoing a life sentence in a state prison with a deadly weapon. We have not been given the benefit of any reasons which would tend to support the claim that said cited sections have any relevancy or bearing upon the validity of section 190. That the Legislature may classify crimes, and prescribe severer punishment for the commission of one class than for another as a deterrent against the commission of more heinous crimes in the exercise of its police power and in the protection of life and property, is no longer open to question. The brief of appellant presents no argument germane to the violation of any constitutional provisions, state or national. Appellant cites no code section which supports his appeal on any ground.

This appeal is entirely frivolous. While this court has always yielded ready willingness to the examination of records upon which criminal convictions are obtained, especially those carrying the death penalty, it is not willing to extend its sanction to the unauthorized and utterly unwarranted proceedings which characterize this and the former appeal from the order of dismissal of a similar motion. People v. Smith (Cal. Sup.) 18 P. (2d) 329. It must have occurred to appellant's attorney that he has long since exhausted all legal remedies which this court is empowered to grant. A repetition of the practice herein attempted will call for the exercise of the disciplinary powers of this court.

The appeal or proceeding, being frivolous and without merit, is dismissed with directions to the trial court to proceed with the execution of its judgment as provided by law.

218 Cal. 531

## ANGLO–CALIFORNIA TRUST CO. v. HOLBROOK et ux.

S. F. 14555.

Supreme Court of California.
July 21, 1933.

**1. Limitation of actions 🔑167(1).**

Lien of pledge is extinguished by lapse of time within which action can be brought upon principal obligation, and thereafter all affirmative rights of pledgee are lost as against pledgor or those who have lien on pledge (Civ. Code, § 2911).

**2. Pledges 🔑56(5).**

Pledgor's consent to pledgee's sale of pledge validated sale, notwithstanding limitations had run on principal obligation, where only persons with any claim to pledge were pledgor and pledgee (Civ. Code, § 2911).

**3. Pledges 🔑56(5).**

Consent of pledgor validates what otherwise would be improper sale by pledgee.

**4. Execution 🔑113.**

Where pledgee sold pledge with pledgor's consent, pledgor's judgment creditor, claiming through subsequent levy and sale under execution against pledgor, and with notice of pledgee's claim, *held* not entitled to pledge, notwithstanding limitations had run on pledgor's principal obligation to pledgee at time of sale (Civ. Code, § 2911).

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In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Anglo-California Trust Company against C. H. Holbrook, Jr., and wife. From the judgment, plaintiff appeals.

Affirmed.

Erwin C. Easton and Isla V. Davies, both of San Francisco, for appellant.

Stanley Pedder, of San Francisco, for respondents.

IRA F. THOMPSON, Justice.

Plaintiff appeals from a judgment decreeing that it has no interest in a certain certificate of membership in the San Francisco Golf and Country Club formerly belonging to defendant C. H. Holbrook, and from a decree quieting the title of defendant Nellie V. Holbrook thereto. Defendant C. H. Holbrook disclaimed any interest in the certificate, pleading that the certificate was the property of his wife, defendant Nellie V. Holbrook. The facts out of which the controversy arose are as follows:

Prior to June of 1925 Mr. Holbrook was admittedly the owner of the membership in question and in possession of the certificate evidencing the same. Prior to this date Mrs. Holbrook, from her personal estate, had loaned various sums to her husband aggregating well over $5,000. On June 2, 1925, as evidence of this indebtedness, Mr. Holbrook executed and delivered to his wife a demand note in the sum of $5,410, and pledged his membership in the club as collateral security therefor. The certificate of membership was indorsed and delivered by Mr. Holbrook to Mrs. Holbrook at the time of the execution of the above note, and the evidence shows that Mrs. Holbrook has been in sole and exclusive possession of the same ever since. Appellant concedes that after June 2, 1925, the certificate was validly pledged to secure the debt owing to Mrs. Holbrook. The collateral security agreement executed by Mr. Holbrook expressly empowered the pledgee, in case of default by the pledgor, to sell the pledged property at public or private sale without notice to the pledgor, and waived presentment, protest, and notice of protest. As already stated, the note in favor of Mrs. Holbrook was a demand note, and for that reason the statute of limitations started to run from the date the note was executed. It therefore follows that the statute ran against the note in June of 1929. No payments of principal or interest were ever made on the note, nor was any written renewal or extension thereof ever executed.

In August of 1930 Mrs. Holbrook learned that appellant was intending to execute on the membership for a judgment debt of her husband. She talked the matter over with her husband, and several days before August 18th notified him that she intended to sell the membership under the pledge agreement. The evidence shows that Mr. Holbrook not only had actual notice of the proposed sale, and consented thereto, but also advised Mrs. Holbrook that to sell under the pledge was the only way to protect her rights. On August 18, 1930, a private sale of the pledged property was held in Mr. Holbrook's office. Mr. Holbrook was present and consented to the sale. Several other persons were also present. Mrs. Holbrook produced the certificate, read it to those present, and asked for bids. None being made, she bid the property in for $1,000, and applied the same on the indebtedness due her. The next day she notified an employee in the office of the club of the change in ownership of the certificate. The trial court held that this was a valid sale, and that thereafter the entire interest in the membership vested in Mrs. Holbrook.

Appellant's claim to an interest in the certificate is based on the following circumstances: On July 29, 1930, appellant secured a judgment by default against Mr. Holbrook in the sum of $2,204.04. Early in August appellant attempted to levy on the certificate, but this attempt was abandoned; appellant now conceding that this first levy was ineffectual for all purposes. On August 27, 1930, however, appellant did levy on the certificate, and on September 3, 1930, at a sheriff's sale, appellant purchased all of the right, title, and interest of Mr. Holbrook in and to the certificate.

It is at once apparent that if the pledgee's sale of August 18th was valid, appellant secured nothing by its subsequent levy and sale under the writ of execution. This is so for the obvious reason that on September 3, 1930, appellant merely purchased the interest of Mr. Holbrook in the membership, and if that interest was terminated on August 18, 1930, the levy of August 27th and the sale of September 3d could confer no rights on appellant. Appellant contends that the sale of August 18th was invalid, for the reason that on that date the note for which the pledge was given as security was barred by the statute of limitations, and for that reason the lien of the pledge was extinguished. Section 2911 of the Civil Code provides: "A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." Appellant contends that under this section after the running of the statute of limitations on the debt all affirmative rights of the pledgee, including the right to sell the pledged article, are lost. Appellant, however, concedes that even after the running of the statute the pledgee retains the negative right of retention of the pledged article, and that neither the pledgor, nor those claiming through him with notice of the pledge, can secure the return of the pledged article without paying the debt. Appellant, therefore, concedes that Mrs. Holbrook has the right to remain in possession of the certificate as against appellant until her debt is paid, but contends that it, as successor in interest to Mr. Holbrook, can redeem the certificate upon paying the debt owing to Mrs. Holbrook. No offer to pay this debt has ever been made by appellant.

[1-4] Although it is true that in this state, contrary to the common law, the rule is that the lien of a pledge is extinguished "by the lapse of the time within which * * * an action can be brought upon the principal obligation" (Civ. Code, § 2911), and that thereafter all affirmative rights of the pledgee are lost as against the pledgor, or those who have a lien on the pledged property (Puckhaber v. Henry, 152 Cal. 419, 93 P. 114, 125 Am. St. Rep. 75, 14 Ann. Cas. 844; 6 Cal. Jur. 601), it is equally true that this is a right of the pledgor alone and may be waived by him. In the present case, before appellant had any claim to the property at all, the pledgor consented to and in fact advised a sale of the pledged property to satisfy in part the debt admittedly owing to the pledgee. On August 18, 1930, the pledgor, or any other person with a lien on the property, could undoubtedly have taken advantage of the provisions of section 2911 of the Civil Code and thus prevented a valid sale. But, in the present case, on August 18, 1930, the only persons with any claim to the property were the pledgor and pledgee. On that date Mr. Holbrook could have *given* his wife the property and, in the absence of fraud, which admittedly was not present in this case, no one could complain. Mr. Holbrook did not *give* the property to his wife, but he consented to her selling the property under the pledge in partial satisfaction of the debt. Such consent and approval must be held to have validated the sale and to have ratified any irregularities therein as to Mr. Holbrook and any one claiming through him subsequent to and with notice of the sale. The principle that the consent of the pledgor validates what otherwise would be an improper sale is well settled. Hill v. Finigan, 62 Cal. 426; Bell v. Bank of California, 153 Cal. 234, 94 P. 889. See, also, Cushing v. Building Association, 165 Cal. 731, 134 P. 324, where the rule was indirectly recognized. After the pledgor had consented to such a sale, and after the sale had been held, thus vesting in Mrs. Holbrook the title to the property as against her husband, the appellant, claiming through a subsequent levy and sale under an execution against Mr. Holbrook, and with notice of the claims of Mrs. Holbrook, could get no more right to the property than Mr. Holbrook had. As was said in Richman v. Bank of Perris, 102 Cal. App. 71, 88, 282 P. 801, 809: "The lien of an execution and attachment proceedings attaches to the real and not to the apparent interest of a judgment debtor in and to his property, and the purchaser at an execution sale takes subject to such existing liens and equities as the property was subject to in the hands of the debtor, unless he can show he purchased the same without notice, either actual or constructive of the existence of such liens or equities. Whitney v. Sherman, 178 Cal. 435, 173 P. 931; Riley v. Martinelli, 97 Cal. 575, 33 Am. St. Rep. 209, 21 L. R. A. 33, 32 P. 579; De Celis v. Porter, 59 Cal. 464; Weston v. Bear River, etc., Co., 6 Cal. 425."

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

218 Cal. 500

## JOHNSON et ux. v. EHRGOTT et al.

S. F. 14821.

Supreme Court of California.
July 14, 1933.

**1. Appeal and error 🔑757(2).**

Appellants' opening brief sufficiently complied with rule requiring that brief present each point separately under appropriate heading, and set forth any part of pleading involved with proper reference to transcript (Rules of the Supreme and District Courts of Appeal, rule 8).

Appellants' opening brief contained a brief narrative of the contents of the complaint, and, on page 2 thereof, definite reference, by page and line, to the court's transcript, wherein could be found the material allegations of the complaint having to do with the circumstances surrounding the discovery of the alleged fraud for which appellants sought to have canceled a written agreement for the exchange of real properties after the expiration of the three-year period prescribed in Code Civ. Proc. § 338.

**2. Appeal and error 🔑801(1).**

Hearing on merits is favored over dismissal of appeal.

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Albert N. Johnson and wife against Mabel De Witt Ehrgott and others. Judgment for defendants, and plaintiffs appeal. On motion to dismiss appeal.

Motion denied.

T. L. Christianson, of Oakland, for appellants.

Robert B. Gaylord, of San Francisco, for respondents.

WASTE, Chief Justice.

Appellants brought this action to have canceled a certain written agreement for the exchange of real properties and to recover damages for alleged misrepresentations asserted to have induced the execution of such exchange agreement. Respondents' demurrer to the tenth amended complaint was sustained without leave to amend. This appeal followed.

[1, 2] Respondents move to dismiss the appeal on the ground that appellants' opening brief does not comply with rule VIII of the rules governing appellate procedure in that it fails to present each point separately under an appropriate heading, and fails to set forth any part of the pleading involved with proper reference to the transcript.

While the brief assailed is not a model document, it sufficiently satisfies the provisions of the cited rule to preclude a dismissal. It contains a brief narrative of the contents of the complaint, and on page 2 thereof definite reference, by page and line, is made to the clerk's transcript wherein may be found the material allegations of the complaint having to do with the circumstances surrounding the discovery of the alleged fraud after the expiration of the three-year period prescribed in section 338 of the Code of Civil Procedure. Under the circumstances, we are not inclined to dismiss the appeal, thus affording to both sides a hearing on the merits, which is always to be favored.

Motion denied.

We concur: SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

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218 Cal. 536

## In re HARTSON'S ESTATE.

Sac. 4759.

Supreme Court of California.
July 22, 1933.

**1. Appeal and error 🔑756.**

Appellant's brief containing headings "Statement of the Case," "Law of the Case," "Argument, A, B, C, D and E," and respondent's brief containing headings "Statement of the Case," "Respondent's Points and Authorities, I, II, III, IV, V and VI," *held* not to comply with court rules (Rules of Supreme Court and District Courts of Appeal, as amended in July, 1932, Rule 8, § 2).

**2. Wills 🔑439.**

Effect must be given, if possible, to intent of testatrix (Probate Code, § 101).

**3. Wills 🔑452.**

Where provisions of will are capable of two interpretations, interpretation by which property goes to those of blood of testator is preferred.

**4. Wills 🔑538.**

Under will providing that, on death of any child of testatrix, monthly income paid to such child should be paid to child's legal heirs, monthly income formerly paid to child's surviving wife who subsequently died *held* properly ordered paid to daughter and not to wife's legal heirs (Probate Code, §§ 101, 122).

5. **Wills** ⚿538.

Under will providing for monthly income to testatrix' children and on death of any child to child's legal heirs, interest devised to legal heirs *held* not only contingent on their surviving at time of death of child, but also contingent on their being alive at time income was directed to be distributed (Probate Code, §§ 101, 122).

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In Bank.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

In the matter of the estate of Electa B. Hartson, deceased. From an order of the superior court denying protests to the eighteenth account of trustee and from an order approving trustee's account, Margaret Halley and Clarence Ryan, executor of the estate of Catherine Tydd, deceased, appeal.

Affirmed.

Puter & Quinn, of Eureka, for appellants.

Henry C. Gesford and Roy E. Lochman, both of Napa, for respondent.

SEAWELL, Justice.

This is an appeal from an order denying appellants' protests to the eighteenth account of the trustee under the will of Electa B. Hartson, and from an order approving the account of said trustee. The facts giving rise to the controversy are as follows:

In the year 1902 Electa B. Hartson died testate in the city of Napa, Cal. Her will was duly admitted to probate and the final decree of distribution made and entered in 1903. By the decree of distribution it was directed, in conformance with the provisions of the will, that certain property should be held in trust, and that the income therefrom should be paid monthly to certain named beneficiaries for and during the lifetime of her three children or the survivor of them. So far as pertinent here, the decree of distribution provided as follows:

"* * * The income from the balance of said trust property said trustees shall pay:

"One-third (1-3) thereof to her daughter, Dasie A. Hartson: one-third (1-3) thereof to her son, Channing K. Hartson; and the remaining one-third (1-3) to her son, Burnell C. Hartson, and his daughter, Ethel Hartson, as follows: One quarter (1-4) of said one-third (1-3) to said Ethel Hartson, and the remainder to Burnell C. Hartson.

"That said trustees shall pay the income of said property as above set out, for and during the term of the natural lives of her said children, and upon the death of any one of her said children, then the amount which should have been paid to said deceased child as his or her share therein, shall be paid by the said trustees to the legal heirs of her said deceased child, if there should be any living at such time, and if not, then the share of such deceased child shall be divided between the remaining living children."

The trustees entered into possession of the properties, and for many years the monthly income was paid to the four persons above named in accordance with the above-quoted provisions of the decree. On April 30, 1928, Burnell C. Hartson, one of the children of Electa Hartson, died, leaving surviving him as his only legal heirs Elizabeth Hartson, his wife, and Ethel Hartson Turner, his daughter, being the same Ethel Hartson named and provided for in the will of Electa Hartson. After the death of Burnell, the trustees paid his share of the monthly income to his wife and daughter in equal shares. On April 19, 1930, Elizabeth Hartson, wife of Burnell, died, leaving as her legal heirs, and devisees of the residue of her estate, her two sisters, appellant Margaret Halley and Catherine Tydd. The latter died in November, 1930, and Clarence Ryan, the other appellant, was duly appointed executor of her will. The sole point involved on this appeal is, Who is entitled to the monthly income formerly paid to Elizabeth—Ethel Hartson Turner, the sole surviving heir of Burnell, or the legal heirs of Elizabeth? The trustee filed its eighteenth report and account for the period June, 1929, to March, 1931, in which it was disclosed that after the death of Elizabeth the trustee had paid the monthly income formerly paid to Elizabeth to Ethel Hartson Turner. The two sisters of Elizabeth filed a protest on the ground that they, as the legal heirs of Elizabeth and as the residuary legatees under her will, were entitled to the income formerly paid to her. The trial court determined that upon the death of Elizabeth her share of the income was properly paid to Ethel Hartson Turner. From the order denying their protests and from the order approving the eighteenth account of the trustee, the protestants appeal.

[1] Before discussing the merits of this appeal, attention is called to the fact that all of the briefs filed in this case fail to comply with the rules of this court as to form. Section 2 of rule VIII of the Rules of the Supreme Court and District Courts of Appeal as amended in July, 1932, requires that "a statement of the question involved * * * shall be set forth on the first page of the appellant's opening brief, and without any other matter appearing thereon. * * * If the respondent does not agree with the appellant's statement, he may frame his own and incorporate it, in like form and content, as the first page of his brief." Neither counsel has favored us with such a statement. The latter part of the same section of the rule requires that "the brief or petition must pre-

sent each point separately under an appropriate heading, showing the nature of the question to be presented or the point to be made." Appellants' briefs contain the following headings: "Statement of the Case," "Law of the Case," "Argument," "A," "B," "C," "D," and "E." Respondent's brief contains the following headings: "Statement of the Case," "Respondent's Points and Authorities," "I," "II," "III," "IV," "V," and "VI." Those headings are not a sufficient compliance with the rule. Under section 4 of the same rule this court could dismiss the appeal, but in the interests of justice, and for the reason that the issues involved are readily ascertainable, we will consider the appeal on its merits.

[2, 3] As stated above, the sole question presented is whether upon the death of Elizabeth Hartson, wife of Burnell Hartson, the monthly income formerly paid to Elizabeth should be paid to Elizabeth's heirs or to Ethel Hartson Turner, the sole surviving heir of Burnell. The proper solution of this question turns upon the proper interpretation of the last paragraph of the quoted portion of the decree of distribution. In interpreting this provision there are certain well-settled rules of construction which must be applied. The paramount rule of construction is, of course, that effect must be given, if possible, to the intent of the testatrix, if that intent can be ascertained. Probate Code, § 101. It is also well settled that, where the provisions of a will are capable of two interpretations, under one of which those of the blood of the testator will take, while under the other the property will go to strangers, the interpretation by which the property goes to those of the blood of the testator is preferred. Estate of Wilson, 65 Cal. App. 680, 689, 225 P. 283. Another rule of construction should also be referred to. Section 122 of the Probate Code provides: "Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession."

[4, 5] Keeping these rules of construction in mind, we have no hesitancy in holding that the trial court correctly held that upon the death of Elizabeth the monthly income formerly paid to her should be paid to Ethel Hartson Turner, the sole surviving heir of Burnell, son of the testatrix. The decree of distribution provided that upon the death of any child of the testatrix, including Burnell, the income formerly paid to that child "shall be paid by the said trustees to the legal heirs of her said deceased child, if there should be any living at such time, and if not, then the share of such deceased child shall be divided between the remaining living children." Upon the death of Burnell, his legal heirs being his wife, Elizabeth, and his daughter, Ethel, his share of the income was properly paid to those two under the above provision. There can be no doubt that this bequest of monthly income to the legal heirs of a deceased child was a bequest of income to a class; i. e., the legal heirs of the deceased child. 26 Cal. Jur. p. 946, § 253. Upon the death of Elizabeth, Ethel has now become the sole surviving member of that class. Under the terms of the will as incorporated into the decree of distribution, the income is to be payable monthly. Since the death of Elizabeth, Ethel is now the only member of the class in existence at the time the income is to be distributed. The heirs of a deceased child are to be paid the income monthly; that is, they are to come into possession of the income monthly, and therefore, under section 122 of the Probate Code, supra, we must interpret the will to mean that the income is to be paid to the heirs of a deceased child living at the time of the distribution of the income. This conclusion is strengthened by the fact that under this interpretation the income is paid to those who are of the blood of the testatrix, and will not go to strangers. We must presume that this was the intent of the testatrix. This conclusion is strengthened also by the fact that upon the death of the last surviving child of the testatrix the trust is to terminate and the corpus thereof is to be distributed to the "surviving heirs of each of her children," indicating a clear intent to keep the property in the hands of the heirs of the children. It is therefore our opinion that the interest devised to the heirs of Burnell was contingent, not only upon their surviving at the time of the death of Burnell, but was also made contingent upon their being alive at the time the income was directed to be distributed to them; i. e., monthly. Upon the death of any of such heirs, the remaining surviving heirs are entitled to the income. To hold that the interest of the heirs of Burnell vested upon his death, as contended for by appellants, would be to do violence to the obvious intent of the testatrix and to violate the well-settled rules of construction above enumerated. This we cannot do.

For the foregoing reasons, the orders appealed from are affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

IRA F. THOMPSON, Justice.

I concur in the decision and the opinion if my understanding of the paragraph relating to the nonobservance of section 2 of rule VIII governing appellate procedure is correct, which is: That it is a warning to the profession generally that there must be a compliance with the rules, and that for failure in that respect the appeal may be dismissed.

133 Cal.App. 309

## PEOPLE v. STRATTON.

Cr. 1269.

District Court of Appeal, Third District, California.
July 14, 1933.

**1. Criminal law 🔑273.**

Statute providing that plea of guilty can be entered by defendant himself only in open court is mandatory (Pen. Code, § 1018).

**2. Criminal law 🔑273.**

Statutory requirement that plea of guilty be entered by defendant himself only in open court *held* not violated, where defendant personally entered such plea to charge of robbery in information not specifying degree; plea including degree determined by court (Pen. Code, § 1018).

**3. Criminal law 🔑980(1).**

Judgment imposing sentence for first-degree robbery on plea of guilty to charge of robbery in information not specifying degree should have specified whether offense was accompanied by torture or defendant was armed with deadly weapon (Pen. Code, § 211a, and § 1168, subd. 2 (b, c), as amended by St. 1931, p. 1053, § 1).

**4. Criminal law 🔑980(2).**

When defendant pleads guilty of offense charged without specifying degree, court must take testimony to determine degree before pronouncing sentence (Pen. Code, § 1192).

**5. Criminal law 🔑1188.**

On appeal from order denying motion to set aside judgment on plea of guilty of offense charged without specifying degree, cause should be remanded with directions to take testimony to determine degree, though defects in judgment might have been remedied on appeal therefrom (Pen. Code, §§ 1192, 1239).

**6. Criminal law 🔑980(2).**

Defendant having pleaded guilty of robbery, charged in information not specifying degree, trial court should have taken evidence to determine degree, and, if first degree, whether it was accomplished by torture or deadly weapon (Pen. Code, §§ 211a, 1097, 1192, and § 1168, subd. 2 (b, c), as amended by St. 1931, p. 1053, § 1).

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Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Axel Stratton, Jr., pleaded guilty of robbery and burglary, and from an order denying his motion to set aside a judgment pronouncing sentence, he appeals.

Reversed in part, cause remanded with directions, and affirmed in part.

Axel Stratton, Jr., in pro. per.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

On October 2, 1931, the district attorney of Stanislaus county filed an information in the superior court of that county against the defendant, in four counts. Count 1 charged the defendant with the crime of robbery committed in the county of Stanislaus on or about the 25th day of August, 1931. Counts 2 and 3 charged the defendant with the crime of burglary committed at different times in the county of Stanislaus. Count 4 charged the defendant with having been convicted of a felony in the state of Nevada and having served a term therefor in the state penitentiary of the state of Nevada. Count 1 simply charges the crime of robbery. Counts 2 and 3 simply charge the offense of burglary. There is nothing in any of the counts contained in the information from which it can be determined whether the offenses charged are of the first or second degrees.

Upon arraignment the defendant entered a plea of guilty to each of the charges contained in the information. The record shows that after the defendant had entered his plea of guilty to each of the charges contained in the information, the following occurred:

"The Court: I will have now to determine the degree of the crime.

"Mr. Fowler, do you make any point on that?

"Mr. Lehane: As far as the defendant is concerned it will be first degree."

This proceeding was had in relation to count one charging the defendant with the crime of robbery. No testimony was taken to determine the degree, and no evidence was introduced showing whether the offense charged was accomplished through torture, or at a time when the defendant was armed with a deadly or dangerous weapon.

Section 211a of the Penal Code, defining the offense of robbery, reads as follows: "All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree. All other kinds of robbery are of the second degree."

The court, just preceding the pronouncing of sentence upon the defendant, and as a part thereof, made the following findings: "That the degree of robbery as set forth in the first count of the information, is robbery in the first degree. That the degree of burglary, as set forth in the second count of the information, is burglary in the second degree. That the degree of burglary as set forth in the third count of the information, is burglary in the second degree." The court then sentenced the defendant in the following language, so far as pertinent here: "That whereas, the said Axel Stratton, true name, Axel Stratton, Jr., having been duly convicted in this court of the crime of robbery, a felony, as charged in the first count of the information, and it being determined that said crime is robbery in the first degree: It is therefore ordered, adjudged, and decreed that the said Axel Stratton, true name Axel Stratton, Jr., be punished by imprisonment in the State Prison of the State of California, at Folsom." This was followed by sentences upon the two counts charging the defendant with burglary in the second degree. No question is made upon this proceeding as to the correctness of the sentence pronounced by the court following the plea of guilty, as to counts 2 to 3 charging the defendant with the offense of burglary.

The proceedings referred to were all had upon the 2d day of October, 1931. No appeal was taken by the defendant from the judgment so pronounced upon him.

On the 18th day of May, 1933, the defendant gave notice that on the 25th day of May, 1933, at 10 o'clock a. m. of said day, in the courtroom of said court, he would move the court to vacate, annul, and set aside the judgment pronounced against him on the 2d day of October, 1931. Three grounds were alleged as the basis for the defendant's motion, as follows, to wit: (1) That the court pronounced a higher and different punishment than that prescribed by law on count one of the information," etc. That without any evidence to prove the degree of robbery, the court fixed the degree of robbery as first degree, contrary to the provisions of section 1097 of the Penal Code. (2) That the judgment imposed by the court is without due process of law, and without equal protection of the laws. That the judgment on count 1 is void and uncertain, and cannot be executed, in that the commitment is for robbery in the first degree, with one prior conviction, without evidence to show whether the offense became first degree as a result of torture, or the use of a deadly weapon. And that under the provisions of section 1168 of the Penal Code, the minimum time of punishment for robbery differs when accomplished through torture, from that fixed when the offense is accompanied by the use of a deadly weapon. (3) That the sentence is neither definite nor certain. And, further, that the court did not fix a maximum term in accordance with the provisions of section 671 of the Penal Code. This motion was denied, and from the order of the court denying such motion, this appeal is prosecuted.

As reasons for reversal, our attention is first called to section 1018 of the Penal Code, which specifies that: "A plea of guilty can be put in by the defendant himself only in open court," etc. This precise question does not appear to have been passed upon directly by any of the California cases called to our attention. Prior to the adoption of section 4½ of article 6 of the Constitution, it has been held that a plea of not guilty cannot be entered by an attorney for a defendant.

In the case of People v. Tomsky, 20 Cal. App. 672, 130 P. 184, this court had before it an instance where a plea of not guilty was entered by counsel in the presence of the defendant, and after reviewing the various decisions having to do with the authority of counsel so to do, came to the conclusion that under the constitutional provisions to which we have referred, the entry of such a plea by counsel for the defendant, rather than by the defendant himself, constituted only an irregularity not justifying the reversal. A hearing in this case was denied by the Supreme Court. The basis for the holding in the Tomsky Case really is in the provision of the law that if a defendant stands mute, the court may enter a plea of not guilty. In other words, the whole proceeding is had upon the theory that the defendant is not guilty, and that in law such a plea is entered in his favor and the trial then proceeds to determine whether such defendant is or is not in fact guilty.

[1, 2] The provisions of section 1018, supra, appear to be mandatory, and we have no reason to conclude that the legislature intended that it should be otherwise construed. It appears to be a personal privilege which the defendant may exercise and waive the formality of a trial which the law otherwise accords him. The question then occurs: Was the requirement of section 1018 violated? We think not. The defendant in this case, the record shows, personally entered a plea of guilty to the charge of robbery. That plea included everything which might be determined by the court as to whether it was first or second degree. This, however, is not determinative of the issues here involved. As we have stated, the counsel for the defendant, when the court queried as to the degree, replied: "As far as the defendant is concerned, it will be first degree." That is not a plea of guilty; it was only counsel's opinion as to the offense being robbery in the first degree. No facts were placed before the court as to whether the offense was accomplished through torture or in the commission of the offense the defendant was armed with a deadly weapon. The finding of the court, as we have stated, was only that the offense of robbery was of the first degree. Nothing is stated as to the accompanying conditions. This leaves an indefinite and uncertain basis for the board of prison terms and paroles upon which to base the term of years that the

defendant should serve in the state prison. Section 1168 of the Penal Code as amended in 1931 (St. 1931, p. 1053, § 1), fixing certain minimum penalties, provided as follows: Subdivision b of subdivision 2 reads as follows: "For a person previously convicted of a felony either in this state or elsewhere, and armed with a deadly weapon, either at the time of his commission of the offense, or a concealed deadly weapon at the time of his arrest, ten years." Subdivision c of subdivision 2 reads: "For a person previously convicted of a felony either in this state or elsewhere, but not armed with a deadly weapon at the time of his commission of the offense, or a concealed deadly weapon at the time of his arrest, five years."

[3] In order that the minimum term of sentence should be definitely fixed and the requirements of section 1168, supra, be complied with, the judgment of the trial court should have specified therein whether the offense of robbery was accompanied by torture, or whether the defendant at the time was armed with a deadly weapon.

[4, 5] While under the provisions of the Code, and especially of the provisions of section 1239 of the Penal Code, the alleged defects in the judgment in this case might have been remedied upon appeal, it appears that the procedure adopted in this case has been twice approved in this state, once in the Supreme Court, in the case of People v. Walker, 132 Cal. 137, 64 P. 133, where no appeal was prosecuted, and after the pronouncement of the judgment a motion was made to set it aside on account of its invalidity. The motion was denied, and from the order denying the motion, an appeal was prosecuted and the order of the trial court reversed. The second case is that of People v. Paraskevopolis, 42 Cal. App. 325, 183 P. 585, in which this court approved the procedure had in the instant case. There, it appears that on the 1st day of October, 1917, the defendant entered a plea of guilty to the charge of murder. The court, without taking any testimony to ascertain the degree, pronounced judgment upon the plea so entered by the defendant. Thereafter, and on the 1st day of October, 1918, being slightly over a year after the pronouncement of judgment, the defendant moved to vacate and set aside the judgment pronounced upon his plea of guilty. This court, after reviewing the cases holding that under the requirements of section 1192 of the Penal Code it is the duty of the trial court to take evidence in order to determine the degree of the offense, reversed the order of the trial court and remanded the cause for further proceedings in accordance with the opinion in that case. The court held that no testimony being taken to determine the degree of the offense to which the defendant had pleaded guilty, the judgment is not a legal judgment and is subject to be set aside upon motion. The opinion prepared by Mr. Justice Hart, reviewing the cases holding that it is obligatory upon the court to take testimony in order to determine the degree of the offense to which the defendant has pleaded guilty, is so full and complete that further consideration of that question on our part is unnecessary. The two California cases which we have cited do not, however, authorize the discharge of the defendant even in cases where the defendant has pleaded guilty to only one count in an information. The holding in both cases is to the effect that the cause should be sent back to the trial court and proceedings had therein for taking testimony to determine the degree of the offense, and again pronouncing sentence. That this is the direct procedure is likewise supported in all habeas corpus cases where the judgment pronounced is found to be invalid, in support of which we cite the following: In re Lee, 177 Cal. 690, 171 P. 958; In re Peter Stroff (Cal. App.) 22 P.(2d) 770. Likewise, in cases prosecuted upon appeal. See People v. O'Brien, 122 Cal. App. 147, 9 P.(2d) 902; People v. Scott, 39 Cal. App. 128, 178 P. 298.

[6] The defendant in this case having pleaded guilty of robbery, his plea of guilty is either first or second degree robbery, as the court might determine upon the evidence presented to it, and if guilty of first degree robbery, it was accomplished either by means of torture or at a time when the defendant was armed with a deadly weapon. To determine these facts, evidence should be taken in the trial court, and for such purpose the order is reversed in so far as the motion of the defendant is directed to the sentence based upon the count in the information charging the defendant with the crime of robbery, and the cause remanded to the trial court with directions to take such proceedings as may be necessary to bring the defendant before it for the purpose of again pronouncing sentence upon the defendant after taking testimony upon a hearing had in the presence of the defendant, determining the facts and circumstances accompanying the commission of the offense, and stating in the judgment, if found to be robbery in the first degree, whether it was accomplished by means of torture or whether the defendant was armed with a deadly weapon. In all other respects the order of the trial court is affirmed.

Other questions have been presented by the appellant, but their consideration here is not deemed necessary in the determination of the issues involved.

I concur: PULLEN, P. J.

## PEOPLE v. MALOWITZ.

Cr. 2321.

District Court of Appeal, Second District, Division 1, California.

July 12, 1933.

Rehearing Denied July 27, 1933.

Hearing Denied by Supreme Court Aug. 10, 1933.

**1. Courts 🔑89.**

Judicial statement construing statute as applied to particular case cannot conclusively determine later case which may depend upon different facts.

**2. Criminal law 🔑254.**

Clerk of municipal court, at preliminary hearing on complaint charging grand theft, *held* authorized to administer oath to witnesses (Code Civ. Proc. §§ 101, 2093; Gen. Laws 1923, Act 6027, § 6; Gen. Laws 1931, Act 5238, § 27).

**3. Criminal law 🔑241.**

That magistrate, in commitment order indorsed on complaint, failed to state offense and defendant's name, *held* mere irregularity correctable by magistrate, and defects were supplied by subsequent commitment order, so that defendant was not entitled to have information set aside because not legally committed (Pen. Code, §§ 872, 995).

**4. Indictment and information 🔑42.**

That district attorney allegedly filed information too late *held* not to warrant setting aside information on ground defendant was not "legally committed" (Pen. Code, §§ 809, 995).

**5. Indictment and information 🔑161(3).**

Where original information was filed timely, fact that amended information was subsequently filed *held* immaterial (Pen. Code, § 809).

**6. Indictment and information 🔑122(1).**

Where accused, on preliminary examination, was committed to answer for certain offense, district attorney *held* authorized to include, in information, additional counts based on evidence adduced on preliminary examination (Pen. Code, § 809).

**7. Criminal law 🔑241.**

On motion to test validity of magistrate's order of commitment after preliminary examination, point that evidence was insufficient for such purpose is unavailable to defendant (Pen. Code, § 995).

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Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Proceeding by the People against Jack Malowitz. From an order granting defendant's motion to set aside the amended information charging defendant with grand theft, the People appeal.

Reversed.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Frank W. Stafford, Deputy Dist. Atty., both of Los Angeles, for the People.

Harry J. Miller, of Los Angeles, for respondent.

HOUSER, Justice.

By each of five counts contained in a complaint filed in the municipal court of the city of Los Angeles, defendant was charged with the commission of the crime of grand theft. At the close of his preliminary examination thereon in said court, the presiding magistrate therein orally announced that defendant would be discharged as to each of four counts, but that he would be held to answer in the superior court on one specified count only contained in the complaint, and thereupon directed the prosecuting attorney to prepare a special commitment in accordance therewith for the signature of the magistrate. However, in either attempted or purported compliance with the pertinent provisions of section 872 of the Penal Code, at that time the magistrate indorsed upon the complaint a written order of which the following is a copy: "It appearing to me that the offense in the within deposition mentioned, to-wit: ——— has been committed, and that there is sufficient cause to believe the within named ——— guilty thereof, I order that he be held to answer to the same, and that he be admitted to bail in the sum of $2500.00 Dollars and that he be committed to the custody of the Sheriff of Los Angeles County until he give such bail."

Ten days later, without the presence of either the defendant or his counsel, and without any opportunity being afforded to either of them to be heard in connection therewith, the magistrate signed a second or "special" order of commitment of defendant by which he was held to answer to the superior court on each of two counts of grand theft, but which commitment embraced all the several counts contained in the complaint. Thereafter and in pursuance either of the original commitment indorsed on the complaint, or of the second or "special" commitment, an information was filed in the superior court against defendant by which, in each of five counts contained therein, he was charged with the commission of the crime of grand theft. Subsequently, an amended information was filed in the latter court, by which information, in each of five counts thereof, defendant was likewise accused of the commission of the said crime of grand theft; and, in addition thereto, by a sixth count therein contained, purportedly in pursuance of evidence adduced on the preliminary examination of defendant, he was charged with the commission of a separate crime of the same kind and character. By order of the trial court, a motion presented by defendant to set aside the said amended information on the ground that he had not been "legally committed" (section 995, Pen. Code) was granted. It is from such order that the instant appeal is prosecuted.

By the terms of section 995 of the Penal Code, on motion of a defendant in a criminal action, the information must be set aside when it appears that before its filing "the defendant had not been legally committed by a magistrate"; and the ultimate point at issue on this appeal relates to the question of whether, within the facts as hereinbefore set forth, and within a correct construction of the provisions of the statute, defendant was "legally committed." The significance which should attach to the words "legally committed," as employed in the statute, has been indicated in each of several decisions by the appellate tribunals of this state. The appeal in the case of People v. Beach, 122 Cal. 37, 54 P. 369, was from an order setting aside an information on the ground that the defendants had not been legally committed, and it was contended that because the evidence did not show that a public offense had been committed, the defendants in the action had not been "legally committed by a magistrate." In commenting upon the question thus presented, in part the Supreme Court said:

"It is contended that the defendants had not been legally committed, because the evidence before the magistrate did not show that a public offense had been committed. If the magistrate had no power or jurisdiction to hold the examination, if no complaint had been made charging the defendants with a public offense, and perhaps if no evidence at all was taken by the magistrate, and there was no waiver by the defendants, it might be held that the defendants had not been legally committed. People v. Howard, 111 Cal. 655, 44 P. 342. The phrase 'legally committed' refers to the examination of the charge and holding the defendant to answer by the magistrate. Ex parte Baker, 88 Cal. 84, 25 P. 966. If a magistrate, upon a complaint duly made, and charging a public offense, has heard the evidence, and has committed the defendant, that ends the matter so far as concerns this motion.

"The question here is not, as upon habeas corpus, whether a person is illegally deprived of his liberty, but whether he can legally be tried upon a criminal charge. * * *

"The right to have a charge dismissed is regulated by statute, and, as we have seen, the phrase 'legally committed' means only that the accused has been committed by a magistrate who has jurisdiction to hold the examination, and who has actually heard the evidence, and determined that probable cause exists for holding the defendant."

In Ex parte Baker, 88 Cal. 84, 25 P. 966, 967, which is cited in the case to which reference has just been had, it appears that on motion of the defendant in the action in the superior court, on the ground that the defendant had never been "legally committed," the trial court had granted the motion to set aside the information which had been filed against the defendant and ordered that the district attorney file another information. Following the filing of a second information, on the application of the defendant therefor, the Supreme Court directed the issuance of a writ of habeas corpus. The opinion of the Supreme Court on the return of the writ is directed toward what appears to have been a failure on the part of the district attorney to pursue the correct procedure precedent to the filing of a second information against the defendant. It is ruled that, in the absence of a second preliminary examination of the defendant, the filing of the second information against him was "unwarranted and void." The only reference to the meaning of the words "legally committed" occurs in the course of the opinion, where it is said: "The phrase 'legally committed,' as used in the foregoing section, refers to the examination of the case, and the holding of the defendant to answer. * * *"

In the case of People v. Howard, 111 Cal. 655, 44 P. 342 (also cited in People v. Beach, supra), the appeal was from the judgment and the order denying the motion for a new trial in a criminal action in which the defendant was charged with the crime of perjury. As indicated in the syllabus, the ruling was that: "A complaint for perjury alleged to have been committed in a criminal proceeding in a recorder's court which fails affirmatively to state facts showing that the recorder's court had jurisdiction of the subject matter of the action in which the oath was taken, or that the offense charged in that action was committed within the jurisdiction of the recorder's court, is insufficient as a basis for an examination or commitment for the crime of perjury, and a motion to set aside an information for such crime, upon the ground that the defendant had not been legally committed by a magistrate, should be granted."

The case entitled In re Williams, 52 Cal. App. 566, 199 P. 347, was a ruling on a return to a writ of habeas corpus. Therein it was held that the magistrate had no authority to order the commitment of a defendant upon testimony given partly before another magistrate.

The case of People v. Hinshaw, 194 Cal. 1, 227 P. 156, included a question regarding the legality of the commitment of the defendant therein and was based upon the alleged insufficiency of the complaint upon which the defendant was preliminarily examined before the committing magistrate. The decision thereon by the Supreme Court is indicated by the syllabus as follows: "When a charge has been examined by a magistrate and the evidence taken, and the examination warrants an order holding the defendant to answer, the imperfections of the complaint are cured, and the commitment is legal."

In each of the several cases respectively of People v. Napthaly, 105 Cal. 645, 39 P. 29, People v. Salas, 80 Cal. App. 318, 250 P. 526, and People v. Miller, 123 Cal. App. 499, 11 P. (2d) 884, it was held that where it appeared that on the preliminary examination of the defendant either that his right to aid of counsel had been denied him, or that he had not been officially informed of the existence of such right, an information filed in the superior court against such a defendant based upon such a preliminary examination was properly subject to attack upon the statutory ground that the defendant "had not been legally committed by a magistrate."

In People v. Wilson, 93 Cal. 377, 28 P. 1061, it was held that in order to sustain an information, an order of commitment by which the defendant was held to answer to the superior court must be in writing, signed by the magistrate; and that an oral order reduced to writing by the stenographic reporter, but not signed by the judge, was not a compliance with the statute and would not justify the overruling of a motion to set aside the information for want of a legal commitment by a magistrate.

[1] From a consideration of the facts and the law as announced in the foregoing authorities, it becomes manifest that the bald declaration in the case of People v. Beach, 122 Cal. 37, 38, 54 P. 369, hereinbefore quoted, to the effect that "if a magistrate, * * * has heard the evidence, and has committed the defendant, that ends the matter," as far as concerns a motion to set aside an information on the ground that the defendant had not been legally committed by a magistrate, is entirely too broad. Indeed, by other statements contained in said opinion it is clearly indicated that the language to which attention has been directed is not to be understood as a declaration subject to no qualifications or exceptions, because it is there said that "if the magistrate had no power or jurisdiction to hold the examination, if no complaint had been made charging the defendants with a public offense, and perhaps if no evidence at all was taken by the magistrate, and there was no waiver by the defendants, it might be held that the defendants had not been legally committed." It is apparent that by no judicial statement, however accurate and justly applicable to the case under consideration, may later cases, perhaps dependent upon altered facts or conditions, be conclusively defined, limited, or determined. In other words, no general rule announced in connection with the particular facts of a given case can furnish a safe and infallible guide for the administration of justice in any other case in which the facts, conditions, or circumstances may materially differ from those present in the case in which the rule has been declared. The statute itself furnishes the controlling legal principle; and primarily the rights of parties dependent upon the facts in each particular case should be determined with reference to the law as announced in the statute. Not that judicial construction of a statute is to be cast aside and set at naught, but that its usefulness should be measured by its applicability to the facts at hand.

[2] With so much in mind as a foundational authority for the trial court to consider the motion presented by the defendant in the instant action, it may be opportune to devote attention to the several reasons urged by him in support thereof:

Perhaps the principal circumstance relied upon by the defendant is the conceded fact that none of the witnesses who testified at the preliminary examination was sworn by the magistrate personally. That duty was performed by the clerk of the court; and on this appeal by the people it is insistently urged by the respondent herein that such facts present a situation from which it necessarily follows that defendant was not "legally committed by a magistrate." It is his contention that no one but the magistrate was authorized to administer an oath to a witness; that although in form each witness was sworn by the clerk, he not having the required authority in the premises, the result was the same as though no attempt had been made to swear the witness, and consequently that no evidence was received by the court upon which its commitment of the defendant might lawfully be based. In that connection, respondent cites the case of People v. Cohen, 118 Cal. 74, 50 P. 20, which was an appeal from a judgment and order denying a motion for a new trial in an action in which the defendant therein had been convicted of the crime of perjury. It appeared that in the action in which it was alleged that the perjury had been committed, a judge of the superior court had sat as the committing magistrate, and that the oath to the defendant as a witness in the action was administered to him by a deputy county clerk, who ex officio was a clerk of the superior court. As far as is here pertinent, it was held that in such circumstances the clerk of the superior court was not authorized to administer an oath to the witness, and consequently that the defendant was not guilty of perjury.

In that case, it should be particularly noted that the ultimate question was not whether a clerk of a municipal court, or of a justice court, or of a police court, had authority to administer an oath to a witness in an action pending in such court; but that the question was confined to whether the clerk of the superior court, while acting in the assumed capacity of a clerk in either a justice or a police court, possessed such power. On the appeal the Supreme Court was not called upon to decide, nor did it intimate, that in an action pending in a justice, or in a police court, a clerk of such court was unauthorized to administer an oath to the witness. Nor does an examination of the opinion therein disclose that the several statutes which on a date when applicable to a decision of the question therein involved purportedly conferred such authority on a clerk either of a police court, a justice court, or a municipal court, were under consideration. It results, as far as the issue here is concerned, that the authority may be accepted as a precedent in establishing the one point only, to wit, that a clerk of the superior court in attempting to perform the duties of a clerk of a justice, a police, or a municipal court, has no authority to administer an oath to a witness in an action on trial in such court. But the issue here involved is different. The question is whether a clerk of the municipal court, acting as such, is possessed of such power. However, aside from any pertinent judicial decision, the general statute relating to the matter would seem conclusive. Section 2093 of the Code of Civil Procedure provides as follows: "Every court, every judge, or clerk of any court, every justice, and every notary public, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations." If more authority were necessary, the several statutes which relate to justice's courts and police courts, and their appropriate consolidation into municipal courts, clearly confer upon the clerk of each of such courts the power to administer oaths. See particularly section 101, Code Civ. Proc.; section 6 of Act 6027, Gen. Laws of 1923; section 27 of Act 5238, Gen. Laws of 1931. See, also, People v. Vasalo, 120 Cal. 168, 52 P. 305; People v. Burns, 121 Cal. 529, 53 P. 1096.

As another reason for adjudging that the commitment of defendant was illegal, respondent takes the position that neither the oral order of the magistrate, nor his said indorsed order on the complaint was valid, and that the second or "special" order of commitment, having been made not only in the absence of defendant, but as well without any notice to him or to his counsel that any application either had been or would be made for such order, and without permitting defendant or his counsel to be heard in opposition to the granting of said order, was likewise invalid.

[3] In that connection, it may suffice to state that, after examination of the authorities suggested by respondent, this court is of the opinion that none of them is controlling of the issue. It may be conceded, especially in the circumstances here present, that the oral order of commitment was of no validity. People v. Wilson, 93 Cal. 377, 28 P. 1061, People v. Upton, 67 Cal. App. 445, 228 P. 50. Also, assuming that the order indorsed on the complaint was complete and valid, that the magistrate had no authority to modify it by a second or "special" order. People v. Bomar, 73 Cal. App. 372. The alleged invalidity of the first order of commitment, being the one that was indorsed on the complaint, consisted in the fact that the blank spaces occurring in such order were not filled. As indorsed, the pertinent part of the order was as follows: "It appearing to me that the offense in the within deposition mentioned, to-wit: ——— has been committed, and that there is sufficient cause to believe the within named ——— guilty thereof, I order that he be held to answer to the same * * *."

At most, it is clear that the omissions in the order, if not typographical, were nothing more than irregularities which the magistrate was empowered to correct at any time. A part of the syllabus in the case of Ex parte Branigan, 19 Cal. 133, is as follows: "Where an examination has been had by a magistrate and a commitment has been issued by him which is defective in form or substance, a second commitment, omitting or correcting the defects of the first, may be issued, provided there is any order, or judgment, or entry of the magistrate made at the conclusion of the examination, to which he can refer for guidance, but he cannot resort merely to his own recollection for the facts of the case."

In the case of People v. Wilson, 93 Cal. 377, 28 P. 1061, it is said (syllabus): "The provision of section 872 of the Penal Code, requiring that where it appears upon a preliminary examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, an order to that effect, and that the defendant be held to answer the same, shall be indorsed upon the deposition, may be regarded as directory, in so far as it requires such indorsement; yet it is essential that the order be reduced to writing and signed by the magistrate, and entered either upon the official docket of the magistrate or upon the complaint or depositions." See, also, People v. Tarbox, 115 Cal. 57, 46 P. 896.

In each of the cases of People v. Van Horn, 119 Cal. 333, 51 P. 538, and In re Mazuran, 57 Cal. App. 411, 207 P. 569, the principle of law is clearly announced that any irregularity in conducting the preliminary examination of a defendant which does not affect his substantial rights in the premises furnishes no ground for setting aside an information thereafter filed in the superior court against the defendant. Likewise, in People v. Flannelly, 128 Cal. 83, 60 P. 670, and People v. Witt, 170

Cal. 104, 148 P. 928, alleged irregularities in the former case in not having the defendant present at the time when the date and place of his execution was judicially determined, and in the latter case, when the date of his execution was adjudged, were declared not to be violative of either the statutory or the constitutional rights of the defendant.

From a consideration of the situation here presented, it would seem apparent that the order of commitment indorsed on the complaint was not violative of the substantial rights of the defendant; that it was either sufficient in itself, or was capable of judicial correction; or that, failing in either of those respects, as far as was applicable, that part of the second order which supplied the defects in the first order would suffice as a legal foundation upon which the filing of an information in the superior court would be authorized.

[4, 5] It is also contended that because of the terms of section 809 of the Penal Code, which in substance provides that within fifteen days after the date of commitment of a defendant it shall be the duty of the district attorney to file in the superior court an information against the defendant, the information in the instant case was filed too late. In the first place, it is clear that, however great might be the delay of the district attorney in filing an information, his action in the premises could not affect the legality of the commitment, and hence could furnish no ground upon which to base a motion in that regard. But even considering the point as available to defendant, the basic facts do not support him. The record herein shows that the original information was filed within fourteen days after the date of the commitment. On principle, as determined by analogous cases, particularly in connection with the operation of statutes of limitation, the fact that an amended information was later filed by the district attorney was of no consequence. It becomes unnecessary to rule as to what would have been the result had the original information not been filed within the prescribed statutory period.

[6] Respondent also attacks each of the informations filed by the district attorney on the ground that he had no power to include in either of them any greater or different offense than that for which defendant was committed by the magistrate. If the question were new in this jurisdiction, or had it not been passed upon by the Supreme Court of this state, undoubtedly there might be room for argument (see dissenting opinion in People v. Sanders, 102 Cal. App. 237, 283 P. 136); but considering the provisions of section 809 of the Penal Code and the authority to which reference just has been had, together with the additional cases of People v. Bird, 212 Cal. 632, 300 P. 23, and People v. Wyatt, 121 Cal. App. 180, 8 P.(2d) 901, it is neither profitable nor advisable to devote further attention to the point advanced.

[7] Finally, respondent presents additional argument for the purpose of establishing the conclusion that the evidence adduced at the preliminary examination of defendant was insufficient to justify the making of the order of commitment. In that connection, it need only be noted that by each of several decisions by the appellate courts of this state it has been held that, on a motion to test the validity of an order by the magistrate of the commitment of a defendant, the point that the evidence was insufficient for that purpose is not available to him. People v. Hinshaw, 194 Cal. 1, 11, 227 P. 156; Ex parte Baker, 88 Cal. 84, 25 P. 966; People v. Beach, 122 Cal. 37, 54 P. 369; People v. Serrano, 123 Cal. App. 339, 11 P.(2d) 81; People v. Howard, 111 Cal. 655, 44 P. 342; In re Williams, 52 Cal. App. 566, 199 P. 347.

All other questions submitted by either of the parties litigant being necessarily dependent upon those herein considered, it is deemed unnecessary to devote further and separate consideration to them.

The order is reversed.

I concur: YORK, J.

CONREY, Presiding Justice (concurring).

I concur in the judgment. But I cannot agree entirely with the foregoing opinion in its interpretation of the decision in People v. Cohen, 118 Cal. 74, 50 P. 20. I think that the limitation placed by that decision, upon the right and power of a judge while sitting as a magistrate, to avail himself of the services of the clerk of the court in which he is a judge, is too narrow; and I venture so far as to doubt that it will be completely approved if brought before the Supreme Court for re-examination.

133 Cal.App. 351

### SMITH v. TAECKER et al.

Civ. 1031.

District Court of Appeal, Fourth District, California.

July 18, 1933.

Rehearing Denied Aug. 14, 1933.

Hearing Denied by Supreme Court Sept. 15, 1933.

**1. Corporations 🔑152.**

Upon declaration of dividends by board of directors, share of each stockholder vests in him as individual irrespective of when assets were accumulated and represents debt of corporation.

**2. Corporations 🔑155(4).**

Where corporate resolution declares dividend as payable on future date, title to such dividend vests in stockholder on date fixed in resolution.

**3. Corporations 🔑155(4).**

By terms of resolution so declaring, dividend may be vested in stockholders of record on date later than date on which resolution was passed.

**4. Corporations 🔑155(4).**

Under resolution of October 23, 1930, declaring dividend payable on or before November 29, 1930, to stockholders of record on November 15, 1930, at close of business on such day, dividends belonged to stockholders on November 29, 1930, unless sooner paid, in which event they vested on date payment was made.

**5. Corporations 🔑155(4).**

Unrecorded transfer of stock *held* good as between parties thereto, and hence transferee on November 12 was entitled to dividend paid to transferor on November 25 under resolution of October 23 declaring dividend payable on or before November 29 to stockholders of record on November 15.

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Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by J. H. Smith against J. L. Taecker and another. From a judgment for defendants, plaintiff appeals.

Reversed with directions.

Griffin & Boone and Edward T. Taylor, all of Modesto, for appellant.

J. L. Taecker and Mary E. Taecker, in pro. per.

TURRENTINE, Justice pro tem.

On October 23, 1930, while defendants were owners of stock therein, the Caterpillar Tractor Company, a California corporation, through its board of directors, lawfully passed the following resolution: "Be it resolved that this company declare a dividend of seventy-five cents per share, and an extra dividend of twenty-five cents per share on its outstanding capital stock, payable on or before the 29th day of November, 1930, to stockholders of record on the 15th day of November, 1930, at the close of business on said day." On November 12, 1930, defendant sold and delivered to plaintiff six hundred shares of stock of the corporation. Plaintiff remained the owner of the stock until after November 29, 1930; the transfer was not made on the books of the corporation until November 26, 1930. The corporation, pursuant to its resolution, paid the dividends to defendants on November 25, 1930, in the sum of $600. At the time of the sale of the stock nothing was provided by the parties either reserving or transferring the dividends especially as distinguished from the transfer of the stock. At the time the resolution was passed there were surplus earnings on hand sufficient to pay the dividends in question. Thereafter, plaintiff demanded of defendants payment to him of the $600 received by them as dividends pursuant to the resolution, and upon a refusal to make the payment, plaintiff brought this action against the defendants to recover the $600 paid to them, alleging the facts as herein set out. The answer admits the allegations of the complaint. Plaintiff made a motion for judgment on the pleadings and the parties submitted said case on the complaint and answer. Thereupon judgment was entered for defendants, from which judgment plaintiff appeals.

[1-5] Upon the declaration of a dividend by the board of directors of a corporation, the share of each stockholder vests in him as an individual. Cogswell v. Second National Bank, 78 Conn. 75, at page 81, 60 A. 1059; Jerome v. Cogswell, 204 U. S. 1, 27 S. Ct. 241, 51 L. Ed. 343. It makes no difference when the assets were accumulated. 14 Cor. Jur. 818. It is universally held that the mere declaration of a dividend creates debts against the corporation in favor of the stockholders as individuals. Where the resolution declares a dividend as payable on a future date, title to said dividend vests in the stockholder on the date fixed in the resolution. By the terms of a resolution so declaring, a dividend may be vested in the stockholders of record on a date later than on the date the resolution was passed. Richter & Co. v. Light, 97 Conn. 364, 116 A. 600; 6 Fletcher's Cyclopedia of Law on Private Corporations, 6149; Ford v. Ford Manufacturing Co., 222 Ill. App. 76; Buchanan v. National Savings & Trust Co., 57 App. D. C. 386, 23 F.(2d) 994; Nutter v. Andrews, 246 Mass. 224, 142 N. E. 67. We are satisfied by principle and by authority that the declaration of the dividends in question must

be interpreted and given the effect which the directors evidently intended it should have, that is, that the dividends declared on October 23, 1930, belonged to the stockholders on the 29th day of November, 1930, unless sooner paid to the stockholder, in which event it vested on the date payment was made. On November 25th the dividend was paid to defendants when plaintiff was, in fact, the owner of these shares. The unrecorded transfer was good between the parties and, therefore, the plaintiff had the right to the dividends as against the defendants. 6 Fletcher's Cyclopedia of Law on Private Corporations, 6342; 14 Cor. Jur. 818; Ashton v. Zeila Min. Co., 134 Cal. 408, 66 P. 494; Cates v. Consolidated Realty Co., 25 Cal. App. 531, 144 P. 301. On the facts of the case and the law, as we have herein announced it, plaintiff is entitled to judgment against defendants for the amount of dividends received by defendants which, in fact, belonged to the plaintiff.

It is therefore ordered that the judgment be reversed, and the trial court is directed to enter judgment for the plaintiff on the pleadings as prayed for in his complaint.

We concur: BARNARD, P. J.; MARKS, J.

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133 Cal.App. 335

## PEOPLE v. EDWARDS et al.

Cr. 2369.

District Court of Appeal, Second District, Division 1, California.

July 18, 1933.

Rehearing Denied.

Aug. 2, 1933.

Hearing Denied by Supreme Court Aug. 17, 1933.

**1. False pretenses 🔑2.**

Amendment to law to include offenses formerly charged as grand larceny, embezzlement, and false pretenses did not repeal quantum of evidence required by statute to sustain conviction for variety of grand theft denounced under statute as obtaining money, labor, or property by false pretenses (Pen. Code, §§ 484, 532, 1110).

**2. False pretenses 🔑49(3).**

Evidence in prosecution for grand theft *held* insufficient by reason of lack of corroboration to sustain conviction on count based on false pretenses (Pen. Code, § 1110).

**3. Larceny 🔑65.**

Evidence *held* sufficient to sustain conviction of grand theft on certain counts on theory of larceny by trick and device.

**4. Criminal law 🔑254.**

Trial judge may as trier of facts reconcile and adjust apparent inconsistencies in testimony.

**5. Criminal law 🔑1159(3).**

Appellate court is not authorized to disturb on appeal result based on conflict in testimony.

**6. Larceny 🔑62(2).**

Offense of theft by trick and device does not require corroboration specified by statute before conviction can be sustained in case of false pretenses (Pen. Code, § 1110).

**7. Criminal law 🔑1170½(2).**

Any error in permitting prosecution to ask question will not require reversal where answer elicited was favorable to defendant.

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Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

William F. Edwards and another were convicted of grand theft, and they appeal.

Reversed as to one count, and otherwise affirmed.

George Beebe, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Bayard Rhone, of Los Angeles, for the People.

HENDERSON, Justice pro tem.

By an information filed against them the defendants were jointly charged with four separate acts of grand theft, in a like number of counts of the moneys of one Elizabeth Bushey. They were tried by the court without a jury and found guilty as charged. Both defendants have appealed from the judgments of conviction and the order denying their motion for a new trial on the ground of the insufficiency of the evidence and alleged errors in the admission of testimony.

While the defendants concede that the evidence, although conflicting, is sufficient to show that complainant was induced to part with her money, which aggregated $2,800, by means of their fraudulent representations, they urge, however, that such evidence was insufficient to support the judgments by reason of a lack of the corroboration required by section 1110 of the Penal Code. The defendants claim that the money was paid to them in consideration of the assignment to Mrs. Bushey of their interest in a certain oil lease in Fresno county by the terms of which there remained but less than a year within which to commence drilling operations. The record discloses that the prosecution relied principally upon the testimony of the complainant to support the convictions as the negotiations between the parties were conducted without the presence of other witnesses.

Prior to the 21st day of January, 1932, the defendants were strangers to Mrs. Bushey, who resided with her invalid husband in Pasadena. They called at her home and falsely represented that they were ready to drill an oil well on the premises and had already spent several hundred thousands of dollars in the development of the property. The defendants suggested, among other things, their desire to have her as a partner in the venture so that she might receive the benefit of their previous expenditures. Being unsuccessful in consummating the deal, the defendants met the complainant on the following day, and after reiterating their desire for a partnership arrangement, they offered her "3000 in stock, *in* interest in the oil well, and three percent royalty" in exchange for the proceeds of her bank account in the sum of $300 and two Texas lots. Following her acceptance of the offer an agreement was executed between the parties by the terms of which defendants assigned to Mrs. Bushey their personally owned "two-sixths (2/6) interest of one-half (½)" of the lease in consideration for the money and the lots.

At a subsequent meeting of the parties by falsely representing that the driller employed on the leased premises refused to continue his operations without some assurance of their ability to compensate him, the defendants induced Mrs. Bushey to execute and deliver to them her promissory note in the sum of $300 for the avowed purpose of merely showing it to the driller. On the day mentioned in the second count of the information, the defendants, falsely representing that the note had been taken from them against their will and placed in a bank for collection and would require payment with interest within thirty days, persuaded the complainant to place in their possession the sum of $350 for the pretended purpose of securing the cancellation of the note. On this occasion the defendants returned the deeds to the Texas lots to Mrs. Bushey in consideration for her promissory note in the sum of $2,900, and they claim that the $300 above mentioned, together with the amounts set forth in counts III and IV of the information, were received in payment of this obligation.

On the occasion indicated by count III of the information, the defendants fraudulently representing that additional money was required for payment of the driller, induced Mrs. Bushey to part with the sum of $700 for this particular purpose. It likewise appears from the complainant's testimony that the defendants at the same time caused her to believe that she was receiving a larger share of their royalty interest for this additional sum of money. At the time specified in count IV of the information in response to defendants' representation that they could advantageously purchase some secondhand oil pipe for use on the lease, the complainant furnished them with the additional sum of $1,500. This was followed by an immediate assignment to her by defendants of their "1/3 personally owned interest of the whole lease" in consideration of the sum of $3,200, receipt of which was acknowledged. It can be clearly determined from the evidence that the complaining witness, due to her lack of sophistication, never possessed a satisfactory understanding of the exact nature of the property rights she expected to receive from defendants during the course of their several transactions. Apparently complainant contemplated that she was merely securing the right to share in defendants' royalty under the lease, which was valueless to her in the absence of their purported endeavor to produce oil on the premises. Upon becoming apprehensive of her position under the lease, Mrs. Bushey learned by an investigation that she had been misled as to the interest actually acquired by her and the purposes for which the money had been used. Notwithstanding her complaint in the matter, the defendants were able to obtain the complainant's authorization to sell her interest in the lease. Being unsuccessful in securing a purchaser, they persuaded Mrs. Bushey to reassign her interest in the lease to them in return for their unsecured note in the sum of $2,900. The defendants admit that an oil well was never drilled upon the leased premises, or a driller employed for such operations, or oil well pipe purchased by them for use in the enterprise.

[1] The defendants first claim, as previously stated, that the evidence in support of the several acts of grand theft charged in the information indicate them to be that species of grand theft known as obtaining money by false pretenses and urge, as a ground for reversal, that said false pretenses lack the corroboration "by the testimony of two witnesses, or that of one witness and corroborating circumstances" required by section 1110 of the Penal Code. In this connection, it should be observed that the amendment to section 484 of the Penal Code to include the offenses formerly charged as grand larceny, embezzlement, and false pretenses did not repeal, either directly or by implication, the quantum of evidence required by section 1110 of the Penal Code to sustain a conviction of that variety of grand theft denounced under section 532 of the Penal Code as obtaining money, labor, or property by false pretenses. People v. Carter (Cal. App.) 21 P.(2d) 129.

The respondent maintains that the evidence is sufficient to sustain defendants' conviction under the classification of theft commonly known as larceny by trick and device, proof of which is not governed by the provisions of said section 1110 of the Penal Code. The requisites of this particular species of theft are stated in the recent case of People v. White, 124 Cal. App. 548, at page 553, 12 P.(2d) 1078, 1080, as follows: "Where a person obtains the money or other property of another by trick or device, as by falsely and fraudulently representing that such property when received is to be applied to a described purpose or object when in fact there exists no purpose or object corresponding to that described, and the owner, through such fraud, parts with the possession of his property without intent to part with the title thereto to the defendant or that it shall go toward any object or purpose other than the described purpose, and the person receiving the property receives it with the intent not of applying it to the purpose or object such as he has described, but of using it as he chooses, as if it were his own, the crime of larceny by trick and device, now included in the crime of theft under section 484 of the Penal Code, has been committed." (Citing cases.)

The offenses of larceny and of obtaining money by false pretenses are admirably distinguished in the case of People v. Delbos, 146 Cal. 734, at page 736, 81 P. 131, where the court, in quoting from Harris on Criminal Law (3d Ed., p. 194), said: " 'The most intelligible distinction between false pretenses and larceny has been thus set forth: "In larceny, the owner of the thing has no intention to part with his property therein *to the person taking it*, although he may intend to part with the possession. In false pretenses, the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud." ' (The italics are our own.)"

[2] Turning our attention to an analysis of the testimony in support of count I of the information, it shows that the complaining witness, although induced to consummate the transaction by the false pretenses of the defendants, not only intended to but actually did receive a certain interest in an existing oil lease in exchange for her money and property. Obviously under these circumstances the inference is inevitable that she intended to transfer the title as well as the possession of the same to defendants. In view of the legal principles above discussed, it is apparent that the offense of false pretenses alone can be predicated upon such evidence, which is insufficient to warrant a conviction by reason of the lack of corroboration required by section 1110 of the Penal Code.

[3] A similar consideration of the evidence supporting count II of the information leads to the conclusion that it is sufficient to sustain the judgment upon the theory of larceny by trick and device. The particular money, which formed the basis of this cause of action, was obtained from this complainant for the pretended purpose of payment to a person, who was nonexistent, in order to secure the purported return of her promissory note. It is inconceivable, under the circumstances, that she contemplated other than a transfer of the mere possession of her money to defendants for the specific, though false, purpose represented by them.

[4, 5] The application of the legal principles involved herein to the evidence educed in support of counts III and IV of the information creates a more difficult problem. It appears from her testimony that the complainant was moved to part with her money not only for the specific purposes of paying the wages of the driller and the purchase of pipe, but also with the intention of receiving from the defendants an increased share of royalty interest for each additional payment. While her testimony in this respect may appear conflicting, yet it was the province of the trial judge, as a trier of fact, to reconcile and adjust the apparent inconsistency to his own satisfaction. See People v. Jensen, 15 Cal. App. 220, 223, 114 P. 585. Moreover, under such circumstances, we are not authorized to disturb, on appeal, the result so reached. People v. Ah Gee, 37 Cal. App. 1, 174 P. 371. In our opinion the testimony of the complainant as viewed by the trial court was sufficient to warrant the defendants' conviction of theft by trick and device under counts III and IV of the information.

[6] It is further urged by defendants that the offense of theft by trick and device also requires the corroboration specified by section 1110 of the Penal Code before a conviction can be sustained. While this section expressly applies to the offense of false pretenses alone, yet defendants endeavor to construe certain language employed in the case of People v. Leach, 106 Cal. App. 442, at page 463, 290 P. 131, as supporting such a contention. This argument is without merit. There the court prefaced its discussion with the statement that the offense, if any, under consideration, constituted theft by false pretenses and not by trick and device.

[7] The defendants further claim that the court erred in permitting the prosecution to ask a question of the witness Joos, a co-owner of the lease, which raised the inference that defendants had by means of false pretenses similarly sold an interest in the lease to a Mrs. Warner for the purported purpose of obtaining money to drill on the premises. Conceding that the question was improper, it elicited an answer favorable to appellants, which constitutes a complete answer to the claim of impropriety in its asking. People v. Wynn, 133 Cal. 72, 65 P. 126; People v. Kelly, 146 Cal. 119, 79 P. 846.

Finally, appellants urge that the admission of the testimony of the witness Cameron, over their objection, that the land covered by the lease had a "speculative value on the basis of oil property," was error. Conceding that the testimony was inadmissible and the witness insufficiently qualified, the appellants fail to satisfactorily show that such evidence was either unfavorable or prejudicial. Be that as it may, after a review of the entire record, we are convinced that the conviction of defendants upon counts II, III and IV was just and has resulted in no miscarriage of justice.

The order denying appellants' motion for a new trial and the judgment under count I are reversed, and a new trial directed as to said count; and the order denying the motion for a new trial and the judgments under counts II, III and IV are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

133 Cal.App. 263

**ROW et ux. v. BIEHL et al.**

**ROW v. SAME.**

**Civ. 1042.**

District Court of Appeal, Fourth District, California.

July 13, 1933.

Hearing Denied by Supreme Court Sept. 11, 1933.

**1. New trial ⚷114.**

Where judge who presided at trial was absent from county, other judge who heard new trial motion could pass thereon (Code Civ. Proc. § 661).

**2. Appeal and error ⚷979(1).**
**New trial ⚷70.**

New trial motion for insufficiency of evidence to justify verdict is addressed to trial court's sound discretion, and its order may not be disturbed on appeal, except for manifest abuse of discretion.

**3. New trial ⚷70.**

To grant new trial for insufficiency of evidence to sustain verdict, judge must be clearly satisfied that verdict is wrong, and, in considering effect of evidence, must act on own judgment.

**4. New trial ⚷72.**

Granting new trial to defendant motorist, though written transcript of evidence was not before court, *held* not abuse of discretion, where there was sufficient undisputed evidence warranting conclusion that contributory negligence was established by greater weight of evidence (Code Civ. Proc. § 660).

**5. New trial ⚷157.**

Party not requesting that phonographic reporter attend hearing of new trial motion and read his notes waives right to object to proceedings on ground that no written transcript of evidence was presented, regardless of whether parties concede all evidence that was produced at trial (Code Civ. Proc. § 660).

Appeals from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Actions, consolidated for trial, by J. M. Row and wife, and by J. W. Row, also known as John W. Row, by his guardian ad litem, Jesse George, against John Biehl and another. Verdicts for plaintiffs, and, from orders granting a new trial, plaintiffs appeal.

Affirmed.

Jesse George, of San Diego, for appellants.

Irving E. Read, of Los Angeles, and Wright & McKee and C. M. Monroe, all of San Diego, for respondents.

TURRENTINE, Justice pro tem.

These actions arise out of a collision between a motorcycle driven by plaintiff J. W. Row and an automobile driven by defendant John Biehl. Just prior to the collision, Biehl was driving east, and J. W. Row was driving west, on A street in San Diego. While Biehl was making a left turn onto Granada avenue, proceeding north, Row ran into the right-hand side of the automobile, striking about the center of the rear door of the car. Action was brought by Row (a minor) for damages for injuries sustained by him in the accident, and action was likewise brought by his parents, J. M. Row and Mattie Row, for expenses incurred. The causes were consolidated for trial, and were tried before a jury and before a judge from another county, which returned verdicts in favor of plaintiffs and against the defendants.

Notices of intention to move for a new trial were filed on behalf of both defendants in both cases, which motions were made upon the grounds of insufficiency of the evidence to sustain the verdicts and errors of law, as well as other statutory grounds. These motions came on for hearing within thirty days after entry of judgments on the verdicts before a judge other than the one who presided at the trial, for the reason that the judge who presided at the trial was absent from the county where the trial was had. At that time the testimony taken at the trial had not been transcribed, but counsel for plaintiffs and defendants submitted the case on oral statements of the evidence produced at the trial, the exhibits which had been received in evidence and the arguments made. No objection was made by plaintiffs' counsel to hearing the motions before a different judge, nor was any objection made to the manner in which they were heard. No request was made by the court or either party to the reporter to attend the hearing and to read his notes or any part thereof. Upon the submission of the motions for new trial, the court made its order in each of said cases "that a new trial of the above-entitled action should be granted upon the ground and for the reason that the evidence introduced upon the trial of the above-entitled cause was insufficient to sustain the verdict of the jury. It is therefore ordered and adjudged that said motion be and the same is hereby granted and a new trial of the above-entitled causes ordered." From the orders granting the new trials the plaintiffs appeal.

[1] The judge who heard the motions had jurisdiction and power to pass upon the motions for new trial. Code Civ. Proc. § 661.

[2] Appellants concede that a judge who did not try the case may hear and determine the motion for new trial without a written transcript of the evidence where the facts necessary to be considered are undisputed and conceded by counsel for both sides. The point raised is whether or not such judge can hear and determine such motion in the absence of a written transcript of the evidence where counsel for both sides do not agree upon all the facts presented in the trial of the case. The trial court has power and it is its duty to hear and determine a motion for new trial. Its duty and power on such a proceeding after a verdict of a jury has been returned is correctly stated as follows:

"Whatever may have been the conclusion of the jury, the rule is well settled that a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict is addressed to the sound discretion of the trial court, and its order may not be disturbed on appeal, unless there is a manifest abuse of such discretion." Anderson v. Lum Show, 124 Cal. App. 490, 492, 12 P.(2d) 1045, 1047.

[3] "Of course, the judge should give due respect to the verdict of the jury, and may sometimes properly deny a new trial in cases where, if submitted to him without a jury, he might, upon the evidence, have made a different decision. He must be clearly satisfied that the verdict is wrong; otherwise he should let it stand. But in considering the question upon the motion he must act upon his own judgment as to the effect of the evidence. The parties are entitled to the judgment of the jury in rendering a verdict in the first instance, but upon a motion for a new trial they are equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence." Green v. Soule, 145 Cal. 96, 103, 78 P. 337, 340.

[4] The record discloses that the judge who passed upon the motions for new trial had before him the undisputed physical facts of the accident and of the intersection where the accident occurred, and sufficient undisputed evidence from which he reasonably could have held that contributory negligence as a fact was established by the greater weight of the evidence. With this before him, there is therefore no showing of a "manifest abuse of discretion," because a written transcript of the evidence was not before the court.

[5] Another complete answer to appellants' contention is that they waived the right to object to the proceedings on account of the lack of the written transcript of the evidence. Section 660 of the Code of Civil Procedure provides: "Hearing of motion for new trial, reference to pleadings, etc. On the hearing of such motion, reference may be had in all cases to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may also be had to any depositions and documentary evidence offered at the trial and to the report of the proceedings on the trial taken by the phonographic reporter, or to any certified transcript of such report or if there be no such report or certified transcript, to such proceedings occurring at the trial as are within the recollection of the judge; when the proceedings at the trial have been phonographically reported, but the reporter's notes have not been transcribed, the reporter must upon request of the court or either party, attend the hearing of the motion and shall read his notes, or such parts thereof as the court, or either party, may require."

We thus see that said Code section provides: "When the proceedings at the trial have been phonographically reported, but the reporter's notes have not been transcribed, the reporter must upon request of the court or either party, attend the hearing of the motion and shall read his notes, or such parts thereof as the court, or either party, may require." It does affirmatively appear from the record that neither the court nor the appellants requested the reporter to attend the hearing of the motion or to read his notes or any part thereof. In view of this provision of the Code, it must be held that a party who does not make such request waives the right to object to the proceedings on the grounds that no written transcript of the evidence was presented at the time of making the motions for new trial, whether or not the parties admit and concede all the evidence that was produced at the trial of the case.

The record discloses no abuse of discretion in the present case. Inasmuch as we must sustain the order granting new trials, it is unnecessary to pass upon the other points urged by the parties, as we have full confidence that they will be properly disposed of by the trial court.

The orders appealed from are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

133 Cal.App. 101

### MERRILL et ux. v. FINIGAN et al.

Civ. 7889.

District Court of Appeal, Second District, Division 2, California.

June 30, 1933.

1. **Automobiles** ⚷244(35).

In automobile collision case involving two automobiles and bus, evidence supported court's finding that bus driver violated statute by entering intersection at speed exceeding 15 miles per hour (Gen. Laws 1931, Act 5128, § 113 (b) (2).

2. **Automobiles** ⚷201(2).

Negligence of bus driver in driving large bus into intersection at rapid speed *held* proximate cause of injuries to occupants of one of two automobiles colliding with each other in avoiding bus (Gen. Laws 1931, Act 5128, § 113 (b) (2).

3. **Negligence** ⚷58.

One who negligently sets in motion series of events stands as sponsor of result and liable therefor.

4. **Appeal and error** ⚷907(5).

Where record on appeal was not complete, in that certain diagrams were not brought up, reviewing court determining sufficiency of evidence to support findings would follow presumption in favor of judgment.

5. **Appeal and error** ⚷731(1).

Complaint on appeal that injuries sustained by plaintiff were not serious sufficiently presented question of excessive damages, though there was no specification that damages were excessive.

6. **Damages** ⚷132(5).

$3,500 to woman *held* not excessive for injuries causing pain and suffering and disabling her from usual avocation and causing diseased condition requiring operation after birth of child and preventing further conception.

> Evidence disclosed that injuries caused woman much pain and suffering, and weakened and disabled her from avocation; that at time of accident she was pregnant, and later was delivered of normal healthy child, but that after delivery it was found necessary to operate on her because of diseased condition directly traceable to injuries, and that injuries received directly contributed toward creating condition preventing further conception.

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Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by Joseph E. Merrill and wife against E. Bruce Finigan and another. From a judgment for plaintiff against defendant the B. & H. Transportation Company and from an order denying defendants' motion for new trial, defendants appeal.

Affirmed.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles, for appellants.

Mulholland & Denny, of Long Beach, for respondents.

PARKER, Justice pro tem.

This is an appeal from a judgment in favor of the plaintiffs in the sum of $4,892.70, against the defendant B. & H. Transportation Company and from an order denying defendants' motion for a new trial. The appellants' brief in reality is a duplicate of the reporter's transcript; the object being apparently to secure here what the court below denied, a trial de novo. This hardly fits into the scheme of appellate practice. However, we will discuss the case as it is presented.

The controversy arises out of an automobile accident in which three different automobiles are involved, and it happened in the intersection of two streets in Long Beach. Redondo avenue runs in a general northerly and southerly direction. Redondo avenue does not intersect Second street in the sense that is generally understood when we speak of intersecting streets. The situation is that Redondo avenue meets Second and stops; yet there is an area that might be classed as an intersection for our purposes.

Plaintiff Joseph E. Merrill was driving a Star automobile on a January night or evening, after dark. His lights were lit, and he was driving at a speed of some 10 miles per hour, hugging the northerly curb of Second street and driving in a westerly direction. Defendant Finigan was driving a Star automobile along Second street on the southerly side thereof and in an easterly direction. His lights were lit. Plaintiffs and defendant Finigan were both in the area which may be designated as the intersection. The defendant and appellant B. & H. Transportation Company owns and operates a line of busses in the city of Long Beach and particularly a bus which on the night in question was being operated by one Slaughter. When the cars noted were in the intersection, each in the act of crossing, appellant's bus came along and entered the intersection at a speed of from eighteen to 20 miles per hour. The area comprising the so-called intersection was 45 feet square. The bus was 28 feet long. This bus came thus into the intersection area and attempted a right turn. In accomplishing this, the bus went past the center of Second street, and practically monopolized the street. It obscured all view of plaintiffs' automobile and put defendant Finigan strictly on the defensive for his own safety. Finigan, in trying to negotiate the crossing, was forced north across the center line and the bus between him and plaintiffs' car. The bus missed plaintiffs' car by approximately a foot, and Finigan, maneuvering along behind the bus, crashed into the car of plaintiffs, causing the damage forming the basis of the recovery, injuring the car of plaintiffs and the passenger therein. The view of Slaughter, the driver of the bus, during the last 100 feet of his approach to the intersection, was obstructed by a building on the property at the southeast corner and palm trees in the parking abutting said property on the north and west, so that Slaughter did not have a clear and uninterrupted view of the traffic east on Second street for a distance of 200 feet east of said intersection.

[1] The court specifically found Slaughter to have violated the provisions of subdivision (b) (2), § 113, Act 5128, General Laws 1931, by entering the intersection at a speed in excess of 15 miles per hour under the conditions stated. There is one significant bit of evidence that may be noted. Slaughter, the driver, testified as a witness on behalf of defendants and appellants. His testimony was to the effect that he entered the intersection at about 8 or 10 miles per hour. The interesting part, however, is his statement that the bus could not be driven around the corner at a greater speed than 8 or 10 miles per hour. The reason is, not on account of the mechanical construction or the speed capacity of the car, but because at a greater speed the bus would sway and veer to an extent that would shift the passengers from one side to the other. The inference is obvious from the testimony that, if the bus was operated at a speed in excess of 15 miles per hour, it would sway all over the intersecting area, which seems to be exactly what it did on the night in question. The witness was carefully questioned and made cautious answers in this connection, inasmuch as there is no testimony on his part that the bus did not sway and careen through the turn.

[2, 3] We are content to accept the finding of the court, as the evidence amply supports the same. Appellant, however, argues further that, conceding the negligence of Slaughter, the negligent operation of the bus was not the proximate cause of plaintiffs' injuries; that the collision between the two Star cars was something entirely independent of the operation of the bus. Surely there can be little expected from this contention. We have the two smaller cars, each rolling peacefully along and each on its own side of the highway at a point where the only lights afforded were those of the cars, not a chance for an accident nor an iota of hazard, and into this peaceful scene comes hurling itself a 28-foot bus at a speed of twenty miles per hour, careening and twisting as a giant monster. Immediate confusion results, and all is chaos. And this chaos and the results must be chargeable to the one and only cause thereof, namely, the bus. The old squib case announced the doctrine centuries ago that one who negligently sets in motion a series of events stands as sponsor of the result and liable therefor. See, also, Sawdey v. Producers' Milk Co., 107 Cal. App. 467, 290 P. 684, and cases therein cited; Craig v. Boyes, 123 Cal. App. 594, 11 P.(2d) 673, and Herron v. Smith Bros., 116 Cal. App. 518, 2 P.(2d) 1012.

[4] We may take occasion to note that the record before us is not complete. It appears from the transcript that many witnesses illustrated their testimony by maps and diagrams which are not before us. The statement of a witness that the car of plaintiff was here (indicating), the bus came along in this course marked by a dotted line, means absolutely nothing in the absence of the diagram. If a diagram is necessary in the court below, it is more necessary for a complete review of the evidence. Often the position of automobiles after an accident may be a contributory factor in influencing and directing the trial court's finding. All we can do on review is guess, and, with the presumption in favor of the judgment, the guess must follow the presumption.

[5, 6] Appellants' next point concerns the amount of damages. The award of the court is as follows: To plaintiff Tennis Irene Merrill on account of her injuries, $3,500; to plaintiff Joseph E. Merrill on account of loss of services of his wife and expenses for her care, $1,334.20; for damages to auto, $58.50. The last amount was pursuant to stipulation.

We find no specification that the damages were excessive. Appellant subheads this branch of the case thus: "The injuries sustained by Mrs. Merrill were not serious," and then quotes the testimony of Mrs. Merrill and the doctors. We do not find any complaint as to the amount awarded the husband. While the point as to Mrs. Merrill is rather equivocally urged, we may consider it as being sufficiently presented. The sum awarded does not at first blush or at all suggest passion or prejudice. The lady did sustain injuries which caused her much pain and suffering and which have weakened and disabled her from her usual avocation. At the time of the accident she was pregnant, and in April of the same year she was delivered of a normal, healthy child. After the delivery, it was found necessary to operate on the patient by reason of a diseased condition discovered to exist in the organs going to constitute the regenerative processes. The testimony supports the conclusion that this diseased condition was directly traceable to the injuries received in the accident. Also there is testimony to the effect that the injuries received in the accident directly contributed toward creating a condition that will prevent Mrs. Merrill from further conception. These facts, combined with the undisputed fact of pain and suffering endured, show sufficient to uphold the judgment. Appellant criticizes the conclusions of the medical experts, and argues that the situation is one that can be determined as a matter of common knowledge without expert testimony. We decline to claim such a knowledge of the subject as would justify our launching off into any lay discussion. The field of medicine and surgery is highly specialized and beyond our ken. Should we assume a wisdom of curb acquirement, we would prefer to remain among the subjects less liable to debate, such as dandruff and psychiatry.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

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## SNODGRASS v. HAND et al.*

Civ. 1024.

District Court of Appeal, Fourth District, California.

July 13, 1933.

Rehearing Denied Aug. 4, 1933.

Hearing Granted by Supreme Court Sept. 11, 1933.

**1. Judgment 🔑256(1).**

Judgment should be entered in conformity to jury's verdict and should not enlarge its scope or change its effect (Code Civ. Proc. § 664).

**2. Trial 🔑331.**

Verdict, however informal, is good if court can understand it and determine jury's intention.

**3. Trial 🔑333.**

Verdict to be good must be definite as to amount awarded.

**4. Trial 🔑333.**

Verdict *held* too vague and uncertain as to whether jury intended to award $5,000 or $10,000 against defendant; hence verdict would not support judgment against such defendant.

> Verdict provided, in part, that we, the jury, find in favor of plaintiff and against defendant H, and fix plaintiff's damages against said defendant in the sum of $5,000 and jointly in favor of plaintiff against defendant D, jointly with H, and fix plaintiff's damages against said defendant in the sum of $5,000.

**5. Automobiles 🔑249.**

Automobile owner's liability for injuries, based on owner's implied consent to driver's use of automobile, can equal but not exceed amount of recovery against driver (Civ. Code, § 1714¼).

**6. Automobiles 🔑247.**

Where verdict was too uncertain to support judgment against automobile driver, judgment against automobile owner whose liability depended on recovery against driver could not stand notwithstanding verdict was certain as to owner (Civ. Code, § 1714¼).

**7. Appeal and error 🔑218(1).**

Generally, party cannot attack verdict for first time on appeal if it is susceptible of construction, having lawful effect, but verdict may be so defective as to be subject to such attack.

Appeal from Superior Court, San Diego County; George H. Thompson, Judge.

Action by Donald Snodgrass, by Karl C. Snodgrass, guardian ad litem, against Henry W. Hand and another. Judgment for plaintiff, and defendants appeal.

Judgment reversed as to the amount of damages, with directions.

See, also, 125 Cal. App. 265, 13 P.(2d) 769.

Edward J. Kelly, of San Diego, for appellants.

Stickney & Stickney, of San Diego, for respondent.

MARKS, Justice.

Respondent instituted this action, alleging damages resulting from injuries which he sustained when he came into collision with an automobile owned by the defendant Dora B. Hand, and operated with her knowledge and consent by Henry W. Hand. The accident occurred on February 24, 1931.

The jury returned the following verdict: "We, the jury in the above entitled cause, find in favor of plaintiff and against defendant Henry W. Hand and fix plaintiff's damages against said defendant, in the sum of Five Thousand ($5,000) and jointly in favor of plaintiff against defendant Dora B. Hand jointly with Henry W. Hand and fix plaintiff's damages against said defendant, in the sum of Five Thousand Dollars ($5,000.00). Dated July 30, 1931. Signed Geo. H. Millener, Foreman."

In the judgment a purported but incorrect copy of the verdict is set forth as follows: "We, the jury in the above entitled cause, find in favor of the plaintiff and against the defendant, Henry W. Hand, and fix plaintiff's damages in the sum of Five Thousand ($5,000) Dollars, and jointly in favor of plaintiff against the defendant Dora B. Hand, jointly with Henry W. Hand, fix plaintiff's

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 31 P.2d 198.

damages against said defendants in the sum of Five Thousand ($5,000) Dollars."

In order that the inaccuracies in the verdict as incorrectly quoted in the judgment may be easily recognized, we italicize the letter and words which have been added in the judgment and which do not appear in the verdict, and inclose in parentheses the words contained in the verdict which have been omitted in the incorrect copy in the judgment. "We, the jury in the above entitled cause, find in favor of *the* plaintiff and against *the* defendant, Henry W. Hand, and fix plaintiff's damages (against said defendant) in the sum of Five Thousand ($5,000) *Dollars*, and jointly in favor of plaintiff against *the* defendant Dora B. Hand, jointly with Henry W. Hand, (and) fix plaintiff's damages against said defendant*s* in the sum of Five Thousand ($5,000) Dollars."

The effective part of the judgment as entered is as follows: "It is ordered, adjudged and decreed that said plaintiff, Donald Snodgrass by Karl C. Snodgrass, guardian ad litem, do have and recover from the said defendant Henry W. Hand the sum of Five Thousand ($5,000) Dollars, and that said plaintiff do have and recover the further sum of Five Thousand ($5,000) Dollars from the defendants Dora B. Hand and Henry W. Hand, jointly, and plaintiff's costs and disbursements incurred in this action amounting to the sum of $208.55."

[1] It will be noted that an additional change in the verdict is made in this portion of the judgment by inserting the word "further" to the recovery clause where judgment is given against both appellants. By the changes in the language of the judgment from that of the verdict an attempt was evidently made to cure the uncertainty of the verdict. When a trial by jury is had, the judgment should be entered "in conformity to the verdict" (section 664, Code Civ. Proc.) and should not enlarge its scope or change its effect.

The sole question presented is whether the verdict is so vague and uncertain that it cannot be determined whether the jury intended to award plaintiff the sum of $5,000 or the sum of $10,000 against Henry W. Hand. We have searched authorities of this and other states in the hope that a similar verdict might have been construed by some court. We have found none and counsel have cited us to none.

[2, 3] In considering this question we must start with the principle recognized in almost every jurisdiction that a verdict, however informal, is good if the court can understand it and determine the intention of the jury which returned it. It is equally true that a verdict to be good must be definite and certain as to the amount awarded so that the judgment entered upon it may conform to the intention of the jury returning it.

[4] It is useless to enter into any discussion of the verdict or to attempt an analysis of its conflicting terms. We have studied it carefully and cannot determine the amount that the jury intended to award against Henry W. Hand, whether $5,000 or $10,000. We have concluded that it is too vague and uncertain to support the judgment against this defendant.

[5, 6] The respondent bases his right to recover from Dora B. Hand on the provisions of section 1714¼ of the Civil Code upon the theory that as the owner of the automobile she gave her implied consent to its use by her codefendant. Any liability on her part depends upon a recovery against him. It can equal but not exceed the amount of the recovery against him up to but not more than $5,000. While the verdict is certain as to Dora B. Hand, as any recovery against her depends upon a liability on the part of her codefendant, the judgment against her cannot stand independent of a recovery against him.

Respondent urges that as the record fails to show any objection in the trial court to the form of the verdict, the defect is waived and cannot be urged here for the first time. He cites the following authorities in support of this argument: Hicks v. Coleman, 25 Cal. 122, at page 146, 85 Am. Dec. 103; Van Damme v. McGilvray Stone Co., 22 Cal. App. 191, 133 P. 995; Benson v. Southern Pacific Co., 177 Cal. 777, 171 P. 948; Asebez v. Bliss, 178 Cal. 137, 172 P. 595; Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 128 P. 9, 18; Harker v. Southern California Edison Co., 83 Cal. App. 204, at page 210, 256 P. 848; People v. Chiappelone, 90 Cal. App. 472, 265 P. 976; People v. Caberera, 104 Cal. App. 414, 286 P. 176; County of Sonoma v. De Winton, 105 Cal. App. 166, at page 177, 287 P. 121; Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 276 P. 1017; Johnson v. Visher, 96 Cal. 310, at page 312, 31 P. 106; Keller v. Richbart (Cal. App.) 20 P.(2d) 55. An examination of these cases discloses that their facts are dissimilar from those of the instant case. For that reason they are of little assistance to us.

[7] Under the facts before us we believe the more appropriate rule to be announced in 24 California Jurisprudence 895, as follows: "As a general rule, a party will not be heard to object to a verdict for the first time on appeal if it is susceptible of a construction which may have a lawful and relevant effect. But the verdict may be so defective as to be subject to subsequent attack, although not objected to at the time of its rendition."

As the only question presented here is the form of the verdict it should not be necessary to retry the questions of negligence and contributory negligence which have been decided in favor of respondent.

The judgment is reversed as to the amount of damages recovered by the respondent, with directions to the trial court to retry the issue of damages only and thereafter enter an appropriate judgment in favor of plaintiff.

I concur: BARNARD, P. J.

133 Cal.App. 383

## WARDEN et al. v. BAILEY et al.

Civ. 4733.

District Court of Appeal, Third District, California.

July 21, 1933.

**1. Appeal and error 🔑743(2).**

Respondent must refer to place in transcript where evidence respondent relies on can be found.

**2. Executors and administrators 🔑383.**

Irregularities in exercise of unquestionable jurisdiction will not invalidate probate sale nor administrator's deed to extent of making them vulnerable to collateral attack.

**3. Evidence 🔑82.**

As against collateral attack, conclusive presumption exists, to uphold court's order confirming probate sale, that courthouse "steps" and courthouse "door," recited in notice of sale and return of sale respectively as place of sale, are same public place (Code Civ. Proc. § 1547).

**4. Quieting title 🔑44(1).**

In quiet title action, defendants had burden of proving prescriptive title in themselves.

**5. Adverse possession 🔑94.**

Where tax sale is had and redemption made in good faith while party or successor in interest possessed property, redemption operates as payment of taxes, and is sufficient to bring occupant within statute requiring their payment as necessary element in establishing title by adverse possession (Code Civ. Proc. § 325).

**6. Adverse possession 🔑92.**

As respects statutory requirement that claimant must have paid taxes for five years to establish title by adverse possession, redemption from sale for delinquent taxes made by grantors who purchased at tax sale cannot inure to benefit of grantees, adverse claimants, who paid taxes by themselves for four years, where grantors were never in possession (Code Civ. Proc. § 325).

**7. Adverse possession 🔑111.**

Evidence of prescriptive title was inadmissible where defense was not pleaded.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by Grace P. Warden and another against Clarence R. Bailey and others. From a judgment for defendants, plaintiffs appeal.

Reversed.

J. Everett Brown, of Los Angeles, for appellants.

Afue McDowell, of Los Angeles, for respondents.

TUTTLE, Justice pro tem., delivered the opinion of the court.

This action was brought for the purpose of quieting title to lots 12 and 13 of Palm Island tract in Los Angeles county. Judgment went for defendants, and this appeal is prosecuted therefrom.

Neither party has attempted to state the facts of the case in his brief. Apparently they proceed upon the assumption that this court heard all the evidence. We are left to the expedient of picking up such facts as appear here and there throughout the discussion. The transcript is filled with discussions of legal points. The facts are interspersed. If section 2 of rule VIII governing the procedure in this court had been in effect when this appeal was perfected, a much clearer presentation of the issues would have been made.

The title of plaintiffs is predicated upon a deed from the administrator of the estate of Emma A. Stone, deceased. That estate was probated in San Bernardino county, and the deed was executed pursuant to an order confirming a probate sale. Defendants relied at the trial upon two sources of title, to wit, one from a tax sale and one based upon adverse possession.

[1, 2] Respondents contend that the record shows that appellants had no title whatever to the property, for the reason that the probate sale, upon which the latter's title is based, was void. It appears from the record that the notice of sale stated that the sale would be held "at the North steps of the old Court House Building, fronting on Temple Street, in the City of Los Angeles." The notice posted and published so provided. The return of sale recited that the property was sold "at the North door of the old Court House fronting on Temple Street in said City of Los Angeles." Affidavits of posting and publication are attached to this return, as exhibits, and it is stated that the posting and

publication were done, "all of which will more fully appear by the affidavits marked respectively Exhibits A and B hereunto annexed and made a part of this return." The order confirming the sale recited that the facts contained in the return of sale were true. Respondents state their point in this language: "Thus, the probate court judicially determined that the sale took place at the Court house door, a place different from the Court House steps, mentioned in the notice of sale." It is stated that there is some evidence in the record indicating that these steps and door are vastly different and far apart, but there is no reference to any place in the transcript where such evidence can be found, and we do not feel that it is incumbent upon this court to discharge this duty which rests upon respondent. There is not even an attempt to quote the testimony upon this point, and we will therefore give it no consideration, assuming it was competent. The posting was done under the provisions of section 1547 of the Code of Civil Procedure, which provided that, "when a sale is to be made at public auction, notice of the time and place of sale must be posted in three of the most public places in the county in which the land is situated." It is the rule in this state that irregularities or errors in the exercise of unquestionable jurisdiction will not invalidate such a sale nor the administrator's deed to the extent of making them vulnerable to a collateral attack. Zilmer v. Gerichten, 111 Cal. 73, 43 P. 408; Estate of Devincenzi, 119 Cal. 498, 51 P. 845.

[3] It has also been held that a finding that a will authorized a sale without notice cannot be questioned under a collateral attack. Bagley v. Bloom, 19 Cal. App. 255, 125 P. 931. In the case of Richardson v. Butler, 82 Cal. 174, 23 P. 9, 11, 16 Am. St. Rep. 101, we find the following language: "The probate court, in its order confirming the sale, declared that the notice of sale was posted in three public places. Respondent introduced evidence, against the objection of appellants, with intent to show that one of the places was not a 'public' place within the meaning of the Code. But surely the court, having jurisdiction of the proceeding, could, within that jurisdiction, find the fact that the place was a public place; and such finding cannot be attacked collaterally." In the instant case the trial court found that the "sales were legally made' 'and that the "said administrator in all things proceeded with and managed such sale as required by law in such cases made and provided." This being a collateral attack, it will be conclusively presumed, if necessary to uphold the order, that the "North steps of the old Court House fronting on Temple Street" and the "North door of the old Court House fronting upon Temple Street" are one and the same public place, and testimony directed toward disputing such presumption was not admissible. "All intendments are in favor of the validity of judgments of courts of general jurisdiction, and the jurisdiction of such courts in rendering a particular judgment is conclusively presumed to have been acquired unless the record itself shows to the contrary." Morrissey v. Gray, 162 Cal. 638, 124 P. 246, 249.

Other points are raised in attacking the proceedings relating to the sale, but they are of the same nature and character, and cannot prevail under the rule stated.

[4] We therefore conclude that the probate proceedings relating to the sale of these lots was valid, and that the deed of the administrator conveyed the title of the decedent. This places the burden upon respondents of proving title in themselves. They concede in their brief that they rely entirely upon adverse possession. "Therefore (they state) the appellate court need not wade through the puzzling pages 74 to 199 of opening brief, where appellant incoherently argues the mysteries of the so-called 'illegal taxation.' We felt that the circumstances do not require our joining in that discussion, for, as hereinafter shows, the upper court must (?) affirm the judgment on other grounds." Thus appellants abandon their source of title based upon tax deeds, and adhere exclusively to a prescriptive title.

Under the provisions of section 325 of the Code of Civil Procedure, the payment of taxes by the adverse holder, if any are assessed against the land, is a necessary element in the establishment of title by adverse possession.

This action was filed March 18, 1925. There is evidence to the effect that defendants went into possession of these lots in 1918. On July 6, 1920, one E. H. Smith purchased lot 12 at a tax sale, based upon the nonpayment of delinquent taxes. Also, on the same date, one Van Lee Hood made a similar purchase of the other lot, No. 13. It is the contention of defendants that the chain of title from Hood and Smith, the purchasers at the tax sale, is complete, and that they are the successors in interest of said purchasers. We will assume that the record supports this contention.

[5, 6] Defendants proved the payments of taxes by themselves for the years 1921, 1922, 1923, and 1924. Under section 325, Code of Civil Procedure, they would have to prove payment of taxes for a period of five years. To meet this requirement they rely upon the redemption from delinquent taxes made by their grantors who purchased at the tax sale. The grantors were never in possession of the property. They merely purchased at the tax sales, and then conveyed to defendants. De-

fendants contend that the statutory requirement respecting payment of taxes for the years prior to 1921 is met by proof of the foregoing facts. It is true that, where taxes have been allowed to become delinquent and a sale has taken place, and, so far as appears, a redemption has been made therefor, while the party or his successor in interest was in the undisturbed possession, and all this is done in good faith, such redemption operates as a payment, and is sufficient to bring the occupant within the terms of the statute requiring the payment of taxes as one of the necessary elements in establishing a title by adverse possession. 1 Cal. Jur. p. 568, par. 49. In the instant case, however, the party seeking to prove adverse possession did not personally purchase at the tax sale or effect a redemption. That was all done by his grantors, who never were in possession, and who subsequently conveyed the property to him by deed. The payment of the taxes by his grantors cannot inure to his benefit, for the reason that such grantors were never in possession of the property. The rule which we have stated has never been extended so that it applies to a redemption made by the grantor of the adverse claimant, where such grantors never had possession of the real property. Our conclusion is that the evidence of adverse possession is insufficient, for the reason that the defendants failed to prove the payment of taxes for the statutory period.

[7] The answer of defendants merely denied the allegations of the complaint, which was in the ordinary form of a quiet title action. The statute of limitations was not pleaded. Early in the trial plaintiffs moved to strike out all the evidence of defendants bearing upon the defense of adverse possession, for the reason that such defense was not set up in the answer. It is a well-settled rule of pleading in this state that, "where a claim is made to a prescriptive title, in order to be taken advantage of, and be in issue, it must be pleaded." 1 Cal. Jur. p. 622, par. 88. Upon the objection being made, the trial court suggested that an amendment to the answer would be allowed if requested. Counsel for defendants, however, insisted that it was not necessary to plead the defense and offered no amendment to his answer. The objection was overruled, and therein we conclude that the court erred. Under the pleadings as they stood at and during the trial and as they now stand, evidence of this defense was clearly inadmissible.

For the reason that plaintiffs established a record title to the property and the defendants failed to prove any title in themselves, the judgment is reversed.

We concur: PULLEN, P. J.; PLUMMER, J.

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133 Cal.App. 450

## PEOPLE v. RICHIEE.

Cr. 2391.

District Court of Appeal, Second District, Division 1, California.

July 27, 1933.

**Witnesses** ⚿337(5).

Though accused charged with assault with deadly weapon and prior conviction of felony on arraignment admitted conviction, cross-examination of accused concerning conviction was proper to affect his credibility (Pen. Code, § 1025).

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Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

B. B. Richiee was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

M. H. Broyles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

HOUSER, Justice.

By an amended information defendant was accused not only of the crime of assault with a deadly weapon, but as well of theretofore having been convicted of a felony. On arraignment, he admitted the truth of the latter charge, but pleaded not guilty as to the former. Following his conviction of the charge of assault with a deadly weapon, he has appealed from the ensuing judgment and from an order by which his motion for a new trial was denied.

Appellant presents two points for reversal of the judgment: First, that the verdict of the jury was not sustained by the evidence; and secondly, that the trial court committed prejudicial error in that, on cross-examination of defendant as a witness in his own behalf, the trial court permitted the prosecution to inquire of defendant whether he had ever been convicted of a felony.

With reference to the first point, an examination of the transcript on appeal reveals the situation that the evidence offered by the prosecution, although contradicted in many essential particulars by defendant, was ample to sustain the verdict. It would serve no useful purpose to set it forth herein. In accord with a host of authorities, the appellant's position in that regard cannot be sustained.

As to appellant's second contention, although it is presented from an unusual standpoint, by an unbroken line of decisions by the appellate tribunals of this state, the point has been ruled that, notwithstanding an admission by defendant on his arraignment that

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

theretofore he was convicted of a felony, and in consequence of such admission, that ordinarily the fact of his former conviction should "not be alluded to on the trial" (section 1025, Pen. Code)—should he become a general witness in his own behalf, his credibility as such witness may be tested in the same manner as the credibility of any other witness may be tested. People v. Rogers, 94 Cal. App. 470, 271 P. 351; People v. Fontes, 110 Cal. App. 141, 293 P. 835; People v. Knoth, 111 Cal. App. 250, 295 P. 577; 8 Cal. Jur. 647, and authorities in each of such citations respectively noted.

The judgment and the order by which the motion for a new trial was denied are affirmed.

We concur: CONREY, P. J.; YORK, J.

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133 Cal.App. 274

## CARR et al. v. TATUM et al.

Civ. 7698.

District Court of Appeal, Second District, Division 1, California.

July 14, 1933.

Hearing Denied by Supreme Court Sept. 11, 1933.

**1. Frauds, statute of 🔑38.**

Broker's representations to owners of realty that purchaser was responsible business man with plenty of money and owned property worth $25,000 *held* "representations as to the credit of a third person" within statute of frauds (Code Civ. Proc. § 1974).

**2. Frauds, statute of 🔑119(2).**

Statute barring evidence of oral representations as to third person's credit should be construed, if practicable, to prevent protection or shielding of fraudulent practices (Code Civ. Proc. § 1974).

**3. Frauds, statute of 🔑38.**

Statute barring evidence of oral representations as to third person's credit *held* applicable to broker's representations to owners of realty as to purchaser's responsibility, though made by fiduciary with intent to defraud (Code Civ. Proc. § 1974).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson and Douglas L. Edmonds, Judges.

Action by Ernest G. Carr and another against C. C. C. Tatum and others. From a judgment of dismissal, plaintiffs appeal.

Affirmed.

Bodkin & Lucas, of Los Angeles (Stuart Silliman, of Los Angeles, of counsel), for appellants.

Guy T. Graves and James C. Sheppard, both of Los Angeles (Haight, Mathes & Sheppard, of Los Angeles, of counsel), for respondents.

HOUSER, Justice.

Plaintiffs were the owners of certain real property. Defendants Tatum and La Gasse were agents who represented plaintiffs in the sale of the property to a man named Hess. In order to assist Hess in his plan to improve the property, in consideration for their deed therefor to Hess, instead of receiving cash or its equivalent, at the suggestion and solicitation of defendants Tatum and La Gasse, plaintiffs received from Hess a promissory note secured by a deed of trust of the property, which was made subject to each of two prior mortgages with which Hess had incumbered the property in order to obtain funds with which to make the proposed improvements thereon. Thereafter, on the failure of Hess to pay the indebtedness secured by one of such prior mortgages, as the result of a sale on the execution of a judgment recovered in a suit to foreclose such mortgage, the plaintiffs lost the amount of money represented by the value of the property formerly owned by them and which, as hereinbefore set forth, had been conveyed by them to Hess. Thereupon plaintiffs commenced the instant action against defendants Tatum and La Gasse to recover from them a judgment for the damages suffered by plaintiffs in the transaction. In form, the action was for fraud and deceit alleged to have been practiced by defendants upon plaintiffs in inducing them to sell the property to Hess on the terms hereinbefore indicated. According to the allegations of the amended complaint filed by plaintiffs, in substance, the fraudulent conduct of defendants consisted in the making of intentionally false oral representations by them to plaintiffs concerning the financial responsibility of Hess. In particular, by the amended complaint it was alleged that, "with intent to cheat and defraud plaintiffs," the defendants made the following representations to plaintiffs:

"(a) That the said William B. Hess was a responsible business man;

"(b) That the said C. C. C. Tatum and Simon LaGasse had 'looked up' Mr. Hess and had found that he was rated 'A-1';

"(c) That defendants' investigations showed that said William B. Hess was a very responsible New York business man;

"(d) That said William B. Hess was then building a large apartment house here in Los Angeles, which said apartment house was to be erected in accordance with a sketch then and there shown to plaintiffs;

"(e) That said Simon LaGasse stated that C. C. C. Tatum was a reliable and honest person and that said C. C. C. Tatum would not stand for any 'crooked work';

"(f) That said Simon LaGasse further stated that said William B. Hess was 'financially responsible', and was a man with plenty of money;

"(g) That said C. C. C. Tatum was a responsible person, and that said defendants would not let plaintiffs lose money in the deal; that said defendants would protect plaintiffs against loss;

"(h) That certain property located in Madera county, California, and owned by the said William B. Hess, had been investigated by defendants and found to be owned by Hess, and worth twenty-five thousand dollars ($25,000.00);

"(i) That said defendants stated to plaintiffs as follows: 'That we would not take you into this deal, if we did not know what we were doing.'"

To the amended complaint defendants demurred both generally and specifically; which demurrer was by the trial court sustained, with plaintiffs "given ten days to amend." On the failure of plaintiffs to amend their amended complaint, a judgment of dismissal of the action was entered. It is from such judgment that the instant appeal is prosecuted.

Although certain minor questions of law are raised by the parties to the appeal, it is largely, if not entirely, upon the construction which should be placed upon the provisions of section 1974 of the Code of Civil Procedure that the rights of the respective litigants herein depend. That statute is as follows: "No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by or in the handwriting of the party to be charged."

The contention by defendants on the hearing of the demurrer to the amended complaint, and as maintained by them as respondents herein was and is respectively that the provisions of the statute are applicable to the alleged representation made to plaintiffs as hereinbefore set forth, and consequently that the amended complaint failed to state a cause of action against defendants. With reference to that situation, on behalf of appellants, the point is met with the implied admission and assertion respectively that "the authorities are quite well settled that where the representation is strictly as to credit of a third person and no other considerations are involved the statute applies, and the representations must be in writing. The difficulty comes, however, when we consider the relationship existing between the person making the representation and the person to whom representations are made."

[1] In such circumstances, this court is relieved from the necessity of establishing the applicability of the provisions of the statute to a general situation wherein it appears that the representations of which complaint is made concededly embrace facts "as to the credit of a third person." Nor does this court experience any hesitation in declaring that, as tested by the allegations of the amended complaint and weighed by the authorities, the representations in question fall squarely within the requisite precedent conditions demanded by the terms of the statute for its operation. That statements made by one person to a second individual to the effect that a third person with whom the second individual was negotiating with reference to a business transaction was "a responsible business man"; that the first person had "looked up" the third person and found that "he was rated A–1"; that the third person "was a very responsible New York business man"; that he was "financially responsible and was a man with plenty of money"—constituted representations "as to the credit" of such third person is so clear that it would seem a useless task to attempt to establish the correctness of such a conclusion (Nevada Bank v. Portland National Bank [C. C.] 59 F. 338; Cook v. Churchman, 104 Ind. 141, 3 N. E. 759), and that the remaining allegations of the complaint regarding business activities of such "third person" in the matter of the contemplated construction by him of "a large apartment house," together with his ownership of "certain property * * * worth $25,000," also constituted representations "as to the credit of a third person," is attested by the language that occurs in the opinion in the case of McKee v. Rudd, 222 Mo. 344, 121 S. W. 312, 319, 133 Am. St. Rep. 529. It is there said that: "Massachusetts has a similar statute, and in Hunnewell v. Duxbury, 157 Mass. loc. cit. 6, 31 N. E. 700, upon a record appeal of that case, the court said: 'It is well settled that representations made by officers of a corporation with reference to its financial standing or means are made with reference to the credit or ability of another person within the meaning of Pub. St. 1882, c. 78, § 4. Kimball v. Comstock, 14 Gray (Mass.) 508; Wells v. Prince, 15 Gray (Mass.) 562; Mann v. Blanchard, 2 Allen (Mass.) 386; McKinney v. Whiting, 8 Allen (Mass.) 207. The plaintiff does not deny the correctness of this proposition, but contends that a statement that another person is possessed of certain specific property does not come within the provisions of the section, and need not be in writing in order to be actionable. We cannot accede to this proposition. The statute is a general one, purposely broad in its terms, and intended to prevent an understood mis-

chief. It is to be so construed as to make it effectual to prevent the fraud at which it was aimed. To exclude from its operation statements as to the ownership of specific property, if made concerning the "credit, ability, trade, or dealings" of another who is said to be the owner of the specific property would deprive it of force. * * *'" See, also, Walker v. Russell, 186 Mass. 69, 71 N. E. 86, 88, 1 Ann. Cas. 688, in which other authorities are cited.

[2, 3] But as to some extent hereinbefore has been indicated, the crucial point of law herein involved is whether in view, firstly, of the alleged fiduciary relationship which existed between the plaintiffs and the defendants; or, secondly, because of the further alleged fact that the representations in question were fraudulently made with the intention thereby to deceive and to defraud plaintiffs, an exception was thus created regarding the express provisions of the statute.

Beginning in 1789, with the English case of Pasley v. Freeman, 3 T. R. 51, 1 Rev. Rep. 634, 12 Eng. Rul. Cas. 235, 100 Eng. Reps. (Full Reprint) 450, and thereafter generally followed not only in English jurisprudence (see headnote annotations in last-cited report), but as well in the United States, as indicated in Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141, and Upton v. Vail, 6 Johns. (N. Y.) 181, 5 Am. Dec. 210, and note, the principle was recognized and made effective that at common law an action for damages resulting from fraud and deceit would lie when it arose from oral false representations made by one person to another regarding the financial standing or credit of a third person, which to his damage was relied upon by the person to whom such false representations were made. As far as England was concerned, it was not until 1828 that any limitation or restriction was placed upon such common-law right; at which time, by the Act of George IV, c. 14, § 6 (generally known as Lord Tenterden's Act), a statute was passed by which in effect it was provided that "no action shall be brought after the first of January, 1829, to charge any person, upon or by reason of any representation or assurance made or given, concerning or relating to the conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods (there) upon unless such representation or assurance be made in writing signed by the party to be charged therewith."

In each of many of the several states of the United States similar statutes, varying somewhat in their respective scopes, have since been enacted. That in this state already has been set forth herein. In Idaho, a statute identical with that in California has been enacted; and it is upon the construction of that statute by the Supreme Court of that state in the case of W. G. Jenkins & Co. v. Standrod, 46 Idaho, 614, 269 P. 586, 587, that appellants place principal reliance for a reversal of the judgment in the instant case on the ground that, where a fiduciary relationship exists as between the immediate parties to the representation, the provisions of the statute have no application. That was an action brought by a banking corporation to recover a judgment for damages from two of its directors on the ground that, by reason of certain false representations made by the defendants to the remaining directors thereof, the plaintiff corporation had been induced to purchase certain promissory notes from another banking corporation, of which latter corporation the defendants were also directors; the false representations being "that all of said notes were good and were worth face value, and would be paid and liquidated in the ordinary course of banking." It is there very definitely ruled that the statute in question "was not intended to cover oral representations made in violation of a fiduciary relationship." However, at the outset of its discussion of the issue there presented, the court made it plain that it was not considered necessary to discuss the applicability of the statute to the representations made by the defendants, but that "the question here is to be viewed rather as the breach by defendants of their duties as fiduciaries, and does not necessarily depend upon the actual representations alleged."

Another case in point for the appellants is that of Vertrees v. Head & Matthews, 138 Ky. 83, 127 S. W. 523, wherein it is held that the statute does not embrace representations that are deceitfully made, but only such as are made in good faith respecting the credit or standing of another.

In a note contained in 9 A. L. R. pages 536, 540, the broad statement appears that "by the weight of authority a statute requiring a writing to make effective a representation as to the credit of another does not apply to representations made with the intention to defraud"; and several authorities emanating from each of the appellate tribunals of the states of Indiana, Kentucky, and Michigan are cited in support thereof. So that it may be not doubted that eminent authority exists for the position assumed by appellants herein and for the establishment whereof in this state they so stoutly contend.

On the other hand, in the same note of volume 9, A. L. R. at page 542 thereof, immediately following the citation of the authorities to which reference just has been had, occurs the statement that "in other jurisdictions the view seems to obtain that since the Statute of Frauds contains no exception with respect to fraudulent representations as to the credit of a third person no such exception can be introduced by the courts"—citing authorities from each of the several states of Alabama, Indiana (Cook v. Churchman, 104 Ind.

141, 3 N. E. 759), Maine, Massachusetts, Missouri, as well as several from England. In that connection, and dealing with each of appellants' asserted exceptions to the apparent expressed intent of the statute, is the well-considered case of Knight v. Rawlings, 205 Mo. 412, 104 S. W. 38, 44, 13 L. R. A. (N. S.) 212, 12 Ann. Cas. 325, wherein many authorities are exhaustively reviewed. In substance and effect, it is there emphatically and positively declared that the statutory provision is a complete bar to an action for damages for false oral representations made with respect to the credit of a third person, regardless of whether such representations were made either in good faith or with knowledge of their falsity, in order to deceive and defraud the plaintiff, or in pursuance of a conspiracy with the person in regard to whose credit the representations were made. In that regard, in part, the language of the court is as follows: "Now it is a familiar doctrine that, when the statute of another state or country is adopted by the Legislature of this state, the construction placed upon that statute prior to its adoption in this state will be presumed to have met the approval of our Legislature when adopting it. We have seen that Lord Tenterden's act was enacted in 1828, and the courts of England had, prior to 1845, expressly ruled that a false representation as to the credit of another would not take the case out of that act. And considering the purpose of that act and the causes which led to its adoption, particularly the case of Pasley v. Freeman, and the great weight of authority in this country, we are inclined to the opinion expressed by Browne in his work on the Statute of Frauds, and hold that the plain meaning of this statute is that it requires a writing to charge a defendant upon any representation made in regard to the credit, etc., of a third party whether such representation is made in good faith, or is known to be false and made in order to deceive and defraud the plaintiff, because the presence of this very element of intention to deceive and defraud was the very point upon which the court, in Pasley v. Freeman, held that the statute of frauds of 29 Car. II did not apply. The plain purpose of Lord Tenterden's act was to require a writing in a case for which St. 29 Car. II had failed to provide, and to sustain the contention of the plaintiff in this case we must go to Pasley v. Freeman and ignore the statute (section 3422, Rev. St. 1899 [Ann. St. 1906, p. 1965]) which was enacted to remedy the ruling in that case. To do that we must import an exception into the statute, a restriction and exception which its language does not justify."

Appraising the authorities generally which have a direct bearing upon the construction which should be placed upon statutes of similar force and effect as the California statute, it is said in 25 Ruling Case Law, p. 445: "The view is taken in some cases that the statute does not apply where representations are made with actual fraudulent intent, but should be restricted to cases of unintentional misrepresentations. The better opinion, however, is to the contrary, for there is no such restriction in the statute. And the fact that the complaint contains averments charging a conspiracy cannot affect the question. The purpose of the statute cannot be disappointed by the form of the complaint. The necessity that the representations should have been made in writing is the same, where a conspiracy is set up as where it is not." Likewise, in volume 14, A. & E. Encyclopedia of Law, page 33, occurs the statement: "Some courts have held that the statute does not apply to cases of actual fraud; that is, to cases in which the representation is not only false, but is made with fraudulent intent. The better opinion, however, is to the contrary, for there is no such restriction in the statute."

No useful purpose would be subserved by a review herein of the many cases in which opinions of the courts have been expressed either respectively in accord or in disagreement with the views of the court in the case of Knight v. Rawlings, 205 Mo. 412, 104 S. W. 38, 13 L. R. A. (N. S.) 212, 12 Ann. Cas. 325, to which reference hereinbefore has been had. As a matter of course, the principle of construction is recognized that a statute of the nature of that here under consideration, if practicable, should be so construed as to prevent it from operating as a protection to or as a shield of fraudulent practices. Nevada Bank v. Portland Nat. Bank (C. C.) 59 F. 338; Stauffer v. Hulwick, 176 Ind. 410, 96 N. E. 154, Ann. Cas. 1914A, 951. On the other hand, it must be apparent, as is stated in each of many of the authorities, that the statute is but a supplement to the statute of frauds; and, although it may not infrequently happen that by the strict operation of the statute a palpable fraud may result in a financial loss to some unfortunate individual, in the vast majority of cases the rule announced by the statute effectively operates to prevent the perpetration of fraud. The language of section 1974 of the Code of Civil Procedure is all-inclusive. Apparently, its provisions embrace any person who may make representations "as to the credit of a third person." No express exception is made as to a person who stands in a confidential relation to the person to whom such representation is made. Nor is any such exception made regarding the intention of the person who may make the representation, whether made honestly or in "bad faith." Not only the history of the statute, but as well the decisions to which reference hereinbefore has been had, indicate that the purpose of the original English statute was to extend or to supplement the statute of frauds, as far as its provisions related to promises "to answer for the debt, default, or miscarriage of another." At least the later statute is analogous to the former. If, generally speaking, neither of appellants' asserted exceptions finds recognition in the law as it may affect the statute of frauds, it would seem improbable that either of the claimed implied exceptions to section 1974 of the Code of Civil Procedure, for which the appellants here contend, could have application. In circumstances similar to those present in the instant action, the weight of authority fails to sustain the position assumed by the appellants.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

## PEOPLE v. LEWIS et al.*

Cr. 2319.

District Court of Appeal, Second District, Division 1, California.

July 24, 1933.

Hearing Granted by Supreme Court Aug. 23, 1933.

**1. Appeal and error 🔑660(2).**
On motion for diminution of record, presumption is that movant's uncontradicted affidavit is true.

**2. Appeal and error 🔑659(3).**
Appellant was entitled to diminution of record to show that written notice of appeal was reformed by insertion of appellant's name therein after due notice (Pen. Code, § 1239).

**3. Appeal and error 🔑801(1).**
On motion to dismiss appeal, presumption is in favor of judgment reforming notice of appeal on motion, where record is otherwise silent as to procedure and evidence heard by trial court (Code Civ. Proc. § 1963, subd. 16; Pen. Code, § 1239).

**4. Appeal and error 🔑799.**
Burden rests on appellee to establish by clear and convincing evidence lack of jurisdiction of appeal.

**5. Appeal and error 🔑782.**
Appellee *held* not entitled to dismissal of appeal because lack of jurisdiction did not clearly appear by record.

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Proceeding by the People against C. K. Lewis and others. From an adverse judgment, C. K. Lewis and A. B. Crist appeal. On appellee's motion to dismiss appeal of appellant C. K. Lewis and on motion of such appellant for diminution of the record.

Motion to dismiss appeal denied, and motion for diminution of record granted.

Robert H. Patton, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

HOUSER, Justice.

The questions which are submitted at this time in relation to the instant appeal affect, first, a motion by respondent to dismiss the appeal of defendant Lewis, and, secondly, a motion by said defendant for diminution of the record.

The grounds of the motion to dismiss said appeal are that it was not perfected as required by section 1239 of the Penal Code, in that neither an oral nor a written notice of any appeal from the judgment in the action was either given or filed by said defendant in accordance with the provisions of said statute. In neither of such respects is it asserted by said defendant that, as far as the face of the record herein disclosed at the time when said motion was filed, the facts were other than that no oral notice of appeal from the judgment was ever given by him, or that his written notice of appeal was not filed until after the time prescribed by the statute had expired. However, by his motion for diminution of the record, said defendant has proposed to show that in legal effect his written notice of appeal from the judgment was actually filed within the time limited by the terms of section 1239, Penal Code, and hence that the motion to dismiss his appeal should be denied. To that end, he has produced, and has requested from this court leave to file, a duly certified "supplement to clerk's transcript," which in substance shows that "good cause appearing therefor," by order of a judge of the superior court the original notice of appeal from the judgment and the order denying the motion for a new trial which purportedly was given and filed in behalf of his codefendant Crist only, be amended by inserting the words "C. K. Lewis" in the notice of appeal herein filed on December 2, 1932, after the words "A. B. Crist where the same appear." The said supplement to the clerk's transcript also contains a new notice of appeal, which is in accord with said order, to which is appended the notation (apparently made by a deputy clerk of the court) "amended by order of court by inserting the words 'C. K. Lewis,' this 20" day of April, 1933."

The motion for diminution of the record

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*For subsequent opinion see 27 P.2d 73.

was accompanied by an affidavit made by the attorney who represents said defendant on his appeal, a part of which being as follows: "* * * That the original Clerk's Transcript submitted on this appeal shows the original Notice of Appeal filed on December 2, 1932 (Cl. Tr., pp. 94–5); that the name of appellant, C. K. Lewis was improperly omitted from said Notice of Appeal; that on March 23, 1933, upon motion of attorney for appellant C. K. Lewis, after due notice to the District Attorney of Los Angeles County, the Superior Court of the State of California in and for the County of Los Angeles duly made its order, a true copy of which is attached hereto reforming said Notice of Appeal by the insertion therein of the name of C. K. Lewis. That it is necessary for the proper presentation of this appeal on behalf of the appellant, C. K. Lewis that the said order of reformation and Notice of Appeal reformed in accordance therewith be included in the records of this appeal."

[1-5] Since no counter affidavit was filed herein, the statement of facts set forth in the affidavit of counsel is presumed to be true. Nor has the respondent filed any objection to said motion. From such situation, it appearing to the court that the said defendant is entitled to have the record herein corrected as hereinbefore has been indicated, it follows that his motion for diminution of the record in accordance with the notice of his motion therefor should be granted. The record thus amended and corrected so as to show, as it now does, that the said defendant gave due and timely notice of his appeal from the judgment, the consequence should be that the motion to dismiss said appeal on the ground stated in the notice therefor should fail. However, with regard thereto, the point is now urged by respondent that the trial court was without jurisdiction to make the order by which defendant Crist's notice of appeal from the judgment was amended. Other than the affidavit of the attorney for said defendant (a part of which having been hereinbefore quoted), the record herein is silent either as to the procedure (other than by "motion") adopted by said defendant in the lower court in presenting his request thereto for the order in question, or as to what, if any, evidence was introduced to the trial court on the hearing of such "motion." In such circumstances, the presumption is not only in favor of the jurisdiction and authority of the trial court to make the order of which respondent complains, but as well that in all respects the order is valid. Subdivision 16, § 1963, Code Civ. Proc.; 7 Cal. Jur. 583; 1928 Supp. to Cal. Jur. 554; 1932 Supp. to Cal. Jur. 293; and authorities respectively there cited. The burden of establishing by clear and convincing evidence the facts upon which an asserted lack of jurisdiction depended rested upon the respondent. In re Estate of Wiechers, 199 Cal. 523, 527, 250 P. 397. If for no other reason, in the absence of any record of the facts upon which to base a conclusion of lack of jurisdiction, the motion of respondent in that regard should not prevail.

It is ordered that the motion for diminution of the record be and it is granted; and that the motion to dismiss the appeal of defendant Lewis be, and it is, denied.

We concur: CONREY, P. J.; YORK, J.

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133 Cal.App. 9

## McLELLAN et al. v. COCOLA et al.

Civ. 1225.

District Court of Appeal, Fourth District, California.

June 24, 1933.

Rehearing Denied July 22, 1933.

**1. Evidence 🔑590.**

In weighing testimony of truck driver and passenger involved in collision, jury, in action for damages, were entitled to consider interests of witnesses and natural bias in light of other evidence.

**2. Automobiles 🔑170(2).**

In applying statute requiring motorist to drive as closely as practicable to right-hand edge of highway, jury must be guided by rule that what man of ordinary prudence would have done would be practicable compliance with law (St. 1923, p. 557, § 122, as amended by St. 1931, p. 2124, § 41).

**3. Automobiles 🔑245(78, 79).**

Whether motorist colliding with truck was contributorily negligent in not driving as closely as practicable to right-hand edge of highway or in driving at excessive speed *held* for jury (St. 1923, p. 557, § 122, as amended by St. 1931, p. 2124, § 41).

**4. Automobiles 🔑242(8).**

Presumption in collision case is that deceased motorist did in careful and prudent manner acts he was required to do.

On Rehearing.

**5. Appeal and error 🔑1064(1).**

Erroneous instruction that pleadings admitted that all defendants were operating truck that collided with deceased motorist's car, and that, if truck driver was found liable, other defendants should also be found liable, *held* prejudicial to defendant denying alleged partnership on information and belief, where parties tried such issue and court gave conflicting instructions thereon.

**6. Pleading** ⚷409(3).

Parties who tried issue attempted to be raised by defendants' denial, on information and belief ,of operation of truck as partner, waived technical objections to failure of answer to raise such issue.

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Appeal from Superior Court, Fresno County; K. Van Zante, Judge.

Action by Myrtle E. McLellan and by Betty Ann McLellan and others, by their guardian, Myrtle Edith McLellan, against F. Cocola and others. From a judgment for plaintiffs, defendants appeal.

Affirmed as to defendants F. Cocola and M. Cocola, and reversed as to defendant Frank Mastro.

Ray W. Hays, of Fresno, for appellants.

G. L. Aynesworth, of Fresno, for respondents.

ANDREWS, Justice pro tem.

This appeal is from a judgment entered upon the verdict of a jury. The plaintiffs sued as the widow and children of the deceased husband, who was killed in the automobile collision involved in this action. The road at the point of the impact was paved to the width of 24 feet, and had oiled shoulders on each side to the width of 8 feet. The time of the occurrence of the accident was about 8:30 o'clock at night. The deceased was driving a Buick passenger automobile in an easterly direction, and defendant F. Cocola was driving a heavy truck loaded with about four tons of grapes in a westerly direction. As a result of the impact, the left front of the truck was damaged, the left front wheel broken off, and the front bumper badly twisted. The truck swerved down across its left side of the highway and landed against a bank adjoining the road. The Buick automobile was wrecked completely from the driver's position to the rear part; the front fenders and bumper not showing serious damage.

The contention of defendants is that the evidence shows conclusively and as a matter of law that the driver of the Buick car was guilty of contributory negligence, and defendant Mastro makes the further claim that the evidence does not establish liability on his part because the only deduction which can be drawn would be that he was not interested in the truck in question or the grapes which were being transported, that he was not a partner of the driver of the truck, and that no basis for liability as against him is established.

1. The claim of contributory negligence is predicated upon two grounds: (a) That the driver of the Buick automobile was not driving as closely as practicable to the right-hand edge of the highway as required by section 122 of the California Vehicle Act, and (b) that the driver of the Buick automobile was not observing where he was driving and was driving at an excessive and unlawful rate of speed. The section referred to reads as follows: "* * * In driving upon the right half of a highway the driver shall drive as closely as practicable to the right hand edge or curb of the highway except when overtaking or passing another vehicle, or when placing a vehicle in position to make a left turn."

The contention of defendant upon this branch of the subject is that the testimony of the driver of the truck and the witness John Mastro who was riding with him, the only eyewitnesses of the occurrence, shows that, while the truck was being driven on its own side of the road at a speed of about 25 miles per hour, the Buick, which they had observed approaching at a rate of speed which they estimated at 45 or 50 miles per hour, suddenly swerved to the left and ran into the front of the truck, deflecting it from its course and leaving it out of control, whereby it swung down to the left across the highway, landing on a dirt embankment about 50 feet from the point of impact; that the Buick automobile, after the accident, and after the driver was thrown out at the point of contact, proceeded more than 100 feet along its course and landed against an embankment on the side of the highway upon which it was traveling; that the marks and indications of the accident left upon the pavement were all at or near the center of the highway, indicating that the collision took place on the center line of the road, and demonstrating by these physical facts that the Buick was driven, not close to the right-hand edge of the highway, but close to or across the center of the highway.

[1] In weighing the testimony of the driver of the truck and the witness who was riding with him, the jury were entitled to take into account the interest which these witnesses had in the result of the suit and their natural bias in favor of defense, and were also required to determine the effect of other testimony tending to impeach the credibility of these witnesses. They also may have weighed the testimony in the light of its inherent probable truthfulness, considering its reasonableness and the controlling force of the physical evidence shown to exist on the cars and pavement.

The witness W. A. Heimann, a hardware merchant who was driving along the highway, came upon the scene almost immediately after the accident. He took the driver of the

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

truck and the witness Mastro with him to the next town, where they asked to be taken to see a doctor. This witness testified that Cocola told him he did not know how the accident happened, it was so sudden, and that Mastro was asleep and did not see the accident. He also testified that Mastro said he was asleep and did not see what occurred.

In their testimony several witnesses described the débris remaining after the accident as being strewn along the outside portion of the highway on the side which the Buick machine was traveling with very little of such evidence at or near the center of the highway. The physical marks demonstrating whatever deduction could be properly made from them were testified to by many witness and were the principal issues of the case. Photographs illustrating the various claims of the parties form a part of the transcript.

One of the contentions of the plaintiffs, which there was evidence tending to support, was that the truck, at the time of the accident, had veered from its own side over several feet from the center, onto the side of the road upon which the Buick car was traveling, and in so doing ran into the side of the Buick car; the theory being that the driver had lapsed into sleep momentarily. No interpretation of the evidence left upon the pavement can amount to demonstration, as a matter of law, of what did actually take place. If the truck did cross the center line and run into the Buick, it is impossible to say where the Buick was traveling with reference to the center or the outside edge of the road. It was peculiarly an issue for the jury to determine.

[2] It is also the province of the jury to determine, from all the evidence in the case and the condition of the highway, whether or not the driver of a vehicle drove "as closely as practicable to the right-hand edge or curb of the highway" at the time of the accident as required by section 122 of the California Vehicle Act (as amended by St. 1931, p. 2124, § 41). A jury, called upon to apply the statute to a particular case, must be guided by the well-settled rule that what a man of ordinary prudence would have done under the circumstances would be considered a practicable compliance with the law.

[3] It will therefore be impossible to find as a matter of law, either from the direct testimony of the witnesses or from the surrounding circumstances and evidence of physical facts, just where the Buick car must have been traveling or whether such position would be in violation of the statutory requirement.

[4] Upon the question of contributory negligence arising from want of attention and excessive speed, the presumption is that a deceased person killed in the operation of a car, whose conduct in its management is involved in litigation, has exercised those instincts of self-preservation which are inherent in human nature and did the acts which he was required to do in a careful and prudent manner. So far as affirmative evidence as to the speed of the Buick automobile is concerned, there is none to indicate a rate beyond that permitted by law, except the testimony of the driver of the truck, who made an estimate of from 45 to 50 miles per hour. One witness, who was driving a car in the same direction at the rate of about 35 miles an hour and whose car the Buick automobile passed not long before the accident, estimated the speed of the Buick at 40 to 45 miles per hour.

The real contention of the defendants in this connection is that the evidence of what took place at the time of the collision, the way in which the truck was thrown out of its line of travel, and the distance the Buick ran after the impact, indicates a much greater speed than the legal rate. This sort of reasoning gets us into the region of pure speculation, and leaves the question one for the jury and not for this or any other court. Upon the entire survey of the evidence, the jury found the driver of the Buick car not guilty of contributory negligence, and that finding cannot be disturbed.

2. Defendant Mastro contended at the trial, and here contends, and after the verdict made a motion which involves the contention, that the evidence of his relationship with the truck driver involved in the accident does not justify any judgment against him. The apparent reason why the question of his liability was submitted to the jury arose out of the testimony given by Mr. Cocola, driver of the truck, in a deposition taken before the trial and introduced in evidence at the trial, in which the witness testified that defendant Mastro was his partner "in the grapes." He was not cross-examined in the taking of the deposition and did not undertake to explain the nature of their relations which he concluded was a partnership, or what their interests in the grapes in fact were.

On the trial of the case the other defendant Cocola and the defendant Mastro, as well as the defendant who had given the deposition, went at length into the business relationship between them, and it developed that the arrangement under which the grapes were being handled did not amount to a partnership or any joint interest in common in the grapes being hauled at the time of the accident. This testimony which was elicited under prolonged examination and cross-examination was apparently so conclusive and uncontradicted that other evidence to rebut or in corroboration, which would have been possible, was not used, and was a complete and harmonious explanation of the testimony given by the defendant truck driver in the deposition. Notwithstanding this, and doubtless because of the testimony in the deposition, the question was submitted to the jury, and the jury by its general verdict found against this evidence and that defendant Mastro was liable.

In the instructions given by the trial court to the jury there appears one reading as follows: "You are instructed that it is admitted by the pleadings in this case that all the defendants were operating the G. M. C. truck, which was being driven by F. Cocola, and if, under the instructions herein given you, you find F. Cocola liable, you shall likewise find the other defendants liable."

This instruction, relating to a condition of the record about which the jury would have no other knowledge, required a finding on their part of a fact not justified by the reference to the pleadings, and left no alternative but to find against defendant Mastro if the other defendants were found liable. The case was originally brought by plaintiffs against the two defendants, Cocola, and Frank Mastro was not made a party, but there were some John Does included in the title. Defendant Mastro was served long after the other defendants as a John Doe defendant, and doubtless because of the evidence in the deposition above referred to. The two defendants Cocola filed their answer December 18, 1931, in which, by not denying the fact that they were the owners of the truck in question, they admitted that fact. Defendant Mastro filed his answer February 29, 1932, more than two months subsequent and after the case had been set for trial, and in his answer he denied all the allegations of that part of the complaint which related to the ownership of the truck by defendants.

Apparently the trial court gave the instruction without attention to the history of the pleadings. Upon the state of the evidence, it might be a matter of some hesitation to say that this court would reverse the judgment as to Mastro upon the ground that no substantial evidence supported it, but, with the error which was introduced into the case by this instruction, it becomes mandatory that, as to him, the judgment must be reversed, and in so doing it may be that substantial justice will be worked out.

The judgment of the trial court is sustained as to the defendants F. Cocola and M. Cocola and reversed as to defendant Frank Mastro.

We concur: BARNARD, P. J.; MARKS, J.

## On Petition for Rehearing.

PER CURIAM.

Respondents have filed a petition for a rehearing for the purpose and to the end that the judgment against Frank Mastro should also be affirmed.

[5] It is contended that the court properly instructed the jury that it was admitted by the pleadings that all of the defendants were operating the truck in question, for the reason that an allegation in the complaint to that effect was denied by the defendant Mastro upon information or belief, and that such a denial was not sufficient to raise an issue since the facts with respect thereto were within his personal knowledge.

Conceding such to be the general rule, a situation somewhat out of the ordinary here appears. The complaint, which alleged that "the defendants were operating and driving a G. M. C. truck" on the occasion in question, named F. Cocola, M. Cocola, John Doe, and three other fictitious names, as defendants. Frank Mastro, sued as John Doe, later appeared by answer, in which the allegation referred to was denied on information or belief. At the trial, after introducing evidence to the effect that F. Cocola and M. Cocola owned the G. M. C. truck involved, the plaintiff introduced evidence to the effect that Mastro was a partner of F. Cocola in the business in which the truck was being used at the time of the accident, and that he had an interest in the grapes being hauled. Later, the defendant Mastro introduced evidence to the contrary, the record of which, with the extensive cross-examination, is quite voluminous.

While the answer is technically lacking in the respect noted, it fully appears from the record that the parties acted upon the same as a denial of the allegation and as creating an issue, and that throughout the trial this was treated as a controversial issue of fact. Under such circumstances we think it was prejudicial error to give the instruction to which we have referred.

[6] A further consideration is that the court gave conflicting instructions on this very issue. After instructing the jury that if they found F. Cocola guilty of negligence, which was the proximate cause of the collision, the court added: "Then you shall find that such of the defendants as were responsible for the operation of said truck are liable," etc. Again, after giving the instruction as to the purported admission made by the pleadings, the court gave the following: "You are instructed that if you find from the evidence that F. Cocola and Frank Mastro were jointly interested in the grapes which were being transported in the Cocola truck, and that the same were being handled with Mastro's knowledge and approval, then said Frank Mastro is chargeable with and responsible for the acts and conduct of F. Cocola." All of these instructions were given at the request of the plaintiffs, and not only are they conflicting, but the plaintiffs, by presenting

evidence and asking for instructions upon the issue of fact concerning the liability of defendant Mastro, waived any technical objection as to the failure of the answer to raise such an issue.

The petition for rehearing is denied.

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133 Cal.App. 82

## REA v. GLENN et al.

Civ. 7876.

District Court of Appeal, Second District, Division 2, California.

June 29, 1933.

**1. Mines and minerals 🔑79(1).**

Phrase "abandon operations" in contract providing for monthly payments for continuation of well drilling on lease until operations should be abandoned, *held* to simply mean to cease operations with no intention of renewing same and not abandonment of entire project.

[Ed. Note.—For other definitions of "Abandon; Abandonment," see Words & Phrases.]

**2. Mines and minerals 🔑79(7).**

Evidence supported finding of abandonment of operations on drilling of well within contract providing that monthly payments should cease when operations were abandoned.

**3. Mines and minerals 🔑77.**

Question of abandonment, whether it be complete abandonment or cessation of operations with intention of never resuming, is always one of act and intent.

**4. Appeal and error 🔑1011(1).**

Findings of ultimate facts are binding on appeal not only when there is direct conflict regarding probative facts, but when those facts are fairly susceptible to opposing inferences.

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge.

Action by Georgia A. Rea against B. P. Glenn and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

I. Henry Harris and Patrick F. Kirby, both of Los Angeles, for appellant.

Louis Luckel, of Los Angeles, for respondent Pettijohn.

Randall & Bartlett and Kenneth W. Kearney, all of Los Angeles, for respondent Wessling.

PARKER, Justice pro tem.

This is an appeal from a judgment in an action to recover money. Said judgment was against plaintiff and in favor of all defendants, adjudging that plaintiff recover nothing and awarding costs to each defendant.

Without further preliminary we launch off into the facts. Some argument is raised as to what were the real issues in the case and inasmuch as the findings are somewhat general there does seem room for argument. However, we may take appellant's contention in this connection as being sufficient for present purposes. The defendants were jointly engaged in the procurement of leases and in the development of certain unproven oil lands of the class generally designated as "wild cat." A certain oil company known as Neame Oil Company had leased some 295 acres of land in Tulare county to parties named Haas and Jones. These lessees had entered upon the lands and undertook the development thereof through sinking a well in the hope of discovering oil. After the well had been sunk some distance, the defendants came upon the scene. They purchased the Haas-Jones interests and the Neame lease was transferred and assigned to defendants and a new deal inaugurated which embraced not only the original 295 acres but took in some 13,000 acres of leasehold. The specific plan seemed to be to proceed with the well then being bored and acquire sufficient other lease interests so that if the field proved a producer greater benefits might result to all concerned. In the original Neame lease and as it was assigned and re-executed there was provision for diligent development and a forfeiture clause. The latter, however, was not self-executing but required declaration of forfeiture with specifications and continuing default for thirty days after notice. As hereinbefore stated, when Haas and Jones sold and assigned to defendants there was a well being bored on the Neame Oil Company's property. The agreement between Haas-Jones and defendants provided for the continuation of this well and among other things the defendants agreed as follows: To pay Haas-Jones $1,000 each month until oil or gas in paying quantities shall be discovered by them in their drilling operations carried on pursuant to the drilling requirements of the Neame Oil Company lease or until such drilling operations shall be abandoned by reason of the encountering of formations, recognized by geologic experience as unfavorable to the production of oil and gas in paying quantities. Shortly after defendants took over the property the plaintiff and appellant herein presented to defendants an order in writing signed by Haas-Jones and reading as follows:

"Messrs. B. P. Glenn, V. Hitchcock and George H. Puntenney, copartners, doing business under the fictitious name of Lincoln Finance Company.

"Gentlemen: You will please pay to Mrs. Georgia A. Rea of Kingsburg, California, the sum of Six Thousand Six Hundred ($6600.00) Dollars out of any and all moneys to become due and payable to us from you pursuant to and in accordance with that certain agreement, bearing date the 23rd day of July, 1926, made by and between yourselves as parties of the first part, and the undersigned as parties of the second part, which agreement relates to matters pertaining to the development of the Neame Oil Company lease, and other oil and gas leases. This order is made subject to a prior order from us in favor of the Neame Oil Company bearing date the 23rd day of July, 1926. Upon the making of payments pursuant to this order you will charge the same to our account under said contract. Dated and signed this 11th day of August, 1926.

"Robert C. Hass,
"C. C. Jones."

The defendants accepted the order as indicated by the following indorsement thereon:

"The foregoing order is hereby accepted this 30th day of August, 1926.
"Lincoln Finance Company,
"A. G. Wessling, Pres.
"By B. P. Glenn, Sec'y."

Incidentally it may be noted that defendants were doing business under the style of Lincoln Finance Company and no question is presented on this.

It is conceded that payments were made for the month of October, 1926, namely $1,000. The action is to recover from defendants the balance of $5,600. The court below found nothing was owing by defendants and their liability under the acceptance had been fully discharged. The main point urged by appellant is that the evidence does not support this finding. The theory of the case at the trial was that there was an abandonment of operations owing to the geological formation having become such as to render futile further boring. Appellant assumes that the court below did so find and that this was the basis of the ultimate finding of nonliability. Inasmuch as appellant seems to concede that if there was an abandonment of operations the judgment must be affirmed, we will decline to go into the technique of procedure relative to implied findings and go direct to this one question. It is conceded that there is sufficient evidence to establish the fact that in October of 1926 the defendants did encounter in the well formations recognized by geological experience as unfavorable to the production of oil and gas in paying quantities. The fact is thus established that defendants did reach a point where further boring could, within the terms of the contract, be abandoned. Whatever the effect of this may be it was a fact to be considered in determining whether the operations were abandoned.

There is in the record positive testimony that on October 25, 1926, all operations at the well ceased; that the defendants were without funds; and that the only thing thereafter done was the cleaning out of the well and removing the tools and such matter as may have accumulated or been lost in the hole. The positive testimony of defendants is that at the time named, October 25, 1926, the operations were entirely abandoned and the record fails to disclose anything by way of overt act in or about the premises to controvert this testimony. However, argues appellant, there were certain acts of the defendants that negative any notion of abandonment. This contention might be summarily disposed of by holding that this latter evidence simply created a conflict in the evidence. Yet we prefer to dispose of the point on its merits.

[1, 2] The sum total of the claim of appellant is that after the date of the claimed abandonment the defendants did attempt to interest third parties in the venture and to dispose of their holdings not only in the lands which included the well but also in the 13,000 acres that went to embrace their holdings in the field. It was manifestly an attempt to salvage what they could or to reimburse themselves in the adventure. Such conduct would not completely negative the claim of abandonment. And here we may consider the essentials of an abandonment under the facts of the instant case. The question of abandoning operations is somewhat different from the question of an abandonment of property in its most general sense. All of the law on the general subject of abandonment has reference to a complete abandonment rather than the cessation of any particular line of endeavor. Here it is fair to construe the phrase of the contract "abandon operations" as simply meaning to cease operations with no intention of renewing the same. It did not mean that defendants should abandon the entire project or that they should withdraw entirely from the field. All of the drilling operations specified were in this one well started by Haas and Jones. Their operations could be abandoned and the interests of defendants in the field remain otherwise unaffected. There was evidence that in January of 1927 the defendants negotiated with Haas and Jones, looking toward a forbearance of forfeiture and extension of privilege to resume boring. These negotiations were conditioned upon defendants' securing new parties to take the well. This was evidence as much in favor of an abandonment of operations by defend-

ants as it was to the contrary. Taken in its entirety, the evidence supports the finding of an abandonment of operations on the well in question. The original obligees, Haas and Jones, recognized the abandonment or at least the record bears that construction of the situation. Haas and Jones, Neame Oil Company, and defendants by and through various agreements were co-operating in the lease interests acquired on the larger acreage and working together toward the proving of the entire field. The negotiations and agreements of the parties after the cessation of operations were general and affected the entire holdings rather than indicating retention of the well and intent to continue the boring.

[3, 4] The court, as indicated, found against appellant on every issue and while the only evidence attacked as insufficient involves the abandonment, so termed, there would be other findings ample to sustain the judgment. The question of abandonment, whether it be a complete abandonment or a cessation of operations with intention of never resuming, is always one of act and intent. Every fact and circumstance is to be considered and given its proper weight. And we think this is exactly what the trial court did and in our opinion it reached a conclusion finding ample support in the evidence. Findings of ultimate facts are binding upon appeal, not only when there is a direct conflict regarding the probative facts, but when those facts are fairly susceptible to opposing inferences. Northwestern P. C. Co. v. Atlantic P. C. Co., 174 Cal. 312, 163 P. 47.

This being the only point urged, the judgment is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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133 Cal.App. 342

## PIDGEON et al. v. LAMB.

Civ. 679.

District Court of Appeal, Fourth District, California.

July 18, 1933.

Rehearing Denied Aug. 14, 1933.

Hearing Denied by Supreme Court Sept. 15, 1933.

**1. Mines and minerals ⇨19(1), 20(3).**

It is unnecessary to post notice of location at point of discovery or to mark boundaries when placer claim is located where United States survey has been extended over land embraced in location (Civ. Code, § 1426; 30 USCA § 35).

**2. Mines and minerals ⇨38(20).**

Copy of affidavit of proof of annual labor on placer claims duly certified by county auditor *held* sufficient to sustain finding that assessment work for certain year was done as required by law, though filed 31 days after time limited for doing work (Civ. Code, § 1426m).

**3. Mines and minerals ⇨23(7).**

Failure to perform assessment work on placer claims in 1916 could not be taken advantage of by persons initiating claims in 1930 where annual assessment work had been performed since 1916 (Civ. Code, § 1426m; 30 USCA § 28).

**4. Mines and minerals ⇨38(18).**

Evidence sustained implied finding that points of discovery of minerals on placer claims were outside of limits of subsequent patent to another.

**5. Abandonment ⇨2.**

"Abandonment" is voluntary act which must be proved by competent evidence by person asserting it.

[Ed. Note.—For other definitions of "Abandon; Abandonment," see Words & Phrases.]

**6. Mines and minerals ⇨29(3).**

Where points of discovery of minerals on placer claims were outside of limits of subsequent patent to another, parts of claims outside patent were not affected by it.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Karl I. Pidgeon and others against Theodore P. Lamb. From a judgment for defendant, plaintiffs appeal.

Affirmed.

John O. Bender and Robert E. Rosskopf, both of Los Angeles, and Frederick H. Brock, of Pico, for appellants.

C. S. Price, of Los Angeles, for respondent.

TURRENTINE, Justice pro tem.

Plaintiffs filed this action seeking to quiet title to three placer mining claims. Defendant answered denying plaintiffs' title and asserted title in himself. Judgment was rendered in favor of defendant quieting his title as against plaintiffs except as hereinafter noted. From this judgment plaintiffs appeal.

On March 25, 1911, A. R. Lendner and his associates, all citizens of the United States, went in and upon unoccupied and unappropriated mineral lands of the United States and located ten contiguous placer mining claims under the claim names of Sheep Creek Placer Mining Claims numbered 1 to 10, inclusive, constituting a consolidated group. The land at the time of entry had been duly surveyed by the United States government and the sections and legal subdivisions thereof were distinctly marked by said United States public survey so that the exterior boundaries of the sections and subdivisions thereof could be readily traced and the quarter section corners thereof could be easily ascertained. All locations were according to and coincided with the legal subdivisions of the property, according to the United States public survey. Mineral in place, to wit, certain lime deposits of commercial quantity and value, were found on each of the claims, monuments were erected, and location notices were posted in a conspicuous place on the monuments on the date of location. Copies thereof were recorded in the office of the county recorder where the land is situated within thirty days. Whatever title the original locators had, now vests in defendant, a citizen of the United States. That defendant and his predecessors in interest performed the necessary annual labor on said claims is unchallenged except for the year 1916. The trial court found that the annual labor was performed by defendant on all of the claims for the year 1916. Appellants challenge the sufficiency of the evidence to sustain this finding and this matter will be discussed hereafter. The defendant and his predecessors in interest at no time actually marked the boundaries of the claims on the land. On March 9, 1930, plaintiffs located three placer mining claims named Monarch Claims Nos. 1, 2, and 3, respectively, on portions of Sheep Creek Claims Nos. 5, 6, and 8, and all of Sheep Creek Claim No. 7. In 1920, a stranger to this action obtained a patent from the United States government covering portions of Sheep Creek Claims Nos. 5 and 6, called the Jersey Bull patent. The judgment in this case does not purport to affect the property covered thereby. Subsequent to the issue of said patent, the defendant and his predecessors in interest did not relocate the portions of Sheep Creek Claims Nos. 5 and 7, which were excluded from the Jersey Bull patent. The final judgment in this action will determine the title to those portions of the property embraced within Sheep Creek Claims Nos. 5, 6, 7, and 8, which are also covered by plaintiffs' claims designated as Monarch No. 1, Monarch No. 2, and Monarch No. 3. Other facts necessary to the determination of the issues will be set forth in connection with the points of law applicable thereto.

[1] Appellants contend that defendant has no title to the mining claims for the reason that no notice of location was posted at the point of discovery and the boundaries of the claims were not marked. Respondent's reply to this contention is that it is unnecessary to post the notice of location at the point of discovery or to mark the boundaries when a placer claim is located where the United States survey has been extended over the land embraced in the location. We are convinced that respondent's contention is correct. Civil Code, § 1426, provides that when a lode claim is located, notice of location shall be posted "at the point of discovery," and further that the notice shall show "the number of linear feet claimed in length along the course of the vein, each way from the point of discovery, with the width on each side of the center of the claim, and the general course of the vein or lode, as near as may be." United States Revised Statutes. § 2324 (30 USCA § 28), provides: "The location must be distinctly marked on the ground so that its boundaries can be readily traced." It is thus seen, as to a lode claim, all measurements start from the point of discovery and that there is a specific requirement to post the notice at the point of discovery. It is the starting point from which all measurements must be made. The boundaries of the claim must be marked. Civ. Code, § 1426a; U. S. Rev. St. § 2324 (30 USCA § 28).

A different procedure is provided for the location of placer mining claims. Section 1426c of the Civil Code provides in part: "The location of a placer claim shall be made in the following manner: By posting thereon * * * a notice of location. * * *" It will be noted that it does not require the notice to be posted at the point of discovery. The same Code section then provides: "* * * provided, that where the United States survey has been extended over the land embraced in the location, the claim may be taken by legal subdivisions and no other reference than those of said survey shall be required and the boundaries of a claim so located and described need not be staked or monumented. The description by legal subdivisions shall be deemed the equivalent of marking." United States Revised Statutes § 2329 (30 USCA § 35), contains a similar provision. It is thus seen that the purpose of distinctly marking the location is to provide a means of readily tracing the boundaries. However, the United States government, by its public survey, has already provided the markings by which the boundaries can be traced and no other monuments or markings can be used with which to trace the boundaries. Section 2329, Revised Statutes of the United States (30 USCA § 35), provides: "Where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands." The provisions of law above referred to would seem to make it clear that it is unnecessary to post the notice of location at the point of discovery or to mark the exterior boundaries when a placer claim is located where the United States survey has been extended over the land embraced in the location. Our conclusions in this regard are supported by the case of Kern Oil Co. v. Crawford, 143 Cal.

298, 76 P. 1111, 3 L. R. A. (N. S.) 993. The evidence supports the finding of the trial court that a notice of location was posted on each of the Sheep Creek claims at the time of discovery.

[2, 3] Plaintiffs' next contention is that defendant or his predecessors forfeited any rights they may have had for failing to perform the annual assessment work in 1916. A copy of the affidavit of proof of annual labor, duly certified by the county recorder, was put in evidence, which is sufficient to sustain the finding of the trial court that the annual assessment work for the year 1916 was done on said claims in the time and manner and to the extent required by law (Civ. Code, § 1426m). The trial court could have rested its finding that the annual labor for 1916 was done on the oral testimony in the record without considering the affidavit of proof of annual labor. Musser v. Fitting, 26 Cal. App. 746, 148 P. 536. This observation is made for the reason that the affidavit was filed thirty-one days after the time limited for performing the labor or making the improvements. In any event, a forfeiture for failure to do the annual labor can only be claimed by one who makes a valid location on the claim before the resumption of labor. U. S. Rev. St. § 2324; Madison v. Octave Oil Co., 154 Cal. 768, on page 773, 99 P. 176. It is conceded that defendant performed the required annual labor since 1916, and plaintiffs did not initiate its location until 1930. Hence, plaintiffs could not claim any rights by reason of the alleged forfeiture for failure to do assessment work in 1916 if that fact be conceded.

[4-6] Appellants contend that the patent of the Jersey Bull claim of 1920, covering portions of Sheep Creek Claims Nos. 5 and 6, forfeited defendant's title to those portions of 5 and 6 not covered by the Jersey Bull patent, relying on the principle laid down in Gwillim v. Donnellan, 115 U. S. 45, 5 S. Ct. 1110, 29 L. Ed. 348, to the effect that where a locator permits another to obtain a patent to a portion of the claim which he has located, on which portion is located the discovery shaft, he thereby loses title to his entire claim. It is undoubtedly true that if the places of discovery of minerals in the original claims 5 and 6 were within the limits of the Jersey Bull patent, that they would forfeit title to all of said claims of which the Jersey Bull patent formed a part. However, the trial court found that defendant was the owner of the portions of Sheep Creek Claims 5 and 6 not embraced within the limits of the Jersey Bull patent, which is an implied finding that the points of discovery were each outside of the limits of the Jersey Bull patent. We think such a finding is justified from the evidence of Frank T. Roberts, United States deputy mineral surveyor, who testified: "While upon this property I caused to be made open cuts upon all of the claims excepting No. 10, for the purpose of determining that there was a continuous body of limestone up through claims No. 9, 8, 7, 5 and 6, which said claims could be reached by working through claim No. 10." As before stated, there is no evidence in the record that the points of discovery of the Sheep Creek Claims 5 and 6 were embraced within the limits of the Jersey Bull patent. The theory on which defendant would lose title to all of Sheep Creek Claims 5 and 6, by virtue of allowing a patent to issue to a stranger on a part thereof, is that they were abandoned. "Abandonment" is a voluntary act which must be proven by competent evidence before the fact can be found to exist (Lakin v. Sierra Buttes Gold Mining Co. [C. C.] 25 F. 337), and the burden to prove abandonment is upon him asserting it. Gear v. Ford, 4 Cal. App. 556, 88 P. 600. Applying these principles, the trial court was fully justified in finding that defendant had title to those portions of Sheep Creek Claims 5 and 6 not covered by the Jersey Bull patent.

The other points urged by appellants do not impress us as of sufficient importance to merit discussion and an examination of the entire record convinces us that the trial court made a proper disposition of the case.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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133 Cal.App. 348

## BENDER et al. v. LAMB.

Civ. 677.

District Court of Appeal, Fourth District, California.

July 18, 1933.

Rehearing Denied Aug 14, 1933.

Hearing Denied by Supreme Court Sept. 15, 1933.

**1. Mines and minerals ⚷19(1), 20(3).**

So long as necessary work was performed on placer claims, locator was not obliged to keep monuments in place and location notices posted where they were not obliterated or destroyed by his fault.

**2. Mines and minerals ⚷22.**

Recorded notices of location of placer claims gave constructive notice of locator's possession and of boundaries.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by John O. Bender and others against Theodore P. Lamb. From a judgment for defendant, plaintiffs appeal.

Affirmed.

John O. Bender, John F. Bender, and Robert E. Rosskopf, all of Los Angeles, for appellants.

C. S. Price and Preston D. Richards, both of Los Angeles, for respondent.

TURRENTINE, Justice pro tem.

This is a companion case to Pidgeon v. Lamb, 24 P.(2d) 206, this day decided, and the facts are very similar. Plaintiffs sued defendant to quiet title to certain mining claims. Defendant denies plaintiffs' title and asserts title in himself and the trial court gave judgment quieting title to the claims in defendant. Plaintiffs appeal.

In 1911 defendant's predecessors located Sheep Creek Claims 1 to 10, inclusive, as placer mining claims where the United States survey had been extended over the land embraced in the locations by the legal subdivisions thereof. In 1929, plaintiffs located placer mining claims on Sheep Creek Claims 3 and 4. Plaintiffs claim that their junior location is paramount, asserting that defendant's location was never lawfully made because the location notice was not posted at the point of discovery and that the boundaries were not marked upon the land. We have this day decided this question adversely to the claim of appellants in the case of Pidgeon v. Lamb (Cal. App.) 24 P.(2d) 206. The transcript does not purport to contain all the evidence or record of proceedings in the trial.

[1, 2] Appellants urge that defendant has lost title to his mining claims by estoppel, fraud, laches, and negligence for the reason that he did not preserve and restore monuments, keep the boundaries well marked, and that he did not notify plaintiffs of his claim. He was under no duty to keep the monuments in place and location notices posted so long as they were not obliterated or destroyed by his fault while he continued to perform the necessary work upon the claims. Jupiter v. Bodie, etc., 11 F. 666 (C. C. Cal.). It is conceded that the necessary work was done upon the claims and there is no evidence that any monuments or notices were destroyed or obliterated through the fault of defendant. The recorded notices of location gave constructive notice of defendant's possession and of the boundaries. We feel that such contentions on the part of appellants are without merit.

Plaintiffs and appellants stipulated that they would not claim that the evidence is insufficient to support finding 4, which reads as follows: "That on and since the 25th day of March, 1911, the said defendant Theodore P. Lamb, with his predecessors and grantors, was ever since, has been and now is the owner (subject only to the paramount title of the United States) and in possession and entitled to the possession by virtue of a discovery of mineral thereon and a valid location thereof according to law made on or about the 25th day of March, 1911, and of performing during each and every year since said time not less than one hundred dollars ($100.00) worth of labor and improvements on each of said mining claims, which said work tended to develop each of said claims and have been in the exclusive and uninterrupted possession of said mining claims ever since the location of the same, and now is in actual possession."

We are therefore satisfied that the judgment of the trial court is correct and that all matters were properly disposed of by the trial court.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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133 Cal.App. 413

## WAGY v. BRAVE.

## HESS v. SAME.

Civ. 7946, 7947.

District Court of Appeal, Second District, Division 2, California.

July 24, 1933.

**1. Automobiles 🔑245(72).**

Evidence as to pedestrians' contributory negligence when struck by automobile *held* for jury, notwithstanding motorist's alleged violation of speed ordinance.

**2. Appeal and error 🔑1056(1).**

Exclusion of questions whether motorist fled from scene of accident to pedestrians *held* not prejudicial.

**3. Appeal and error 🔑1056(1).**

Exclusion of question whether speed of 15 to 20 miles per hour previously testified to by motorist was maintained by him up to instant of collision with pedestrians *held* not prejudicial.

**4. Appeal and error 🔑1064(1).**

Instruction *held* not prejudicial as imposing on pedestrians injured by automobile while crossing street burden of proving freedom from contributory negligence.

Jury were instructed that to find for plaintiffs they must not only find from a

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

preponderance of the evidence that defendant was negligent, but also that such negligence was the proximate cause of the injuries to plaintiffs, and must further find that the evidence failed to show by a preponderance thereof that plaintiffs were guilty of negligence, however slight, contributing proximately thereto, and that otherwise their verdict must be for defendant.

**5. Appeal and error ⚷1064(1).**

Mere multiplicity of instructions on contributory negligence of pedestrians injured by automobile while crossing street *held* not prejudicial, where they were correct in form and substance.

Appeals from Superior Court, Los Angeles County; Walter Guerin, Judge.

Separate actions by Wallace P. Wagy and Florence Hess against Louis B. Brave, which were tried together. From judgments for defendant, plaintiffs appeal.

Affirmed.

Culbert L. Olson and Henry L. Knoop, both of Los Angeles, for appellant Wallace P. Wagy.

Earl E. Howard and Albert J. Sherer, both of Los Angeles, for appellant Florence Hess.

Joe Crider, Jr., of Los Angeles, for respondent.

CRAIG, Justice.

Two causes emanating from the same transaction and asserted against the same defendant were tried together before the superior court sitting with a jury, verdicts and judgments in favor of said defendant were rendered, and the plaintiffs appealed upon a single transcript.

While crossing in a northerly direction an easterly and westerly thoroughfare, at an intersection, the plaintiffs were struck by a westbound automobile which was under the management and control of the respondent. The complaints alleged that the defendant carelessly, negligently, and unlawfully drove and operated his said automobile in excess of fifteen miles per hour, toward the south side of said thoroughfare, across the intersection and crosswalk in which the plaintiffs were walking, and in violation of certain pleaded municipal ordinances, without due regard to the traffic, surface or width of said street. The plaintiffs, walking together, were preceded by two friends who first saw the approaching vehicle and hastened toward the northerly curbing, but admitted at the trial that they did not look backward. The plaintiff Hess at first testified that she saw the automobile about one-half block toward the eastward, but thereafter stated that she was on the left side of plaintiff Wagy, and that her view was obstructed. To the following questions the latter testified:

"Q. I understand you got past the center line of the street, got north of it at the time you were struck? A. Yes.

"Q. You got north of it before you looked to your right, didn't you? A. Yes.

"Q. Now, the next time you looked towards the right was when you were north of the center line of the street, wasn't it? A. Yes"

One of the witnesses first mentioned testified:

"I don't know, because I was looking the other way, whether it swerved any or whether it went straight ahead.

"Q. You don't know whether it swerved one way or the other? A. No."

Miss Hess swore on cross-examination that she did not see the machine at any time before she was struck. The defendant testified that the accident occurred at about 12:30 or 1 o'clock a. m.; that some of the street lights were out, but that the top globe of a cluster was lighted; that as he was proceeding at a speed between 15 and 20 miles per hour he saw two people running across the street at an angle, "then I saw some more, and then I put my brakes on," "I know they were not in the crosswalk."

[1-3] The first ground assigned for reversal urges negligence per se on the part of the respondent in driving more than 15 miles per hour, and attempts to refute any contention that the appellants were guilty of contributory negligence. But the appellants correctly state that under all of the facts presented and circumstances disclosed this latter question remained for the jury to determine. Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125; Davis v. Breuner Co., 167 Cal. 683, 140 P. 586, 587. "It is the duty of a foot passenger to look both ways before starting to cross a street, particularly when, as in this instance, the street over which he intends to pass is a busy thoroughfare in the heart of the business district of a great city. * * * The mere fact that defendant Hollenbeck was violating an ordinance and was therefore, as matter of law, guilty of negligence did not preclude the court from finding that the plaintiff's negligence was the efficient and proximate cause of the injuries suffered by him." Davis v. Breuner Co., supra. It is also insisted that objections to certain questions as to whether the defendant did not in fact flee from the scene were erroneously sustained. Prejudice from such rulings may only be inferred, and is not claimed, nor does the record warrant such inference. The defendant testified positively: "I stopped my automobile * * *

right next to him. * * * I picked the man up and the lady. * * * Helped Mr. Wagy." Having previously testified that he was driving at 12:30 or 1 o'clock at about fifteen or twenty miles per hour, objection was sustained to the question, "Was that your speed all the way?" It is contended that testimony by one of the plaintiffs that the car was traveling between 35 and 45 miles per hour at the time of the impact rendered this evidence admissible as to its speed upon entering the crosswalk. "The question of the remoteness of evidence which is offered with relation to the actions and conduct of a party, particularly as to the rate of speed and method of driving an automobile just before a collision occurs, is one which rests so largely within the discretion of the trial court that no positive rule upon the subject can be laid down, and for that reason the ruling of the trial judge as to the admission or rejection of that sort of evidence will not be disturbed except upon a clear showing of an abuse of such discretion." Traynor v. McGilvray, 54 Cal. App. 31, 200 P. 1056, 1057. The rule was likewise stated in Ritchey v. Watson, 204 Cal. 387, 268 P. 345.

[4] It is objected that an instruction given to the jury at the defendant's request constituted prejudicial error, in that it must be implied therefrom that the burden of proof rests with the plaintiff in such cases to establish a want of contributory negligence. The plaintiff Wagy had testified that he had passed the center line of the thoroughfare to the north before looking to the right, when he was injured. His coplaintiff also testified that she "didn't look because he was there to look." The jury were instructed in part as follows: "In order to find a verdict for the plaintiffs you must not only find from a preponderance of the evidence that the defendant was negligent, but also that such negligence was the proximate cause of the injuries to plaintiffs, and you must further find that the evidence fails to show by a preponderance thereof that plaintiffs were guilty of negligence, however slight, contributing proximately thereto, otherwise your verdict must be for the defendant." While it is the rule that one who without negligence on his part is suddenly confronted with immediate danger is required to act only as a reasonably prudent person would act under the same circumstances, it can be invoked only by those whose position of peril is not caused by their own want of due care. Where there is some evidence from which the jury may reasonably deem their perilous position due to their want of the exercise of due care, such question should not be omitted from the instruction. Brooks v. City of Monterey, 106 Cal. App. 649, 290 P. 540. It cannot be said that the charge required evidence on behalf of the plaintiffs, but rather that it properly required an absence of proof to the contrary. If the jury did conclude that a failure of the plaintiffs to look toward the approaching car amounted to the proximate negligent cause of their injuries, it may not be said upon appeal that it was error to consider such evidence.

[5] Error asserted on account of a multiplicity of instructions upon the question of contributory negligence and the repetition or similarity of certain expressions used therein, though criticized, is not held a ground for reversal in authorities cited by the appellants or by others examined. No objection is made to their form or substance, and in such case the error, if any there be, is not sufficient to cause a disturbance of the judgments. Ritchey v. Watson, 204 Cal. 387, 268 P. 345; Metcalfe v. Pacific Electric Railroad Co., 63 Cal. App. 331, 218 P. 486.

There being no appeal from an order denying a new trial, the appeal from said order in civil case No. 7946 is dismissed. The judgments are affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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133 Cal.App. 72

## CHAPMAN v. EDWARDS et al.

Civ. 7797.

District Court of Appeal, Second District, Division 2, California.

June 28, 1933.

Rehearing Denied July 25, 1933.

Hearing Denied by Supreme Court Aug. 25, 1933.

**1. Master and servant** ⚿318(1).

"Independent contractor" is one who, exercising independent employment, contracts to do piece of work according to his own methods and without being subject to control of employer except as to result of work.

[Ed. Note.—For other definitions of "Independent Contractor," see Words & Phrases.]

**2. Contracts** ⚿1.

"Contractor" is one party to contract, or one who has contracted to do or perform certain work.

[Ed. Note.—For other definitions of "Contractor," see Words & Phrases.]

**3. Master and servant** ⚿318(1).

Test in determining whether person employed to do work is independent contractor or mere servant is control over work reserved by employer.

**4. Appeal and error ⇨842(9).**

Whether relation of employer and employee existed under contract as respected liability of employer for injury to third person *held* mixed question of law and fact to be determined in lower court.

Record disclosed that employment was pursuant to telephone conversation with office girl of employer, telling employee that he could go to work and drive truck and that work consisted of hauling dirt from excavation being done by means of shovel, steam or gas, which lifted dirt and dropped same into truck; compensation being certain amount per truck load.

**5. Master and servant ⇨332(1).**

Only where evidence is reasonably susceptible of but single inference does question of whether one is employee or independent contractor become one of law for court.

**6. Appeal and error ⇨1010(1).**

Finding of lower court is binding on appellate court, provided there is any competent evidence to support finding.

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Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Paul F. Chapman, administrator of the estate of Charles Jesse Chapman, deceased, against L. E. Edwards and another, copartners doing business under the fictitious name and style of Edwards Bros., and others. Judgment for plaintiff, and defendants named appeal.

Affirmed.

George L. Greer, of Los Angeles, for appellants.

Mulroney, Murphy & Doherty, of Los Angeles, for respondent.

PARKER, Justice pro tem.

This was an action to recover damages as a result of the death of one Charles Jesse Chapman. The action was against L. E. Edwards and C. A. Edwards as copartners doing business under the firm name and style of Edwards Bros. and against one John Klein as an individual. The cause of action was based upon the theory that the death of Chapman was caused by the negligence of the defendants. This brief statement will suffice as a general statement, inasmuch as the sole point to be considered does not require further detail.

After trial by jury, a verdict was returned in favor of plaintiff and against all defendants in the sum of $15,000. A new trial having been denied, judgment followed pursuant to the verdict. Defendants Edwards, who will hereinafter be referred to as Edwards Bros., or Brothers, appeal. No question is presented on the question of the negligence of defendant Klein, nor is there any point made as to the amount of damages awarded. It is not contended that the court erred in any respect, whether in rulings on the admission of evidence or in instructing the jury. It is apparently conceded that defendant Klein was guilty of negligence proximately causing the death of Chapman. The sole point urged is that Edwards Brothers are in no wise responsible for the negligence of Klein for the urged reason that at all of the times surrounding the happening of the unfortunate event Klein was an independent contractor. We may here narrate the facts as to the relationship of Klein and Edwards Brothers. The last named were contractors engaged under contract to do the excavating preparatory to the construction of a large building in the city of Los Angeles. The excavating contract involved the performance of much work and labor, calling for the use of much equipment and many men and trucks. Klein, as far as the record indicates, was an individual owning a truck. We phrase thusly to negative the idea that Klein was engaged in the trucking business, with men and equipment. As far as indicated, Klein owned a truck and obtained employment for himself and this one truck whenever and wherever work was available. After Edwards Bros. entered upon the excavation, it became desirable to move the dirt faster. Thereupon the office girl of Edwards Bros. telephoned to Klein and inquired if he was then working. When informed that he was not working, she told him he could go to work on the job of Edwards Bros. That was all of the conversation, and forms the basis of the arrangement between Edwards Bros. and Klein. The girl had authority to thus phone Klein, but had no authority further than to tell him to report for work. The excavation was being done by means of a shovel, steam or gas, which lifted the dirt and dropped the same into trucks, which trucks thereafter removed the dirt from the premises. Accordingly, Klein reported with his truck. He had worked for or been engaged by Edwards Bros. before, and, being familiar with the work, required no general instructions. He just pulled his truck in under the shovel, obtained his load, and drove away. The foreman told him his compensation would be $1.75 per load. Within a few days thereafter Edwards Bros. voluntarily and arbitrarily raised the price per load to $2. The reason given for the raising of the price per load appears as follows: "If I remember rightly we could see that they were not going to make their wages; and so, rather than have them dissatisfied, I think, we raised it to $2.00." As stated, there were a number of trucks used on the job. All but one or two, out of a possible dozen, were operated by Edwards Bros. Klein reported for work at the same time as the other trucks each day and all trucking ceased when the shovel stopped; the obvious reason for this being that, when the shovel was idle, there was no dirt to haul. The shovel and its operation was under the control of Edwards Bros., whose foreman directed its movements as far as placement was concerned. The one person on the job who directed the work of the trucks was a foreman called Adolph. It was stipulated that Adolph was in charge; that he directed where he wanted the steam shovel to work and moved it from place to place and directed the trucks to come under it when they were ready to load—in other words, the trucks were acting, in the loading, under his direction. Adolph had control over all of the trucks, hired, rented, or owned, to the extent of telling them when he wanted to have them loaded. He would tell them to get in their place; but most of the time they just ran automatically. As the testimony went, "they had sense enough to see for themselves what to do." Adolph, the foreman, would always tell Klein when it was his last load at night. Klein was paid each month for his work, computed according to the loads hauled. According to the testimony of Edwards, he was hired for the job, if he wanted it; it was up to himself whether he wanted to stay or not—that is, his truck was hired.

There is no further need of detailing the situation. In the discussion of appellants' claim there may be from time to time statements of fact which will, in each instance, be deemed to reflect the record, unless otherwise noted.

[1-3] An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work. 14 R. C. L. p. 67. Like many other definitions, this statement serves as a generality. However, as a working definition, this has been generally accepted, with occasional additions. The books abound in applications of the term, and it will be found that, as in many other instances, the question whether or not one is an independent contractor is to be determined largely from the facts of the particular case under observation. Throughout the body of the law we find a careful selection of words in describing a situation. Rarely, if ever, do we find words used which do not upon first contact reveal the general idea sought to be conveyed. And so here. The term "independent" is descriptive of a contractor. A contractor, obviously, is one party to a contract or one who has contracted to do or perform certain work. And it becomes perhaps a commonplace to assume that every contract contains within itself everything that is to be done or performed by each party thereto and the consideration underlying or supporting the obligation. And so, at the outset, where it is claimed that a party was an independent contractor, we may first inquire the nature of the contract or whether there was any contract. Turning then to the instant case, we inquire as to Klein's contract. He had no written contract and there is in the record nothing to indicate the terms, if any, upon which he undertook the work. The job was one entire job, not subdivided into definite or any portions; it consisted of one entire excavation of defined area. Every one employed in the said excavation worked together to a common end. There were no means of distinguishing the work of a hired truck or an owned truck. There was no definite scale of compensation. And all of the work was to be done upon the premises of the employer, or the premises occupied by the employer in the discharge of the main contract of excavation. There was no work that Klein could do independent of the employer, inasmuch as, the latter being in exclusive control and management of the shovel, there would be no dirt to remove until the shovel furnished the load. There was no discretion vested in Klein other than to get under the shovel in his turn with the other trucks of the employer and get his load. There was no obligation upon him to take any dirt, nor was there any liability imposed upon or assumed by him if he chose not to haul. Likewise there was no obligation upon Edwards Bros. to furnish sufficient dirt to load the truck, nor was there any obligation on Edwards Bros. to continue the employment for any period. It seems generally conceded that a test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. The power of the employer to terminate the employment at any time is a strong circumstance tending to show the subserviency of the employee, since it is incompatible with the full control of the work usually enjoyed by an independent contractor. Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so. Press Publishing Co. v. Industrial Accident Commission, 190 Cal. 114, 210 P. 820.

[4-6] The real test by which to determine whether a person is acting as the servant of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control and was liable to be discharged for disobedience or misconduct. Western Metal Supply Co. v. Pillsbury, 172 Cal. 407–417, 156 P. 491, Ann. Cas. 1917E, 390. Other factors which

may be considered are the hours of labor, terms of compensation, place where work is done, and manner and nature of work to be performed. These factors are discussed in an exhaustive note in 75 A. L. R. 725, to which reference is made. In the case before us the hours of labor for Klein were exactly those of the admitted employees and servants. He could work at no other time. His compensation was arbitrarily fixed by the employer for the purpose, as stated by the employer, of assuring him a fair wage. All of the work was done upon the premises under the control of his employer. Whatever argument may be made, we must eventually come back to one undenied and undeniable fact that the entire work in hand was the excavation of the lot upon which a building was to be erected. Some person must have been in control of this work as an entirety. It would seem absurd to hold that Edwards Bros. were in control of the work in as far as affected all of the trucks and men except Klein and his truck. The method and manner of removing the dirt was one entire plan. Klein had no right to remove the dirt from the truck in his own way. He had to await his turn. As an example, at or about the exact time of the accident it was Klein's desire to load up before lunch and get out. His orders from the foreman were to wait and get his load after lunch for the reason that the shovel was to be moved. We fail to find one independent act that Klein could perform upon the premises. The record does not disclose where, at any time while on the premises, Klein was beyond the immediate control of Edwards Bros. Where some fifteen trucks and drivers are engaged in the same labor to a common purpose and working together at all times it would tend to disorganization rather than toward system to deem that one was an independent contractor merely because he owned the truck he drove. If this particular one were independent, there surely must be some way through which he could manifest his independence. After all, a truck remains but an appliance, regardless of its size, a super wheelbarrow as it were. If a person should furnish his own wheelbarrow and go down into a pit to work, with a compensation based upon what the boss thought would allow him fair wages, it would seem a far stretch of principle to accord to his employment the dignity of an independent contractor. Hillen v. Industrial Accident Commission, 199 Cal. 577, 250 P. 570, affords an illustration of the principle. The case involved a shingler whose employment was to lay shingles under a mutual understanding that when he came on the job it would be $1.25 per thousand, and there was nothing further said about the agreement to shingle and when each job was done the bill would be made per thousand and after the bill was approved it would be paid. Everything was used in the actual shingling, namely hatchet, snips, and apron. Further, when necessity required, the shingler hired other men to assist him, none of whom were carried upon the employer's pay roll. There was no specified period of labor per day. The shingler was held to be an employee rather than an independent contractor. We note again this significant language: "Coincident with the right of control is the right of either employer or employee to terminate the relation without liability. This is but another way of stating the rule, for the right to immediately discharge involves the right of control." See, also, Eng-Skell Co. v. Industrial Accident Commission, 44 Cal. App. 210, 186 P. 163. Without further discussion, we may conclude by stating that it must be conceded that appellants' strongest showing is met with a showing by respondent which leaves the question debatable. In other words, conceding that there may be certain features of the employment from which an inference supporting the relationship of an independent contractor may be drawn, yet it is equally true that there are present many facts and circumstances from which it might be reasonably inferred that the relationship was that of master and servant. It is only where the evidence is reasonably susceptible of but a single inference that the question of whether one is an employee or an independent contractor becomes one of law for the court. Nelson v. Stukey, 89 Mont. 277, 300 P. 287, 78 A. L. R. p. 491, with cases therein cited. Whether or not the relation of employer and employee exists under the contract in this case is a mixed question of law and fact to be determined in the court below like any other question, and the finding in the court below is binding upon this court, provided there be any competent evidence to support the finding. Hillen v. Industrial Accident Commission, 199 Cal. 580, 250 P. 570; Johnson v. Department of Industrial Relations, 101 Cal. App. 1, 281 P. 440; May v. Farrell, 94 Cal. App. 703, 271 P. 789; Western Pac. R. Co. v. Industrial Accident Commission, 193 Cal. 413, 224 P. 754; Case of Murray, 130 Me. 181, 154 A. 352, 75 A. L. R. 720 (with annotation), and Lowmiller v. Monroe, Lyon & Miller, Inc., 101 Cal. App. 147, at page 150, 281 P. 433, 282 P. 537.

The jury was fully and correctly instructed as to the law and its application to the facts of the case, with particular reference to the question of independent contractors and employees. Not a suggestion of criticism is presented as to these instructions. We think it was correctly determined that the relationship of employer and employee existed between Klein and Edwards Bros. at the time of the accident.

The judgment is affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

133 Cal.App. 374

## IRVING v. IRWIN.

Civ. 1041.

District Court of Appeal, Fourth District, California.

July 20, 1933.

**1. Guaranty 🔑16(1).**

Written guaranty to hold bondholder harmless from loss on bonds, executed in consideration of bondholder's deposit of corporate bonds with guarantor, *held* supported by consideration where bondholder would have received specified cash proceeds from foreclosure sale if she had kept bonds (Civ. Code, § 1605).

> "Detriment" as respects consideration means giving up something which the promisee had a right to keep, or doing something which he had a right not to do, and "benefit" means the receiving as the exchange for his promise of something which the promisor was not previously entitled to receive.
>
> [Ed. Note.—For other definitions of "Benefit" and "Detriment," see Words & Phrases.]

**2. Guaranty 🔑34.**

Whether written guaranty to hold bondholder harmless from loss on bonds deposited with guarantor was absolute or guaranty of collectibility *held* immaterial as regards guarantor's liability, where principal debtor failed to pay debt when due and bondholder used reasonable diligence to collect debt (Civ. Code, § 2800).

**3. Guaranty 🔑70.**

Finding in action on guaranty, that bondholder depositing bonds under contract guaranteeing against loss used reasonable diligence to collect from principal debtor *held* sustained by stipulation that principal debtor was insolvent prior to its default on bonds and that action against makers thereof, other than foreclosure, would have been of no avail (Civ. Code, § 2801).

**4. Guaranty 🔑77(2).**

Bondholder depositing bonds under guaranty contract to hold bondholder harmless from loss thereon need not take action against principal debtor before taking action against guarantor, where debt could not have been collected (Civ. Code, §§ 2800, 2801).

**5. Guaranty 🔑77(1).**

Assignee of bondholder depositing bonds with guarantor guaranteeing against loss need not sue guarantor to secure corporate stock which guarantor secured for bonds before bringing suit on guaranty contract, where principal debtor on bonds was insolvent and guarantor converted bonds to his own use (Civ. Code, §§ 2800, 2801).

**6. Guaranty 🔑77(1).**

Bondholder's assignee suing on contract guaranteeing against loss on corporation bonds bondholder deposited with guarantor, and which guarantor exchanged for stock in new corporation, *held* not required to resort to property of new corporation.

**7. Guaranty 🔑81.**

Action on contract guaranteeing against loss on bonds deposited with guarantor *held* not prematurely brought, where principal debtor was insolvent before default on bonds, and action against makers, other than foreclosure, would have been of no avail (Civ. Code, §§ 2800, 2801).

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Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by M. J. Irving against I. I. Irwin, also known as Isaac Irwin, also known as Isaac I. Irwin. From a judgment for plaintiff, defendant appeals.

Affirmed.

Ray M. Harris, of San Diego, for appellant.

Gray, Cary, Ames & Driscoll, of San Diego, for respondent.

TURRENTINE, Justice pro tem.

For many years I. I. Irwin, the defendant, was in the banking business in San Diego, and since 1915 had been the confidential advisor of Mrs. Maria L. Connell in all her business transactions. During the year 1925 Mrs. Connell purchased from defendant certain bearer bonds of the Utah-Nevada Land & Livestock Company, a corporation, paying therefor the par value of $5,000, plus accrued interest. The payment of the bonds was secured by a mortgage or trust deed upon certain ranch property in Utah and Nevada. Prior to July 14, 1927, default in the payment of the interest on the bonds was made. Subsequent to the default the defendant, together with other bondholders, organized the United Securities Corporation for the purpose of buying the assets of the Utah-Nevada Land & Livestock Company at a proposed foreclosure sale. Defendant called Mrs. Connell by telephone a few days prior to the 14th day of July, 1927, and asked her to call at his bank. She went to the bank that same day where he requested her to deliver her bonds to him, orally agreeing to "guarantee" that she would lose neither principal nor interest thereon. She delivered the bonds pursuant to this request. On July 14, 1927, Mrs. Connell called on defendant and requested a writing embodying the agreement. At this second visit, and pursuant to this request, defendant executed and delivered to Mrs. Connell the following document:

"California Savings & Commercial Bank of San Diego

"San Diego, California, July 14, 1927. Received from Mrs. Maria L. Connell for deposit in foreclosure: Five Thousand Dollars par value 7% Utah-Nevada Land & Livestock Co., due 1936. And I guarantee to hold said Maria L. Connell harmless from any loss of principal and interest accrued. I. I. Irwin."

On conflicting evidence the trial court found, and was justified in finding, that defendant at no time informed Mrs. Connell of what he proposed to do with her bonds; of the default in the payment of interest; or of the organization of the United Securities Corporation.

Early in July, 1927, the mortgage or trust deed securing the payment of the bonds was foreclosed, and the assets of the Utah-Nevada Land & Livestock Company were purchased at the foreclosure sale by the United Securities Corporation. Payment therefor was made with the bonds delivered to the bondholders' committee, including Mrs. Connell's bonds, which had been delivered to the committee by defendant. The capital stock of the United Securities Corporation was then issued to the members of the pool in the proportion which the bonds furnished by them bore to the total used at the foreclosure sale. A certificate for 2,725 shares of this capital stock was issued to defendant; Mrs. Connell's bonds being included in the computation fixing this number of shares. In December, 1927, and semiannually thereafter, to and including June, 1930, defendant, from his personal funds, paid to Mrs. Connell the interest on her bonds at the rate therein provided.

On conflicting evidence, the trial court found, and was justified in finding, that Mrs. Connell was not informed of the foreclosure; of what use was made of her bonds; of the issuance of the stock to defendant; or even of the existence of the United Securities Corporation.

On or about the 25th day of July, 1930, defendant assigned the 2,725 shares of the capital stock of the United Securities Corporation, together with his other assets, to one Howard Throckmorton, as trustee for the benefit of his creditors. On November 20, 1930, Mrs. Connell assigned to plaintiff herein, for the purpose of collection, her cause of action against defendant. The present action was instituted on November 24, 1930.

The sale price under the foreclosure proceedings adverted to was such that, if Mrs. Connell had not turned in her bonds to be used in such foreclosure matter, she would have received $1,690. At the time this suit was instituted, the total net market value of the assets of the United Securities Corporation was such that, had Mrs. Connell received stock for her bonds in the regular ratio in which the stock was issued, it would have amounted to $2,800, based on the total net value of the assets of the corporation.

It was stipulated that, prior to the date of the delivery of the bonds by Maria L. Connell to defendant, the Utah-Nevada Land & Livestock Company defaulted in the payment of the bonds and the interest thereon, and became and was insolvent from that date on, and that legal action against the company other than the foreclosure proceedings referred to would have been of no avail. There was no evidence that the stock of the United Securities Corporation ever had a market, or a market value, although it was not a closed corporation. From these facts the trial court entered its judgment for plaintiff for $5,000, together with interest from June 14, 1930.

Defendant appeals, and states the questions involved as follows: "1. That there is no consideration for the guaranty which is the basis of plaintiff's action. 2. That the guaranty sued on is not an unconditional guaranty but only a guaranty of collectibility. 3. That the action was prematurely brought. 4. That a number of the findings of the trial court are not supported by substantial evidence; that a number of the findings of the trial court are not supported by any evidence; that a number of the findings of the trial court are contrary to the evidence. 5. That plaintiff's amended complaint and amendment thereto do not state a cause of action."

[1] Defendant's contention that there is no consideration for the guaranty must fail. One reason is that, if Mrs. Connell had kept the bonds, she would have received about $1,690 cash from the foreclosure sale, whereas she has in fact received nothing except the agreement sued on. When she delivered the bonds to defendant, she parted with all dominion and control thereover, and accepted in lieu thereof the contract of defendant. Mrs. Connell, having given up a valuable right in exchange for defendant's promise, suffered detriment which constitutes consideration. Civ. Code, § 1605. Conversely, the defendant obtained the right to use the bonds in a manner which he had no right prior to the delivery to him. It was thus a benefit to him which constituted a sufficient consideration. Civ. Code, § 1605; Chrisman v. Southern California Edison Co., 83 Cal. App. 249-254, 256 P. 618. The rule is thus expressed in 1 Williston on Contracts, § 102a: "Detriment * * * means giving up something which the promisee had a right to keep, or doing something which he had a right not to do. Any benefit correspondingly must mean the receiving as the exchange for his

promise of something which the promisor was not previously entitled to receive. That the promisor desired it for his own advantage and had no previous right to it is enough to show that it was beneficial."

[2-4] Defendant contends that the contract is that of a guaranty of collectibility only, while plaintiff contends that it is one of absolute guaranty. Viewed as either the result is the same. If an absolute guaranty, the liability of the defendant was fixed by the failure of the principal debtor to pay when due. This was not done. If a guaranty of collectibility, the liability was incurred after the plaintiff used due and reasonable diligence to collect the debt from the principal debtor. Ohio Electric Car Co. v. Le Sage, 182 Cal. 450, 188 P. 982; Civ. Code, § 2800. The finding of the trial court that due and reasonable diligence was used by plaintiff is sustained by the stipulation that the principal debtor was insolvent prior to its default on the bonds and at all times thereafter and that any legal action against the makers thereof, other than the foreclosure, would have been of no avail. Defendant's contention that plaintiff was required to take action against the principal debtor is thus answered: "A guaranty, such as is mentioned in the last section [Civ. Code, § 2800], is not discharged by an omission to take proceedings upon the principal debt, or upon any collateral security for its payment, if no part of the debt could have been collected thereby." Civ. Code, § 2801.

[5] To defendant's contention that it was the duty of plaintiff to sue defendant to recover the stock received by him for the transfer of her bonds, we would say that the law only requires an exhaustion of remedies against the principal debtor. Civ. Code, §§ 2800, 2801, 2802; Pierce v. Merrill, 128 Cal. 464, 471, 61 P. 64, 79 Am. St. Rep. 56. In addition to receiving the stock, defendant converted the same, and plaintiff should not be required to pursue property which defendant has himself converted to his own use.

[6] Defendant urges that plaintiff was required to resort to the property of the United Securities Corporation. This she could not do, even were she the owner of stock in the corporation. "The stockholders of a corporation have no estate in the land or other property of the corporation, and the transfer by a stockholder of the stock owned by him does not transfer any of the property of the corporation, or affect any right or obligation of the corporation in reference to the property held by it." Bank of Visalia v. Smith, 146 Cal. 398, 403, 81 P. 542, 544. See, also, Sanchez v. East Contra Costa Irr. Co., 205 Cal. 515, 518, 271 P. 1060; 6a Cal. Jur. 748 et seq.

[7] It follows from what we have said that the action was not prematurely brought. A careful consideration of the entire transcript leaves no doubt in our minds that the amended complaint, and amendment to the amended complaint, state facts sufficient to constitute a cause of action, and that all material findings of facts challenged by defendant find abundant support in the evidence before the trial court.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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133 Cal.App. 354

## PEOPLE v. VAN EVERY.

**Cr. 2380.**

District Court of Appeal, Second District, Division 1, California.

July 19, 1933.

**1. Homicide ⚷257(8).**

Evidence that accused rained blows upon head of complaining witness with hammer sustained conviction for assault with "deadly weapon" with intent to commit murder.

Hammer is a "deadly weapon," which is one likely to produce death or great bodily injury.

[Ed. Note.—For other definitions of "Deadly Weapon," see Words & Phrases.]

**2. Criminal law ⚷878(4).**

Evidence authorized finding of assault with intent to murder by means of revolver after abandonment of alleged attempt at robbery, so that finding of not guilty on robbery charge was not a finding that accused did not assault complaining witness.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

John L. Van Every was convicted of assault with a deadly weapon with intent to commit murder, and he appeals.

Affirmed.

Crop & Crop and William Christensen, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone of Los Angeles, for the People.

DESMOND, Justice pro tem.

Defendant appeals from a judgment whereby he was found guilty of the crime of assault with a deadly weapon with intent to

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

commit murder. When arraigned, he had entered pleas of not guilty and not guilty by reason of insanity to that charge as also to another count in the information charging him with attempted robbery. The judge who tried the case without a jury found the defendant not guilty of attempted robbery, and largely upon that fact defendant bases his appeal, contending "that the finding by the trial court on count one of said information, charging the defendant with the crime of attempted robbery is in effect, in view of all the evidence, a finding that no assault was made by appellant upon the complaining witness." Appellant also contends that the evidence was insufficient as a matter of law to sustain the judgment of conviction which was entered, arguing that "in the crime of assault with intent to commit murder the guilty person must specifically contemplate the taking of life and commit the assault with such intent," citing the case of People v. Weston, 32 Cal. App. 571, 163 P. 691, to the effect that "if in truth he does not intend to kill he is not guilty of the crime of assault with intent to commit murder."

In the instant case the defendant had gone to the office of the complaining witness, a physician who had treated him some years previously, and against whom, according to the evidence, he held a grudge for the double reason that in the opinion of the defendant the doctor had overcharged him and also had made an erroneous diagnosis of his ailment, and in treating him had injected poison into his system. The defendant telephoned the doctor's office for an appointment, and, on being admitted from the waiting room to the physician's private office, pulled a revolver from his left-hand overcoat pocket, aimed it with his left hand at the doctor, saying, "Give me all you have;" then, as the doctor arose from his chair commanded him to get down on the floor. Instead, the doctor jumped through an open door into an adjoining treatment room. Defendant followed, and, as he came through the doorway, the doctor grappled with him trying to hold defendant's left arm, the one holding the gun, up in the air. The doctor testified that he noticed in the struggle that he was being hit on the back of the head; that "the pain was terrific and I bled profusely"; that the defendant "put his right arm up on his left hand, that I was holding up in the air and then two shots were fired." Finally the doctor knocked the defendant down, falling upon him, all the time holding the hand of the defendant that grasped the gun in position where it did not actually aim at the physician's body, although, when discharged, the bullets, according to the testimony, came as near to him as they possibly could and not hit him. Not until defendant was prone upon the floor with his pistol-bearing arm outstretched did the doctor succeed in taking that weapon from him. Shortly thereafter, while police officers were looking about the premises, the physician saw upon the floor of the treatment room, where he had suffered blows upon the back of his head while struggling with defendant, a hammer which he had never seen before; this hammer being wrapped "over the driving surface" with cloth. A Mr. Cochran, who was in the waiting room of the physician's office at the time this disturbance started, testified that he kicked open a door and saw the doctor and defendant scuffling on the floor; that the doctor was bleeding badly and had injuries on his head; that "there was so much blood on the head that I could not see the extent of the injuries." Introduced in evidence was a smock which the physician stated he was wearing at the time of his struggle with the defendant and which was stained with blood which, according to the doctor's testimony, came from the wounds upon his head. The doctor testified that he did not see a hammer in either of defendant's hands, but "from the violence of the concussion and the injury produced it would have to be something of an object of that description," and from the evidence it appears that in the early part of the altercation while the left hand of the defendant grasped the gun his right hand was free. Defendant took the witness stand, but gave no testimony about the hammer that was introduced in evidence. He did not disclaim ownership of it, but said that on December 11, 1932, the date of the offense charged, "I was not myself; I don't know just what I did."

[1, 2] Disregarding the revolver as a weapon, was there sufficient evidence before the court to justify a finding that the defendant rained blows upon the head of the physician with this hammer? We believe there was. Since a deadly weapon is one likely to produce death or great bodily injury (3 Cal. Jur. 206), it will not be contended seriously that in such a case as this a hammer is not within that class. This brings us to the question of intent. The Weston Case, supra, says: "What that intent was must be determined from all the circumstances—among them the character of the weapon and the consequences likely to follow the use made of the weapon." Applying this rule to the present case, if the learned trial judge ignored altogether the testimony directed toward proof of attempted robbery by means of a revolver and considered only what happened in the treatment room, he would have been warranted in finding that an assault with intent to murder had been committed with a deadly weapon, to wit, a hammer. Further, it may be said that in our opinion the court would have been justified in finding from the evidence that any attempt at robbery was concluded the instant the doctor jumped through the open door of the treatment room, and that thereafter the purpose of the defendant became one of assault

with intent to murder by means of a loaded revolver. Under this view of the case, we feel that it is unnecessary to give further consideration to the claim of appellant that the finding of not guilty on count 1 "is in effect a finding that no assault was made by the appellant upon the complaining witness."

Judgment affirmed.

We concur: CONREY, P. J.; YORK, J.

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133 Cal.App. 316

## PEOPLE ex rel. STRONG et al. v. CITY OF WHITTIER et al.

Civ. 8613.

District Court of Appeal, Second District, Division 2, California.

July 15, 1933.

Hearing Denied by Supreme Court Sept. 11, 1933.

**1. Municipal corporations 🔑34.**

Whole of proposed city addition, divided into seven parcels joined together, *held* single inhabited body of land, subject to annexation through one general election, though two parcels were uninhabited (St. 1913, p. 587).

**2. Municipal corporations 🔑33(9).**

Evidence that lines of city addition included property subject to uses inconsistent with urban development, excluded property on one side of included street, included only portion of orchard along street line, and passed between two houses served by same driveway, *held* immaterial on any issue except fraud in quo warranto proceeding to annul annexation (St. 1913, p. 587).

**3. Municipal corporations 🔑33(9).**

Evidence that annexation of territory to city was oppressive on some relators in quo warranto proceeding to annul it because of use of some land therein *held* incompetent and immaterial; subject-matter being legislative, not judicial (St. 1913, p. 587).

**4. Municipal corporations 🔑33(9).**

Evidence that former attempts to annex part of territory added to city failed, that annexation petition was drawn and filed by city officer living in addition, that lines thereof included property of those favoring annexation, and excluded lands of those opposed, and that relators in quo warranto proceeding to annul annexation were not informed of proceedings, *held* immaterial and incompetent on any issue except fraud (St. 1913, p. 587).

**5. Municipal corporations 🔑33(1).**

Drawing of lines of area annexed to city to include lands of persons favorable and exclude those of persons opposed to annexation and failure to inform objectors of proceedings *held* not to constitute fraud, though line deviated from boundary of fairly symmetrical area to include city pumping plant and workers (St. 1913, p. 587).

**6. Municipal corporations 🔑34.**

Annexation of territory to city *held* not invalid because council determined certain facts without taking evidence, where determination thereof was left exclusively with council by law (St. 1913, p. 587).

**7. Municipal corporations 🔑34.**

Inducement paragraphs in city ordinance calling annexation election *held* sufficient to show that council took evidence as to jurisdictional requirements (St. 1913, p. 587).

Inducement paragraphs of ordinance referred to reception of petition by council, and stated that petition described territory annexed as single body of land contiguous to city was signed by not less than fourth of qualified electors residing in such territory, and showed that territory formed no part of any other municipal corporation and was inhabited.

**8. Evidence 🔑83(2).**

Court cannot assume that city council found jurisdictional facts in proceeding for annexation of territory to city without evidentiary basis; presumption being that officials performed duties in accordance with legal requirements (St. 1913, p. 587).

**9. Municipal corporations 🔑33(10).**

Whether city councilmen knew territory annexed to city or viewed it between filing of annexation petition and passage of ordinance calling election cannot be considered on collateral attack in quo warranto proceeding to annul annexation (St. 1913, p. 587).

**10. Quo warranto 🔑1.**

Quo warranto lies only to right existing wrong, not to try moot questions.

**11. Quo warranto 🔑49.**

Complaint in quo warranto to annul annexation of territory to city should allege that jurisdictional facts, alleged to have been determined by city council without taking evidence, did not exist to present issue as to council's fact findings (St. 1913, p. 587).

**12. Municipal corporations 🔑33(5).**

Petition for annexation of territory to city need not be dated (St. 1913, p. 587).

**13. Municipal corporations 🔑33(5).**

Failure to affix dates after names of signers of petition for annexation of territory to city does not affect validity of petition (St. 1913, p. 587).

**14. Municipal corporations 🔑33(10).**

Motive of petitioners for annexation of territory to city in fixing boundary line of one parcel one foot beyond ownership property line or their intention to fix it on latter line cannot be considered after completion of proceedings (St. 1913, p. 587).

**15. Municipal corporations ⚿34.**

Publication of notice of election to annex territory to city, with reference to city's existing indebtedness, payable by levy of taxes over whole territory after annexation, for four weeks before hearing, *held* sufficient (Const. art. 11, § 8½; St. 1913, p. 587).

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Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Quo warranto proceeding by the People, on the relation of Harriet R. Strong and others, executors of the last will and testament of H. W. R. Strong, deceased, and another, against the City of Whittier and others. From a judgment declaring annexation of certain territory to the City of Whittier invalid, defendants appeal.

Reversed, with directions.

Arthur G. Wray, of Whittier, Hill, Morgan & Bledsoe, Vincent Morgan, and Kenneth K. Wright, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and Kemp, Partridge & Kemp, of Los Angeles, for respondents.

STEPHENS, Justice.

This is an appeal from a judgment in quo warranto, declaring invalid an attempted annexation of certain territory in the city of Whittier, Los Angeles county.

There are three separate acts prescribing the procedure for the annexation of territory to an existing city. These acts are the same basically. The act of 1889 (Stats. 1889, p. 358) provides for annexation of inhabited territory upon petition of electors of an existing city. The act of 1899 (Stats. 1899, p. 37) provides for the annexation of uninhabited territory to an existing city. The act of 1913 (Stats. 1913, p. 587) provides for annexation of inhabited territory to an existing city upon petition of electors residing in territory proposed to be annexed. This latter act also provides in effect that two or more noncontiguous bodies of land cannot be annexed under a general election in the territory proposed to be added to the city. It was this latter act that was used in the instant proceeding. Throughout this opinion we shall designate the area proposed to be annexed as the "addition" and the city of Whittier as it existed territorially before this annexation proceeding as the "city."

The complaint in this action follows the opinion in the case of People v. City of Lemoore, 37 Cal. App. 79, 174 P. 93. As may be seen by the drawing reproduced in the printed report, that case concerned an attempt to annex territory almost completely surrounding the original city of Lemoore. The opinion proceeds to divide the proposed annexation area into nine parcels. All of these parcels are contiguous to the old city. The boundaries of parcel 1 do not touch the boundary of any of the other parcels, but this parcel is connected with one of the other parcels by a 20-foot road 1600 feet long. The court found these two parcels to be noncontiguous, and held the annexation void as the proceedings sought to effect the annexation through a general election within the proposed annexation area. Just what rule the court used in dividing the whole area into parcels is not divulged, but it is clear that ownership, a railroad right of way, county roads, and subdivisions were considered in such division exactly as in the case now before us for decision. There is language in the opinion seeming to hold that, notwithstanding each of these parcels was contiguous to the old city area, each of these parcels had to touch each of the other parcels, else the whole annexation area could not be said to constitute a single body of land and thus be the subject of annexation through one general election in the area. But this opinion does not constitute any authority whatever upon this point, for upon petition for hearing before the Supreme Court that court specifically withheld its assent to such a holding. (See Supreme Court opinion following Lemoore opinion, supra.)

[1, 2] The complaint in the instant case divides the area of the "addition" into seven parcels. As in the Lemoore Case, ownership, subdivisions, roads, and a railway right of way are considered in the division of the annexation area into parcels. But, unlike the Lemoore Case, there is no area of the proposed addition lying away from the main area and connected only by a narrow strip of land. The legal description of the "addition" shows the property to be one single body of land lying southwesterly of the old city lines and contiguous thereto. However, counsel for the people urge in their briefs that these so-called parcels are, or some of them constitute, separate and distinct bodies of land, and claim therefore that the whole area could not be annexed under one general election. As authority, the Lemoore Case and People v. City of Monterey Park, 40 Cal. App. 715, 181 P. 825, are cited. As we have already pointed out, we think the Lemoore Case does not assist respondents. The holding in the Monterey Park Case that two bodies of land, one without inhabitants and one with inhabitants, but connected only by a street running through other lands, are noncontiguous, is certainly not inconsistent with the Supreme Court's limited approval of the Lemoore Case.

Almost every annexation case reported in appellate decisions of this state shows the annexed area to be traversed by streets, and in no case except the Lemoore Case can there be found a word of support for the proposition that a street traversing a body of land divides the portion lying on one side from the portion lying on the other side so as to constitute separate bodies of land under the annexation acts. People v. City of South Gate, 118 Cal. App. 428, 5 P.(2d) 482, holds that a flood control right of way, a water course, a line of railway, or a public highway does not so operate. In the arbitrary division of the annexation area of the instant case into separate parcels, there are two parcels upon which there are no residents. Parcel 2, about the size of a city lot, is the site of Whittier city wells and pumping plants. Adjacent thereto on two other lots, parcel 3, families of three employees in the water plant live. Parcel 2 is uninhabited. Parcel 6, being a very small piece of ground occupied entirely by the railroad right of way, is uninhabited. All other parcels are inhabited. In People v. Town of Ontario, 148 Cal. 625, 84 P. 205, 212, where there were vacant lots and areas, it is said the annexation area was territory, "which, taken as a whole, may fairly be said to be inhabited territory." This is authority for holding, and we do so hold, that the whole proposed "addition" to the city of Whittier is in fact and in law one single inhabited body of land. As all of the facts hereinabove related were alleged in the complaint and not denied or covered by a written stipulation, no additional evidence was required to establish the same. Respondents claim, however, that the lines of the "addition" were drawn so as to include property subject to uses inconsistent with urban development and introduced testimony to show the use to which the land within the "addition" is put and the use and development to which adjacent land outside of the area is put. They also show that one boundary line of considerable length includes a street, but not the properties fronting on one side of such street, and in another instance drops below this street line into a subdivided tract, including only a small portion thereof (referring herein to "parcels" 2 and 3). They also showed by evidence that a portion only of an orchard along a street line is included. Also that one short boundary line passes between two houses, both of which are served by the same driveway. Conceding (but reserving doubt) that the court was right in permitting the testimony to come in as an inquiry upon an issue of fraud or oppression, this evidence was wholly immaterial as to any other issue before the court. We base this ruling particularly on People ex rel. Peck v. City of Los Angeles, 154 Cal. 220, quoting from page 223, 97 P. 311, 312, "We are satisfied that whether the territory in question, and of the shape, extent, and character fixed, should be annexed to the city of Los Angeles, was purely a political question, which, under the act, was left to the exclusive determination of the voters of the municipality and the territory sought to be annexed." People v. Loyalton, 147 Cal. 774, 82 P. 620; People v. City of Riverside, 70 Cal. 461, 9 P. 662, 11 P. 759.

[3] Respondents contend that, by reason of the use to which some of the land in the addition is put, the annexation is oppressive upon some of the relators. Evidence upon this point was incompetent and immaterial, as the subject-matter is legislative and not judicial. Allen v. Board of Trustees, 157 Cal. 720, 109 P. 486.

[4] The complaint also alleged that there had been former attempts to annex a part of this territory with a greater area, and that these attempts had either failed or had been abandoned because of opposition. It also alleges that the petition for the annexation election was drawn and instituted by a deputy city engineer of the city of Whittier, living in the proposed annexation area, and that the lines were drawn so as to include those favorable to the annexation project and exclude those unfavorable thereto. Also that those favorable to the project did not inform relators of the projected proceedings. We think all of this is immaterial to any issue before the court unless proper under a fraud inquiry as heretofore stated in regard to other evidence, and that all such testimony was immaterial and incompetent on any other issue.

[5] There is an indefinite allegation of fraud in the complaint, and during the course of the trial it was stated by counsel for the people in effect that the fraud intended was constituted by the facts that would go to establish the allegations just referred to—that is, the drawing of the lines to indicate those favorable and exclude those unfavorable, and the noncommunication as to initiation of the proceedings. We think the authorities above cited are authority for holding that the facts pleaded as constituting fraud were merely political questions as to which the courts have nothing to do. Every court in the land knows that the lines of few cities and few annexation areas are drawn on any fixed plan of form or shape. It is probable that lines are drawn to include those favoring the project and to exclude those opposed, but we know of no inhibition thereof. There is but one circumstance in the case where the line seems to deviate from a boundary of a fairly symmetrical area. The one is parcel 2 and 3 to include the city pumping plant and workers. Fraud cannot be decreed upon this fact or upon all of the facts herein claimed to constitute fraud, and the trial court did not find fraud existent in the case.

[6-9] The complaint alleges that the city council of Whittier ordered the election after

the presentation of the petition, and determined certain facts stated in the petition without taking any evidence thereon. There are two conclusive answers to this allegation. The first one is that the determination of the referred to facts is left exclusively with the council without the right of appeal to any tribunal. It was said in People v. City of Los Angeles, 133 Cal. 338, 65 P. 749, 750, an action in quo warranto (Code Civ. Proc. § 803 et seq.), that "whenever any board, tribunal, or person is by law vested with authority to decide a question, such decision, when made, is res judicata, and as conclusive of the issues involved in the decision as though the adjudication had been made by a court of general jurisdiction." In People v. Town of Ontario, 148 Cal. 635, 84 P. 205, 210, another and leading annexation quo warranto case, the court said: "Whatever may be the rule applicable in certiorari [Swanson v. City of Orange, 97 Cal. App. 344, 275 P. 889, our citation], which is a direct attack upon the particular order alleged to have been in excess of jurisdiction, * * * the decisions in this state compel us to hold that even an implied finding is conclusive in a quo warranto proceeding, or in any case where the order is collaterally attacked." And again, in the same opinion: "Under the decisions, the order of the board calling the election must here be taken as conclusive evidence that the petition presented, sufficient on its face, was, in effect, sufficiently signed by electors to confer the requisite power, and that the finding of the board to that effect, be it express or implied, was sustained by satisfactory proof." See Wolfskill v. Los Angeles, 178 Cal. 610, 174 P. 45, and People v. San Diego, 71 Cal. App. 422, 236 P. 377. The other answer is that this allegation is not sustained by the evidence. The ordinance calling the election (Exhibit C) includes a number of inducement paragraphs or "whereases." The first one refers to the reception of the petition by the council; the second one states that the petition contains a description of the territory in words and figures which would show it to be in one single body and contiguous to the city; the next one states that the petition was signed by not less than one-fourth of the qualified electors residing in the territory described; and the next one, that the territory described does not form a part of any other municipal corporation, and that it appears that the territory is inhabited. We think it sufficiently appears from these paragraphs that the council "took evidence" upon the jurisdictional requirements. In the petition for annexation the council had evidence before it. This petition was signed by a number of persons whose statements the council was evidently willing to take. One of the inducement paragraphs states as a finding of fact that the registration of voters of the county (when compared with the petition) shows that one-fourth of the qualified electors residing in the territory described had signed the petition. Certainly we cannot assume that the council decreed these facts without any basis therefor. Rather the presumption is the other way, that officials in performing their duties performed them with all legal requirements. The petition also showed that the property was inhabited (as did the said register of voters), and that the territory constituted one body of land. For all we know (and this collateral attack cannot inquire), each councilman himself knew the territory well, or each and/or all of them went to view the property between the third of the month, the filing date, and the tenth of the month, the date of the ordinance.

[10, 11] It may also be added, if more were needed, that the proceeding known as quo warranto is to be exercised only to right an existing wrong and not to try moot questions. It therefore would seem necessary before any issue is presented in the case, as to findings of fact by the council, that there should be allegations that such facts were actually not true. See interesting comment in Imperial Water Co. v. Board of Supervisors, 162 Cal. 14, at pages 24 and 25, 120 P. 780, where the same point is treated in certiorari. Not only is this allegation not to be found in the complaint, except as to the territory constituting one or more bodies of land, but the stipulation of facts completely covers all of the facts necessary to be found by the council before it could act upon the petition.

[12, 13] The complaint alleges, and the stipulation of facts is to the same effect, that the petition was not dated; but the statute does not require that it be dated. Likewise, it is alleged and admitted that no dates were affixed after the names of any of the signers of the petition; but under the authority of People v. City of Belmont, 100 Cal. App. 537, 280 P. 540, we hold that this does not affect the validity of the petition.

[14] A remaining point concerns an alleged error in the description of the "addition." The stipulation referred to is that the petitioners intended to fix the boundary line between the most northerly line of parcel 7 on the ownership property line, but through some error it was described to fall one foot beyond this line. All of the proceedings carry this error. We think it is too late after the annexation proceedings have all been had to go back and inquire into the motive or the intention of the petitioners, and that the lands described remain the lands within the proposed "addition." The logic of this statement would seem to support it, but the Supreme Court passed upon a question of somewhat the same character in the same way, in People v. Town of Loyalton, 147 Cal. 774, 82 P. 620. The only materiality of the stip-

ulation regarding this fact is that it absolves the petitioners from any ulterior motive in drawing the line one foot off the property line.

[15] Respondents raise a very interesting constitutional question. The annexation statute of 1913 requires that the election notice, including appropriate reference to any existing indebtedness of the city which is to be paid by the levy of taxes over the whole territory after annexation, shall be published, if published at all, for 4 weeks preceding the hearing thereof. Section 8½ of article 11 of the Constitution generally covers the matter of consolidating territory into one organization known as a "city and county." In the various steps toward that end the consent of incorporated territory must be had by separate vote before it can be included in a district with other territory in which a vote is to be taken upon the acceptance or rejection of consolidation into a city and county. Thus two elections are provided for, and both of these elections are proceedings relating to the consolidation of territory into or with a "city and county" government. In both of these elections, notice, if published, is required to be published for 5 successive weeks, the last thereof to be not less than 20 days prior to the date of election. It would seem clear thus far that the notice of elections as here just referred to would have no application to a simple annexation to a city. However, further on in this subdivision of the Constitution we find the following paragraph: "No property in any territory hereafter consolidated with or annexed to any city or city and county shall be taxed for * * * any indebtedness of such city or city and county outstanding at the date of such consolidation or annexation * * * unless there shall have been [successfully] submitted to the qualified electors * * * the proposition regarding the assumption of indebtedness *as hereinbefore set forth.* * * *" The question presents itself as to whether, under this provision, the election procedure prescribing for steps in city and county formation or enlargement applies as well to an annexation proceeding to a city as in the instant case. It will be seen that this question could not have arisen had the expression which is above italicized by us, "as hereinbefore set forth," not been in the provision, for then any appropriate election would have answered the requirement. It is then most important to ascertain the antecedent, as it were, of this phrase. The immediate subject before this phrase treats of the submission to electors of "the proposition regarding the assumption of indebtedness." This, of course, needs explanation as to what indebtedness is meant, and the question is answered by referring back in the same paragraph to "any indebtedness * * * outstanding at the date of * * * annexation." We conclude that the questioned phrase refers to the indebtedness intended as expressed in the paragraph with such phrase, and not to the procedure for city and county enlargement occurring in the Constitution several paragraphs earlier, and that the notice of election which was published in this instance was effective for all purposes. The question does not seem to be raised in Fostler v. Los Angeles, 179 Cal. 263, 176 P. 438, but the opinion and decision therein could not have been reached had the court followed the theory contended for by respondents herein.

Appellants respond to this question in another manner. The point is not raised in the complaint, but before decision in the superior court plaintiffs requested the privilege of amending, to add it. The court denied the application, and appellants here assert that this ruling has become res adjudicata, since no appeal was taken thereon. Respondents answer that jurisdictional questions can be raised at any time, and appellants counter with the proposition that it comes too late, as it amounts to a new cause of action, and section 349½, Code of Civil Procedure, is a binding statute of limitation against questioning the legality of an annexation later than 3 months after completion of the proceedings. We do not think it is necessary to pass upon the point.

The judgment is reversed, and the superior court is directed to make its findings of fact and conclusions of law in accord with this opinion, and to enter judgment for defendants and against plaintiffs, together with costs.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

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## SCHLENKER v. EGLOFF et al.

Civ. 7977.

District Court of Appeal, Second District, Division 2, California.

July 22, 1933.

Hearing Denied by Supreme Court Sept. 19, 1933.

**1. Trial 🔑127.**

Where one charged with negligence acknowledges responsibility, and as part of statement refers to fact that he carries insurance, declaration is admissible.

**2. Appeal and error 🔑1170(6).**

Misconduct of counsel in injection of fact of insurance into case is not cause for reversal unless it prevented complaining party from having fair trial (Code Civ. Proc. § 657, subd. 1).

**3. Appeal and error 🔑978(2).**

Ordinarily, misconduct of counsel is question for trial court, whose determination thereof, made on motion for new trial, is conclusive unless plainly wrong.

**4. Appeal and error 🔑933(4).**

Absent contrary showing, District Court of Appeal must conclude that motion for new trial was denied as matter of law (Code Civ. Proc. § 660).

**5. Appeal and error 🔑1170(6).**

Injection into automobile accident case of fact of defendant's indemnity insurance *held* to warrant reversal of judgment for plaintiff, where evidence of defendant's negligence was conflicting and evidence of plaintiff's intestate's negligence was almost conclusive (Code Civ. Proc. § 657, subd. 1).

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Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by John Schlenker, as administrator of the estate of Georgia May Schlenker, deceased, against Eugenie Egloff and others. From a judgment in favor of plaintiff, named defendant appeals.

Reversed.

Paul Nourse, of Los Angeles (Forrest A. Betts, of Los Angeles, of counsel), for appellant.

Paul Blackwood, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Action by John Schlenker, as administrator of the estate of Georgia May Schlenker, for the death of the latter, his wife, through the alleged negligence of defendant Egloff. From a judgment in favor of plaintiff that defendant has appealed, the action having been dismissed as to all others.

On November 9, 1929, defendant Egloff was driving her Buick coupe on Eagle Rock boulevard in Los Angeles, when at or near the intersection of Avenue 42 with said thoroughfare decedent came in contact with her car. At the place where the accident occurred Eagle Rock boulevard does not run north and south but lies nearer east and west. For convenience, however, it will be treated here, as in the trial of the case, as if it ran northerly and southerly. Defendant was traveling toward Hollywood, or, as we will say, south on Eagle Rock boulevard. Cuts of two maps of the location are attached to the reporter's transcript, each marked as though drawn to a scale. The scale of 1" to 10" shown on the cut marked Plaintiff's Exhibit 1 is clearly erroneous, as that would make the entire width of the boulevard but approximately 32.5 feet, an impossible figure considering its physical features as hereinafter shown. Defendant's Exhibit A shows it to be approximately 65 feet wide. In establishing the fixed distances we use the scale on the latter cut, as it seems to give distances more in accord with the space required and more in consonance with some of the figures given by the witnesses. The boulevard is apparently paved on each side of a dirt strip which, according to Exhibit A, is 17½ feet wide. The strip is higher than the pavement and on it are double tracks of the Los Angeles Railway, with a space wide enough for an unloading platform between the outer rails and the inner edge of the pavement. Each of the paved strips is approximately 23 feet in width. Avenue 42 comes into the boulevard from the west and extends across the tracks, the right of way being cut down and paved through the strip to the east roadway of the boulevard, with a width of approximately 45 feet. There is a pole about 60 feet south of Avenue 42, on the south side of the boulevard, which plays a prominent part in the evidence. Decedent having alighted from a northbound street car, waited for it to pass and then proceeded from the unloading platform on the east side of the right of way to the west side thereof, on a walk across the strip parallel with Avenue 42 and about opposite from the sidewalk along the south side of the avenue. She was seen by one of plaintiff's witnesses to step down from the right of way into the paved roadway over which defendant was traveling. None of plaintiff's witnesses saw her thereafter until after or about the time of the accident.

The case came on for trial before a jury on March 8, 1931. Plaintiff's attorney in his opening statement to the jury said in part: "We will show by the officer who made the investigation immediately after the accident that Mrs. Egloff told him that she had to appear at KNX station; she was broadcasting over the radio at 8 o'clock that evening and she was in a hurry to get to work * * *; and further said: 'I am fully covered by insurance and the insurance company will pay all damages.'" On defendant's motion a mistrial was declared and the jury excused, the judge remarking: "I have always maintained that insurance has absolutely no business before the jury. * * * I don't want to put you out again and I don't want to try it, if you can make the same motion before another judge who will allow you to do it." The case was then sent back to the master calendar department and two days later was assigned to another jury department for trial. In this department the attorney for plaintiff stated that there was a question of law to decide before making the opening statement, and in the absence of the jury it was explained to the court what had happened previously and permission was asked to include the matter referred to above in the opening statement and to introduce evidence thereof on the trial as an admission against interest. The objection of defendant thereto was overruled and counsel for plaintiff said, in making such statement: "When the officer arrived on the scene to investigate the accident he asked the lady who was driving the car how the accident happened. She told him she had to appear at KNX to broadcast that night and was in a hurry, but she said, 'I am fully insured, and the insurance company will pay all the damages.'" At this point the attorney for defendant objected to such statement as improper, no insurance company being involved, as prejudicial error and misconduct on the part of attorney for plaintiff in attempting to get before the jurors a matter not for their consideration and solely for the purpose and in the hope of influencing them, and asked the court to declare a mistrial. This motion was denied, the court however instructing the jury to disregard any statement of counsel or testimony "in reference to the insurance company, except in so far as any conversation may relate to the question of negligence, if any, on the part of defendant." Attorney for plaintiff, continuing his statement to the jury, then said: "There is no use in picking my thread or line of thought to repeat that statement. That statement is made to you only as showing the state of the defendant's mind on the evening there immediately after the accident. I don't expect you to go up to the jury room and reason that this is against an insurance company. It is not. You decide this case the same as if no insurance or nothing was ever mentioned, and I know this jury can do that."

Defendant was called as a witness by plaintiff under section 2055 of the Code of Civil Procedure, and among other questions and answers are the following:

"Q. Didn't the police officer Roddenberry ask you how the accident happened? A. Yes, I believe he did.

"Q. Didn't you reply in substance that you were going to appear at KNX and were in a hurry that night, but if you injured anyone your company would pay all the damages? A. Absolutely untrue."

Here counsel for defendant objected to the asking of the question upon the same grounds as were urged in objection to the opening statement and also that it could not be an admission of any responsibility for the accident, assigning it as prejudicial error to bring the matter of insurance before the jury. The court overruled the objection with the announcement that it would consider the same objection made as to any similar question whenever the matter appeared in the record and the same ruling given.

Officer Roddenberry, called as a witness for the plaintiff, was asked several leading questions relative to the conversation had with defendant after the accident, to which no objection was made until he was asked, "Did she state to you in substance that ——" at which time an objection was interposed by counsel for defendant on the ground that it was very apparent that the question was leading. Attorney for plaintiff, however, contended that it was impeaching and that he had a right to ask it in the same words he had previously used in interrogating defendant. The court ruled that the witness could relate the conversation. Counsel for plaintiff then continued:

"Q. Did she say anything to you about where she was going? A. She did.

"Q. What did she state about that? A. She said she was going to KNX broadcasting station.

"Q. Did she say anything about whether she was wanting to get there soon or—— A. She said she was in a hurry."

Here the court stated that the witness should relate the conversation had with defendant, and the officer then said:

"I asked the defendant if—where she was going, and she said she was going to KNX broadcasting station and that she was in a hurry to get there. She was afraid she was going to be late. She stated—wanted to know if the lady was hurt very bad, hurt in the accident, and I told her I didn't know, and she said——

"Mr. Betts [counsel for defendant]: Just a moment, that is—I think that fully answers the question.

"The Court: You may relate the conversation you had. Mr. Blackwood [counsel for plaintiff]: Go right ahead. A. * * * She stated she had full coverage on the automobile." Counsel for defendant at this point renewed his objection and asked the court to declare a mistrial. This motion was denied and the court stated in substance that after the witness had "related all the conversation which he had with the defendant" he would permit counsel for plaintiff to ask the impeaching question which he desired to ask. After this interruption the examination proceeded:

"Q. Will you relate any further conversation, if you had not completed the statement? A. The defendant also stated she wanted the lady who was hurt to receive the very best of care, and so forth, and I told her I would have to take her to the Highland Park police station for further investigation. She then got in her car and drove to the Highland Park station and I followed."

The witness was then asked the so-called impeaching question:

"Q. Did she state to you, Mr. Roddenberry, there at the scene of the accident, in substance as follows: 'I am in a hurry to get to KNX, I had to broadcast there, at KNX tonight, but I am fully covered, and the insurance company will pay all of the damage?' A. She did.

"Q. Did she further state in substance that same thing, in effect, at the station, at the Highland Park station after you got her down there? A. She did."

On cross-examination the officer stated that he asked defendant "approximately a dozen questions" and that "she made all of those statements on the evening of the accident," but that "there was no relationship of one to the other, so far as I know of." He admitted that he knew there was no cause for a felony charge at that time and that he made no charge against defendant, and although he made a report of the case he could not remember whether he "stated there was no traffic violation or not"; that at the police station he did not ask any questions but "turned her over to the detectives, and they were handling the case from then on."

The sole contention of appellant is that the injection into the case of the fact of her indemnity insurance, considering the manner in which it was done and in view of the condition of the evidence under which the jury could well have found in her favor, was prejudicial error.

Certain significant facts are undisputed. It clearly appears that appellant was not due to go on the air at KNX until 8 o'clock p. m., and that she was only required to be there in time to do so; that she did not telephone the broadcasting studio that she might not be there until she called from the police station at about 20 minutes of 8; that she actually arrived at KNX at 8:01 p. m., from the police station, which is a greater distance from the broadcasting station than is the scene of the accident. There is evidence from which the jury might conclude that decedent collided with appellant's car in crossing from the sidewalk on the right of way to that directly across the roadway on the south side of Avenue 42, as there is from which it might have concluded that she was not going at right angles but diagonally away from Avenue 42 and was hit at a point from 25 to 50 feet south of the sidewalk line. A city ordinance was introduced in evidence which makes it unlawful to cross a roadway except by the shortest route to the opposite curb and which applied to the roadway wherein the accident occurred. There is also evidence from which the jury might have concluded that appellant's car was traveling between 25 and 30 miles per hour, and other evidence—estimated by experts from skid marks measured by some of the witnesses the day after the inquest or about six days after the accident—which fixed the rate of speed at from 50 to 60 miles per hour. The investigating officer, F. M. Stay, a witness for plaintiff, testified that he found skid marks starting 10 feet north of Avenue 42 and going straight down the boulevard for a distance of 70 feet, where "they sort of swerved into the west curb line."

What we have said of the evidence shows, in our opinion, that the jury might well have decided the question of appellant's negligence either way.

[1, 2] Considerable doubt exists in the decisions as to just what is involved in the error urged here. Undoubtedly where one charged with negligence makes a statement which may be fairly construed as an acknowledgment of responsibility, "and as part of such statement makes reference to the fact that he carries insurance," the declaration is properly admissible. Harju v. Market Street Railway Co., 114 Cal. App. 138, 299 P. 788. As one court has said in regard to the cases involving statements referring to insurance: "A fair conclusion, from a résumé of the cases, would be to class such a reference under the head of misconduct of counsel. It might be conceded that where it is obvious or fairly deducible that the sole purpose was to impress that fact of insurance on the minds of the jury, for no other reason than to create a prejudice, then a reversal will follow. But where the reference, as indicated in the cited cases, is merely incidental, misconduct will not be found." Noble v. Bacon (Cal. App.) 18 P.(2d) 699, 702. We think it is equally true that even where the record points unerringly to misconduct in the injection of the fact of insurance into the case, such misconduct would not be cause for reversal unless it had the effect of preventing the complaining party from having a fair trial. Robinson v. Western States Gas, etc., Co., 184 Cal. 401, 194 P. 39. In other words, in order to justify a reversal, such misconduct, in our opinion, must constitute such an irregularity in the proceedings or conduct of the court, jury, or adverse party as to ma-

terially affect the substantial rights of the party aggrieved. Section 657, subd. 1, Code Civ. Proc.

[3-5] Ordinarily the question of misconduct is one for the trial court, and its determination thereof, made on motion for a new trial, will not be disturbed unless under all the circumstances it is plainly wrong. Lafargue v. United Railroads, 183 Cal. 720, 192 P. 538. The record here shows that appellant made such a motion at the time the notice of appeal was filed. The record is silent as to any further proceedings thereon. The merits of the motion were apparently not brought to the attention of the trial court, and we must conclude in the absence of a contrary showing that such motion was denied as a matter of law under section 660 of the Code of Civil Procedure. On the condition of the evidence as to the negligence of defendant alone, it would seem that the injection into the case of the very disconcerting idea of insurance might well have turned the scale in the minds of the jurors on that question, resulting in preventing her from having a fair trial of that issue.

With regard to the negligence of decedent the evidence is undisputed. Appellant's testimony is to the effect that decedent walked or ran into the side of her car. Respondent's witness Stay, the investigating officer, in describing the marks on appellant's car, said: "The left front fender was dented. There were marks on it as if being brushed by a cloth of some kind * * * just once." That there was a dent "in the cowl, * * * the portion between the hood and the windshield * * * as from some blunt object * * *; it was a dent that I would say, with reference to a ball, about the size of a ten pin ball, a bowling ball." That the left front cowl light was "dented and twisted around from facing the front of the car so that the light would shine off at the side of the car," and was "bent back a little," and that "the left windwing was broken." That the damage just described, excepting the small dent in the front of the left fender, which may have touched the telephone pole as the car reversed itself, was made by contact with decedent is admitted by counsel for respondent during the course of his argument to the jury, in answer to the question of a juror as to what the "cowl" was. After describing what was meant by the cowl of the automobile and the cowl light, he said: "She [decedent] was thrown over and she hit the cowl and made a dent in it." That she was not thrown over from the front is evident from the physical fact that the dust was brushed off "a little to the side and on top of the fender." There obviously would have been more evidence of contact than that if the car had hit decedent with the front of the fender. Appellant thought she had averted the accident when she turned the front wheels "at almost right angles," and the physical facts are more in accord with the theory that decedent walked or ran into the car, brushing the fender and falling onto the cowl head first, the head and shoulders twisting the headlight and breaking the windwing as she was thrown off the machine. In other words, the evidence seems to establish decedent's negligence almost as a matter of law.

It is to be observed that the only statement relative to insurance testified to by Officer Roddenberry, when relating the conversation had with appellant, was that "she stated she had full coverage on the automobile," and that so far as the individual statements were concerned, while made on the evening of the accident, "there was no relationship of one to the other, so far as I know of." In other words, the statement that she had full coverage was not made in connection with the statement that she was going to the broadcasting station, was late and in a hurry to get there, from which an admission of responsibility for the accident might be implied; and no such implication can be made from the mere statement that she had full coverage, made possibly in answer to a question propounded or possibly from mere thankfulness that she had the foresight to carry insurance, regardless of whether she was negligent or not—a feeling that one might well have in view of the uncertainty of the verdict in a negligence case. Nowhere did the officer testify that appellant said "the insurance company will pay all the damage," until the words were put into his mouth by the so-called impeaching question, which was combined with other statements concerning which the witness actually testified and to which he answered "she did." That is a conclusion from the statement that appellant had full coverage which respondent and the witness might make, but it should not be permitted to be given before a jury as it was here, in our opinion. "The natural tendency of a line of examination that suggests to the jury that the defendant is indemnified against any judgment for damages against him is highly prejudicial to his rights, especially in a closely balanced case where the evidence otherwise would be easily sufficient on appeal to support a verdict either for the plaintiff or for the defendant." Citti v. Bava, 204 Cal. 136, 139, 266 P. 954, 955.

The trial court could only conclude from the opening statement to the jury that the statement as to insurance would be shown by the evidence to be inextricably connected with an admission against interest; but when the fact appeared that it was only so connected by counsel in his effort to get before the jury the question of insurance, then the court should, without hesitation, having granted the motion of appellant and declared a mistrial. Advising the jurors to disregard the question of insurance except as connected with an admission of liability, and instructions to that effect did not repair the damage, as is shown by the fact that the jury gave no heed to almost conclusive evidence of decedent's negligence in failing to notice an oncoming lighted car and in walking into the side of it.

Judgment reversed.

We concur: WORKS, P. J.; CRAIG, J.

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133 Cal.App. 358

## FLORMAN v. PATZER.

Civ. 7656.

District Court of Appeal, Second District, Division 1, California.

July 19, 1933.

**1. Appeal and error 🔑931(7).**

In pedestrian's action for injuries, motorist could not complain that court should have considered particular intersection in determining negligence, where record did not show that court failed to consider such fact; presumption being that manner in which intersection of street was formed was considered by court.

**2. Appeal and error 🔑996.**

On appeal from judgment, where it appears that evidence was such that inference either of negligence or of contributory negligence might have been drawn fairly by jury or trial court, conclusion reached thereon may not be disturbed by reviewing court.

**3. Automobiles 🔑244(35).**

Evidence that motorist drove automobile across intersection at speed greater than 15 miles per hour, striking crippled pedestrian, supported finding of motorist's negligence.

**4. Automobiles 🔑244(50).**

Evidence supported finding that crippled pedestrian struck by motorist at intersection was not contributorily negligent.

> Evidence disclosed that before crossing intersection, pedestrian looked to his left and to his right and saw automobile at distance which he considered sufficiently far away to permit his crossing without being struck, that pedestrian could be seen by others at distance of sixty feet away, though it was raining and visibility was bad, and that, if motorist were looking where he was going, he could have avoided accident.

**5. Damages 🔑163(1).**

Plaintiff seeking damages must prove extent of damages alleged to have been suffered by him.

**6. Damages 🔑163(1).**

Crippled pedestrian struck by automobile *held* not entitled to special damages, though he introduced evidence that his artificial leg was rendered practically useless and that his clothes were torn, where there was no evidence of value of damaged articles.

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Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by B. M. Florman against Gus C. Patzer. Judgment for plaintiff, and defendant appeals.

Affirmed, with modification.

H. M. Lineman and Mab Copeland Lineman, both of Los Angeles, for appellant.

Dempster & Dempster, of Los Angeles, for respondent.

HOUSER, Justice.

[1] While walking west, across the south side of Thirty-Seventh street, in the city of Los Angeles, at a point where Thirty-Seventh street intersects Hill street, plaintiff was struck by an automobile which at that time was being driven by defendant south on Hill street. Thirty-Seventh street ends at the west line of Hill street. In an action brought by plaintiff against defendant for damages which resulted from such accident, plaintiff was awarded a judgment therein for the gross sum of $2,625, of which amount the sum of $2,500 was for general damages, and the sum of $125 was for special damages. From such judgment defendant has appealed to this court.

Although it is admitted by appellant that within the contemplation of the law the accident occurred at an intersection of two streets, and consequently with reference thereto that the law finds its application, nevertheless it is within the contention of appellant that, in reaching a conclusion as to whether either defendant was guilty of negligence, or plaintiff was guilty of contributory negligence, the situation with reference to the particular intersection should have been taken into consideration by the trial court. But, conceding that the position assumed by appellant in that regard is correct, it nowhere appears in the record herein that, in reaching its final decision, the trial court failed to give consideration to such fact; and, since the facts to which reference has been had were in evidence, it must be presumed that the manner in which the intersection of the streets was formed was among the several facts of which the trial court took notice in reaching its conclusion.

Specifically, the trial court found that defendant was guilty of negligence, and that plaintiff was not guilty of contributory negligence. Among the several findings of fact made by the trial court may be noted the following:

"That, at the time and place of the said accident, defendant was driving the said automobile in a street intersection at a rate of speed in excess of fifteen miles an hour.

"That the defendant, at the time and place of the said accident, was not looking where he was going; that if the defendant had been looking where he was going, he would have seen the plaintiff in time to avoid a collision with the plaintiff.

"That the defendant, at the time and place of the accident, was driving his automobile at such a rate of speed that he could not stop in time to avoid hitting the plaintiff, after the plaintiff came within the area lighted by the lamps of the defendant's automobile.

"That it is not true that the plaintiff endeavored to cross the street at a place not intended for pedestrians.

"That, at the time and place of the accident, the street was wet and slippery from rain, which was at that time falling.

"That the accident happened in the evening, but it was not difficult to see; that, at the time and place of the accident, the visibility was such, that the plaintiff was visible to other persons at a distance of sixty (60) feet.

"That the plaintiff was crippled and using crutches, but that neither his crippled condition nor the use of crutches caused or contributed to the accident.

"That the plaintiff did not negligently proceed from a place of safety in the path of defendant's automobile, but, on the contrary, plaintiff was crossing the street, and had nearly reached the far side of the street when he was struck by the defendant's automobile.

"That the accident could have been avoided by the defendant, if the defendant had been using ordinary care."

Appellant does not complain either that such findings are not supported by the evidence, or that prejudicial error was committed by the trial court, either in receiving evidence offered by plaintiff, or in rejecting evidence offered by defendant. However, for a reversal of the judgment appellant principally relies upon each of two specifications of error: First, that defendant was not guilty of negligence; and, secondly, that plaintiff was guilty of contributory negligence.

Within the evidence adduced on the trial of the action may be noted the following testimony: The accident occurred on a rainy night. With the assistance afforded him by two crutches, plaintiff was walking across the street in which he was injured in a position which would be within lines marked by a prolongation of the sidewalk lines of the intersecting street. On each of its "four corners" the intersection was illuminated by two electric lights. There was no "pedestrian lane." Before attempting to make the crossing, plaintiff looked both to his right and to his left. After reaching the center of the street which he had essayed to cross, he again looked to his right and, at a distance of "three or four blocks," saw the automobile which defendant was driving approaching plaintiff from that direction. In the words of plaintiff: "I walked down then because I thought I would have time * * * watching that car * * * all the time * * * held up my crutch * * * I did keep looking north, and held up my crutch instantly, and I kept it up nearly all the way until he struck me. * * * He (defendant) was coming not slowly at all; * * * I considered it fast." Another witness testified that at the time the accident occurred defendant's auto was traveling at a rate of twenty miles per hour. Plaintiff also testified that he stopped just before he was struck by defendant's auto, which was at a point about eight feet from the curb. According to the testimony given by defendant, he was traveling at the rate of sixteen to eighteen miles an hour. His car was equipped with large two-wheel brakes which were in proper working order; also equipped with automatic windshield wiper which was in operation at the time, and with proper headlights, which were "on at the time." He first observed plaintiff at a point twelve feet from the west curb line, at which time plaintiff was from four to eight feet from defendant. As soon as he observed plaintiff he "swerved," turning his automobile to the left to avoid striking plaintiff, but the right fender of his automobile struck plaintiff and knocked him to the pavement. Several automobiles were traveling in a southerly direction and several were traveling in a northerly direction, at about the same rate of speed at which the automobile of defendant was traveling. The street lights cast shadows on the street so that the visibility was poor, and headlights of automobiles approaching from the south reflected in the windshield of defendant's automobile at the time of the accident; and defendant's automobile did not skid at the time he turned to avoid striking plaintiff.

[2] In substance and effect, repeatedly the law has been declared by the appellate courts of this state that on appeal from a judgment, where it appears that the evidence adduced on the trial of the action was such that an inference either of negligence of the defendant, or of contributory negligence of the plaintiff, fairly might have been drawn either by the jury, or by the trial court, a conclusion reached thereon by either of such triers of fact may not be disturbed. 19 Cal. Jur. 723 et seq., and authorities there cited.

[3, 4] Reverting to the established facts, it is clear that at and immediately preceding the time of the accident plaintiff not only had a lawful right to occupy the position in the street which he did, but that during all such time he was in the exercise of at least ordinary care for his safety and protection. Before attempting to cross the intersection of the two streets, he not only stopped, but he looked both to his left and to his right, and from such action he ascertained that in the latter direction the automobile driven by defendant at that time was at an estimated distance from plaintiff of "three or four blocks"; and, notwithstanding his crippled condition, even handicapped by the enforced use of crutches, he advanced so far in crossing the intersection before he was struck by the automobile as to be within about eight feet of the curb of the sidewalk.

On the other hand, if for no other reason, defendant's negligence in the premises, which was the proximate cause of the accident, is established by the fact that, at the time when and at the place where the accident occurred, he was driving his automobile in a street intersection at a rate of speed greater than that permitted by law, and that in the circumstances, "he could not stop in time to avoid hitting plaintiff." But, in addition thereto, the established facts present the situation, as found by the trial court, "that at the time and place of the accident, the visibility was such that plaintiff was visible to other persons at a distance of sixty feet; * * * that the defendant * * * was not looking where he was going; that if the defendant had been looking where he was going, he would have seen the plaintiff in time to avoid a collision with the plaintiff."

It becomes manifest that neither of the principal points presented by appellant is tenable.

[5, 6] However, appellant complains of the lack of evidence to support the finding of the trial court to the effect that plaintiff suffered special damages in the sum of $125. It is admitted by appellant that, as a foundation for such award, testimony was adduced to the effect that plaintiff's artificial leg was bent and rendered practically useless, and that "his clothes were torn," etc. Respondent does not deny that no evidence regarding the value of any of such damaged articles was either offered to or received by the trial court. The general rule is that the burden of proving the extent of the damage alleged to have been suffered by him is on the plaintiff. 8 Cal. Jur. 895, and authorities there cited; Hahn v. Wilde, 211 Cal. 52, 293 P. 30. The case of Smith v. Calley, 103 Cal. App. 735, 284 P. 974, 975, was for damages to an automobile which resulted from a collision between it and a motortruck. Although it appeared in evidence that plaintiff's automobile had been driven several thousand miles, what was its original cost, and that after the collision it was "a complete wreck," it was held that because "there is no evidence of the amount of money required to repair the injuries, if they could be repaired, nor the value of the car after the accident," the evidence was insufficient to support the judgment.

It follows that the judgment herein should be modified by deducting therefrom the sum of $125. As thus modified, the judgment is affirmed; appellant to recover costs.

We concur: CONREY, P. J.; YORK, J.

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133 Cal.App. 332

## PEOPLE v. NEEL.

Cr. 90.

District Court of Appeal, Fourth District, California.

July 17, 1933.

**1. Criminal law** ⚿982.

Application for probation *held* waiver by defendant of pronouncement of judgment.

**2. Criminal law** ⚿1023(12).

Order granting probation, not being an order made after judgment, *held* not appealable.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

E. O. Neel was convicted of driving an automobile on a public highway while under the influence of intoxicating liquor. From an order granting probation upon conditions, defendant appeals.

Appeal dismissed.

Harmon C. Brown, of Riverside, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged with driving an automobile on a public highway while under the influence of intoxicating liquor and, after a trial before the court without a jury, was found guilty. On his application the court made an order granting him probation upon certain named conditions. The defendant made no motion for a new trial, but gave notice of an appeal from the order granting probation.

[1, 2] Judgment has not been pronounced, the defendant having waived the same by

application for probation, People v. De Voe, 123 Cal. App. 233, 11 P.(2d) 26, and the order granting probation, not being an order made after judgment, is not an appealable order, People v. Patello, 125 Cal. App. 480, 13 P.(2d) 1068; People v. Noone (Cal. App.) 22 P.(2d) 284; People v. Von Eckartsberg (Cal. App.) 23 P.(2d) 819.

We may add, however, that the sole point raised on this purported appeal is that the evidence was insufficient to sustain a conviction in that, aside from the admissions and confessions of the appellant, the corpus delicti was not proven. We have examined the record, which is very brief, and are satisfied that the corpus delicti was sufficiently established by facts and circumstances other than the admissions and confessions of the defendant, and these admissions leave no doubt as to the guilt of the defendant.

The appeal is dismissed.

We concur: MARKS, J.; TURRENTINE, Justice pro tem.

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133 Cal.App. 410

## MILLER v. HENNING.

Civ. 7864.

District Court of Appeal, Second District, Division 2, California.

July 24, 1933.

**1. Bills and notes** ⚷489(2).

Written instrument showing that note sued on was assigned to plaintiff *held* not inadmissible on ground instrument was not pleaded as required by statute, in absence of contention that fact of assignment was not pleaded or that such instrument was incompetent evidence of assignment (Code Civ. Proc. § 447).

**2. Bills and notes** ⚷489(2).

In action on note wherein defendant raised question of consideration, defendant's letters to payee amounting to admissions and guaranty of payment, and offered in corroboration of plaintiff's pleaded consideration, *held* not "written instruments" within statute requiring such instruments to be pleaded (Code Civ. Proc. § 447).

[Ed. Note.—For other definitions of "Written Instrument," see Words & Phrases.]

**3. Appeal and error** ⚷1056(1).

Where defendant sued on note testified that he agreed in writing to guarantee indebtedness and executed note to fulfill agreement, excluding his testimony regarding conversations showing note had been given for different purpose *held* not prejudicial.

**4. Evidence** ⚷471(2).

Where defendant testified that he gave note sued on to fulfill agreement to guarantee indebtedness, testimony in answer to question whether he received any consideration for note *held* properly excluded as witness' conclusion.

Appeal from Superior Court, Los Angeles County; J. C. Needham, Judge.

Action by Harry S. Miller against H. B. Henning, also known as Horace B. Henning. From a judgment for plaintiff, defendant appeals.

Affirmed.

Alfred L. Armstrong, of Los Angeles, for appellant.

CRAIG, Justice.

An action having for its basis a promissory note of the defendant, payable to the plaintiff's assignor, resulted in a judgment in favor of the plaintiff, from which said defendant appealed.

[1] Following proof of the note and indebtedness, which were not denied, an instrument was offered in support of the allegation that "prior to the commencement of this action the claim sued upon was duly and regularly assigned to the plaintiff herein." Objections were interposed by the defendant that the written assignment had not been pleaded as required by section 447 of the Code of Civil Procedure, which provides that, "if the plaintiff relies upon a written instrument, in whole or in part, that fact shall be pleaded." It is argued that to permit the introduction in evidence of a written instrument without allegation according to said section would constitute reversible error. However, since it is not contended that the fact of assignment was not pleaded, nor that the offered document was incompetent evidence thereof, such objection was untenable in the instant case. Meyer v. Foster, 147 Cal. 166, 81 P. 402.

[2] Letters of the defendant to the payee amounting to admissions and a guaranty of payment "to secure the indebtedness in a manner satisfactory" to the latter were objected to upon the same ground, which objections were overruled. We are not aided by a brief on behalf of the respondent, and for obvious reasons are unable to consider appropriate argument or citation of authority which the appellant's attack upon the judgment demands. Mosher v. Johnson, 51 Cal. App. 114, 196 P. 84. The defendant having affirmatively raised by his answer the ques-

tion of consideration, it appears that said letters were offered in corroboration of the plaintiff's evidence in support of his pleaded consideration. This being true, they were not written instruments within the domain of the quoted section, but constituted evidence in connection with the documentary basis of the action, which was pleaded in hæc verba. Hence objection upon the ground stated by the appellant was properly overruled.

[3] The defendant having testified that he entered into the agreement evidenced by said letter above mentioned and gave his promissory note accordingly, he was asked by his counsel to relate conversations asserted to have transpired, tending to show that said note had been given for another and different purpose. The exclusion of this evidence is assigned as error. In support of such contention is cited Richardson v. Lamp, 209 Cal. 668, 290 P. 14, which was an action upon a promissory note in the principal sum of $1,500. However, it there appeared that the plaintiff as agent of another had attempted to sell certain property to a corporation in which the defendants were interested; that the plaintiff induced the defendants to execute their said note for an aggregate of charges for trips and expenses upon the representation that he would not collect the same unless it could be obtained from other persons against whom the defendants had claims for money and damages. It was definitely agreed that the plaintiff would not hold the defendants liable and would collect, if at all, from others "as additional damages which he alleged he could collect from the said [other persons]." Since said note represented nothing more than damages which the plaintiff proposed to collect from other persons, consideration flowing to the defendants was found wanting. In the instant case the defendant testified that he had agreed in writing to guarantee an indebtedness; that he executed said note in the proper amount; that "the reason for giving his note was the acceptance of this letter," and "it was the only thing I could do at the time in fulfillment of this letter." It does not appear that the ruling assigned as error was prejudicial.

[4] The only remaining question arises from exclusion of testimony offered by the defendant in response to questions as to whether or not he did "obtain anything of value" or "receive any consideration" for said note. The evidence tendered could have constituted no more than conclusions of the witness in denial of his prior testimony, and the objections were properly sustained.

The judgment is affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

## HANSEN v. FRESNO JERSEY FARM DAIRY CO.*

Civ. 826.

District Court of Appeal, Fourth District, California.

July 20, 1933.

Rehearing Denied Aug. 14, 1933.

Hearing Granted by Supreme Court Sept. 18, 1933.

**1. Account stated 🔑1.**

Application of "account stated" to case having written contract should be confined to such elements as have been left unsettled by contract, or to things left subject to later determination, and should not ordinarily be applied to establish a lesser price for goods bought than that fixed in prior written contract.

[Ed. Note.—For other definitions of "Account Stated," see Words & Phrases.]

**2. Account stated 🔑4.**

Under contract for sale of milk providing for fixed price until changed in accordance with provisions, buyer's payment with checks for lesser amount than provided for *held* not "account stated," where contract was not changed.

**3. Accord and satisfaction 🔑25(4).**

One relying on accord and satisfaction must plead and prove both.

**4. Accord and satisfaction 🔑8(1).**

Without honest dispute, agreement to take lesser amount in payment for liquidated claim is without consideration, and void as "accord and satisfaction."

[Ed. Note.—For other definitions of "Accord and Satisfaction," see Words & Phrases.]

**5. Accord and satisfaction 🔑11(1).**
**Compromise and settlement 🔑5(2).**

To constitute "accord and satisfaction" there must be not only bona fide dispute, but circumstances must show that lesser amount tendered was given and accepted on condition that acceptance would fully discharge obligation.

**6. Accord and satisfaction 🔑11(1).**
**Compromise and settlement 🔑5(2).**

Under contract for sale of milk, seller's acceptance of checks for less than contract price *held* not "accord and satisfaction," where evidence showed that seller did not accept checks in full payment.

> Evidence disclosed that there was no real dispute as to amount due under terms of contract, and that attempted reduction was arbitrarily made. When first told of reduction, seller protested and stated he would look into his legal rights. Seller cashed checks, but did nothing to indicate that he accepted them in full payment.

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*For subsequent opinion see 31 P.2d 359.

**7. Contracts** 🔑**170(1).**

In determining meaning of written contract, consideration must be given interpretation which parties themselves placed on it as evidence of their acts.

**8. Sales** 🔑**77(1).**

Where seller under contract for sale of milk agreed to assume one-half of reduction in buyer's price to "customers," seller *held* not bound by buyer's reduction of price to wholesalers, where parties intended retail customers only and contract referred to price in singular.

[Ed. Note.—For other definitions of "Customer," see Words & Phrases.]

**9. Sales** 🔑**382.**

In seller's breach of contract action against buyer, excluding evidence of buyer's oral notice 45 days before expiration of year of intention to terminate contract *held* not error, where contract provided for written notice 30 days before expiration of year, and written notice given was not received within such time.

**10. Sales** 🔑**181(11).**

In seller's action against buyer for breach of contract for sale of milk, evidence sustained finding that seller complied with contract, and that buyer continued to accept milk, though he claimed milk to be below standard.

Evidence disclosed that complaints as to quality were made many months before expiration of the year at which time the contract was to terminate, that buyer rejected the milk on those occasions, but went on receiving milk for long periods after each rejection, and that seller was able to deliver same quality of milk for second year.

Appeals from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Jacob Hansen against the Fresno Jersey Farm Dairy Company. From the judgment, plaintiff and defendant appeal.

Modified and affirmed.

Irvine P. Aten, of Fresno, for plaintiff.

Everts, Ewing, Wild & Everts, of Fresno, and Pillsbury, Madison & Sutro, of San Francisco (Dan F. Conway, of Fresno, and Eugene D. Bennett, of San Francisco, of counsel), for defendant.

BARNARD, Presiding Justice.

The defendant, engaged in distributing dairy products in the city of Fresno, entered into a written contract with the plaintiff, a dairy farmer, providing for the purchase and sale of approximately eighty gallons of milk daily for the period of one year from April 1, 1930, with the provision that the same should be extended for another year unless written notice of termination was given thirty days prior to the expiration date. The contract, after allowing for a deduction for hauling, fixed a net basic price of 24 cents per gallon for the milk to be delivered. It also provided: "That whenever and whilst the buyer reduces its price to customers in order to meet competition or on account of a milk price war in Fresno, the said basic price for milk hereinbefore fixed shall stand reduced for the time of continuance of buyer's said reduced price, in an amount equal to one-half of said reduction." On May 28, 1930, the defendant's manager informed the plaintiff that thereafter the basic price for milk delivered would be reduced 2 cents a gallon. It appears that at that time the defendant reduced its price for milk delivered directly to the homes of consumers, that is, at retail, from 14 cents per quart to 13 cents, and that the plaintiff was told of this fact. It also appears that at the same time the defendant reduced the price of milk it sold to stores from 12 cents per quart to 9 cents, although it appears that this was not known to the plaintiff. The defendant paid the reduced price of 22 cents per gallon for a time, but on September 9, 1930, it informed the plaintiff that it was not making any money, that other people were buying milk for less, and that it would make another cut of 4 cents per gallon, making this retroactive from and after August 1. Plaintiff protested, and stated he intended to look into his legal rights. Thereafter from month to month the defendant sent to the plaintiff an itemized statement showing the amount of milk delivered during the month, the amount due at the contract price, the amount of deduction at 6 cents per gallon, the amount of the balance, together with a check for the amount of the balance shown on the statement. Plaintiff cashed these monthly checks, making no further protest at the respective times.

On March 5, 1931, the defendant gave written notice to the plaintiff that it would discontinue taking milk from him after April 1, 1931. On the last-named date the defendant refused to accept plaintiff's milk, and thereafter he sold the same to other buyers. In this action which followed, a first cause of action seeks to recover an amount covering the 4 cents per gallon deducted by the defendant during the balance of the first year of the contract, and a second cause of action seeks recovery of damages in the amount of the difference between the selling price of the milk for the second year and the reduced contract price of 22 cents per gallon for that milk. Judgment was rendered in favor of the plaintiff, but for amounts less than those prayed for in the respective causes of action, and from this judgment both plaintiff and defendant have appealed.

It appears that the defendant made no reduction in its price to its customers after May 28, 1930, and that the only reasons given to the plaintiff for the attempted reduction in his selling price in September were that the company was not making money and that other firms were buying milk at a cheaper price. Neither in its answer nor in its briefs on this appeal does the defendant set forth any claim of right to make this reduction of 4 cents per gallon under the terms of the contract. In both places it relies entirely upon the contention that the plaintiff's acceptance of the checks as sent constituted an executed agreement to accept the lesser amounts in full payment for milk furnished during the respective months.

[1, 2] The first question presented is whether the acceptance of these checks month by month, under the circumstances, precludes the plaintiff from recovering the balance of the contract price of the milk delivered, as previously reduced to 22 cents per gallon. The defendant contends that the sending of these monthly statements, with the retention of the checks sent therewith, constitute a succession of accounts stated. While both parties have discussed the matter with reference to the theory of an account stated, we think this theory is not properly applicable to the facts of this case. An account stated has been thus defined: "An account stated is a mere unperformed promise by one party to pay a stated sum to another." Bennett v. Potter, 180 Cal. 736, 183 P. 156, 159; Hammond L. Co. v. Richardson Building, etc., Co., 209 Cal. 82, 285 P. 851. Both historically and as it has developed this doctrine has always been applied to the settling or making certain of what was an unsettled account. Bennett v. Potter, supra. It should not ordinarily be applied or upheld for the purpose of establishing a lesser price for goods purchased and delivered, than that fixed in a prior written contract. In any event, it should not be so applied except under the most unusual circumstances and upon convincing proof. If ever applied in cases where there has been a written contract, the application should be confined to such elements as have been left unsettled by the contract or to things that have been left subject to later determination. It was never intended that this device for rendering certain such contractual elements as have been left uncertain should be used to vary the fixed terms of a written contract or to permit a party who has, in writing, agreed to pay a certain price for goods delivered to escape a part of his obligation by merely remitting a portion of the amount due.

The contract here in question provided for a fixed price until changed in accordance with its provisions, and, never having been so changed, the real question here is whether the payment of a part thereof was made and accepted under circumstances which will constitute an accord and satisfaction. In B. & W. Engineering Co. v. Beam, 23 Cal. App. 164, 137 P. 624, 626, it is said:

"The phrase 'accord and satisfaction' as it is known and applied in the law means the substitution of a new agreement for and in satisfaction of a pre-existing agreement between the same parties. More minutely defined, an agreement of accord and satisfaction is one whereby one of two parties, having a right of action against the other upon a claim arising out of an existing agreement, agrees to accept from the other party something in satisfaction of such right of action different from and usually less than that which might be recovered upon the original obligation. Civ. Code, § 1521. The effect of such agreement when executed is to extinguish the antecedent liability. Civ. Code, § 1523. As a matter of course an agreement of accord and satisfaction presupposes a prior controversy concerning the relative rights of the parties under the pre-existing agreement; and it may be conceded to be the law, as counsel for the plaintiff contends, that, before a dispute concerning a claim for money alleged to be due under an existing contract can be made the basis of an agreement of accord and satisfaction, it must be shown that such dispute was bona fide."

In Berger v. Lane, 190 Cal. 443, 213 P. 45, 47, the court said:

"The general rule, which is but an amplification of our Code sections (Civ. Code, §§ 1521, 1523) defining satisfaction and accord, is—'That where the amount due is in dispute, and a check less than that claimed is sent to the creditor with a statement that it is sent in full satisfaction of the claim, and the tender is accompanied by such acts or declarations as amount to a condition that if the check is accepted at all it is accepted in full satisfaction of the disputed claim, and the creditor so understands, its acceptance by the creditor constitutes an accord and satisfaction even though the creditor states at the time that the amount tendered is not accepted in full satisfaction.' Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25, 134 P. 989; B. & W. Engineering Co. v. Beam, 23 Cal. App. 164, 137 P. 624."

[3, 4] "The general rule is that he who relies upon an accord and satisfaction must plead and prove both. Simmons v. Oullahan, 75 Cal. 508, 17 P. 543. While it is not necessary that the dispute or controversy should be well founded, it is necessary that it should be founded in good faith. Without an honest dispute, an agreement to take a lesser amount in payment for the liquidated claim is without consideration and void. An arbitrary refusal to pay, based on the mere pretense of the debtor, whether for the ob-

vious purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will satisfy the requirements of the rule. Corpus Juris, vol. 1, § 75, pp. 554, 555, and notes."

[5] While a different rule has been applied as between principal and agent (Egan v. Crowther, 74 Cal. App. 674, 241 P. 900), to constitute an accord and satisfaction not only must there be a bona fide dispute as to the amount due, but the circumstances must show that the lesser amount tendered was given and accepted upon the condition and with the understanding that the acceptance thereof would constitute a full discharge of the obligation. Sierra, etc., Co. v. Universal Elec., etc., Co., 197 Cal. 376, 241 P. 76; Berger v. Lane, supra. In the latter case, the court further said:

"In all the cases that have been called to our attention in which a satisfaction has been held to have been conclusively expressed in writing, the writing in some form shows without question that the acceptance of the inclosure was clearly intended to be a satisfaction in full of the claim. This sometimes is shown by the express words used in the body of the check or by an accompanying receipt, stating that the amount sent is in full of all demands."

[6] The court here found, at least impliedly, that the plaintiff did not accept the monthly checks sent in full payment of the amounts due. We think the evidence sustains the findings made. It fully appears that there was no real dispute as to the amount due under the terms of the contract, and that the attempted reduction was arbitrarily made for express reasons not recognized by the contract. Nothing appears to show that the checks were accepted in full payment except that they were cashed and that suit was not brought at once. When first told of the reduction, the plaintiff protested, and stated he would look into his legal rights. No receipts were given, and the statements and checks contained nothing to indicate that they were conditional in any way, or that the payments made were intended to be in full. While the court made no express finding that there was no accord and satisfaction, not only is this really a conclusion of law, but the court found in favor of the plaintiff on the material facts put in issue by the answer, and found, among other things, that the contract price of the milk delivered was a certain amount; that a lesser amount had been paid; that a part of the contract price had not been paid; and that a balance was still owing and unpaid. There is an implied finding that the plaintiff did not accept these checks in full payment of the amounts due, the only possible conclusion from the findings is that there was no accord and satisfaction, and, in the absence of a better pleading, the findings must be held sufficient.

The next question is as to the amount of the judgment rendered on the first cause of action. While the court found that the amount paid to the plaintiff for milk delivered was $733 less than the same would have brought had not this deduction of 4 cents per gallon been made, it allowed this 4 cents per gallon only on 15 per cent. of the milk delivered, giving judgment on this cause of action for $109.92. This resulted because the court found, in accordance with certain evidence produced by the defendant, that on May 28, 1930, the defendant reduced the price of milk to its retail customers 1 cent per quart and to its wholesale customers 3 cents per quart; that on that day it reduced its basic price to the plaintiff 2 cents per gallon; that the defendant made no further reductions in price to its customers; that on May 28, 1930, the defendant was selling and disposing of 20 per cent. of the milk it purchased from the plaintiff and other producers at wholesale, and was selling 80 per cent. thereof at retail; and that at all times after August 1, 1930, the defendant was selling 15 per cent. of such milk at retail and 85 per cent. at wholesale. Accordingly, the court allowed the additional 4 cents per gallon only on 15 per cent. of the gallonage delivered.

[7] The conclusion thus drawn by the court from these facts requires a consideration of the meaning of this contract and of such evidence as throws any light thereon. The contract provides for one price only, equivalent to 24 cents per gallon, which was later reduced to 22 cents. It refers to this price in the singular as "said basic price," "said reduced price," and the like. It makes no reference to any difference in the price dependent upon whether the defendant resold the milk at retail or at wholesale. In providing for a possible reduction, it makes the same dependent upon whether the buyer reduced "its price to customers." The plaintiff testified that "our price has always been based on the retail price," and that, when the reduction was made on May 28, 1930, he was informed of the reduction in the retail price, but not of any reduction in the wholesale price. Not only is it reasonable to infer from the contract that the one price to the customers of the defendant, referred to therein, was the retail price where milk was delivered to householders, this kind of trade then constituting the greater part of the defendant's business, but this interpretation is borne out by the subsequent conduct of the parties. As was said in Work v. Associated Almond Growers, 102 Cal. App. 232, 282 P. 965, 966:

"In determining the meaning of a written agreement, the courts have always given the utmost consideration to the interpretation which the parties themselves have placed upon it, as evidence of their acts, 'and in all cases where the terms of their contract, or the language they employ, raises a question of doubtful construction, and it appears that the parties themselves have practically interpreted their contract, the courts will follow that practical construction. It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. * * * In its execution, every executory contract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty.' Mitau v. Roddan, 149 Cal. 14, 6 L. R. A. (N. S.) 275, 84 P. 145, 150."

[8] When the reduction in price was made on May 28, 1930, although the defendant was then selling 20 per cent. of its milk at wholesale, this situation was not even mentioned to the plaintiff, and the basic price to him was reduced by only his share of the reduction that had been made in prices to retail trade. This was done although the plaintiff had agreed to assume one-half of any reduction in "its price to customers," and although the wholesale price had been reduced three times as much as had the retail price. While the additional reduction to the plaintiff, had the proportion sold at wholesale been considered, would have amounted to about $20 a month at the time the change was made in accordance with the retail price, and must have greatly increased each month as the court found that 85 per cent. of its milk was being sold at wholesale by the defendant from and after August 1, this important matter was never mentioned or acted upon by the defendant. The interpretation thus placed upon the contract by the parties is rather conclusive, especially in view of the fact that, when a further reduction was arbitrarily attempted in September, no mention was made of wholesale prices or of any increase in that part of the business, and, even when the answer was filed in this case, no facts were alleged in connection with such a situation, and no contention has been here made with respect thereto. Both under the pleadings and under the contract, as interpreted by the parties, all evidence as to any change in the proportion of milk which was being sold at wholesale was immaterial. Under these circumstances, we think the plaintiff was entitled to recover the additional 4 cents per gallon on the amount delivered, and the court has found that this amounts to $733.

[9, 10] The answer of defendant sets up as defenses to the second cause of action that the plaintiff had not performed his part of the contract during the first year, in that on certain dates milk was furnished which was not up to the required standard, and that notice of termination had been given before the close of the first year as required by the contract. The only points here raised by defendant, with regard to the second cause of action, are that the court erred in refusing to admit evidence that the defendant gave to the plaintiff an oral notice of termination of the contract some forty-five days before the end of the year, and that the court erred in excluding evidence to the effect that on ten scattered dates throughout the first year of the contract a part or all of the milk delivered by the plaintiff was rejected by the board of health of the city of Fresno as not up to standard. The contract called for written notice thirty days before the expiration of the year, and it is undisputed that the only written notice given was received by the plaintiff on March 5, 1931. No proof was offered tending to show any waiver of the written notice. With respect to the quality of the milk delivered, no evidence was offered to show what proportion of the delivery on any date was rejected. Most of the ten days complained of were many months before the end of the first year; the last two being on January 7th and March 2d. The contract provided that the defendant should not be required to pay for any milk that did not meet the requirements of the board of health, and that the buyer need not pay for any milk with a foreign odor or, in its discretion, could allow a lesser price therefor. The offer of proof shows that the milk on these occasions was rejected by the defendant, and under the terms of the contract it was under no obligation to pay for the same. However, the evidence shows that the defendant went on receiving milk for long periods after each rejection. The court found that the plaintiff had complied with the contract, that written notice of termination was not given within the time required, and that the plaintiff was ready, able, and willing to deliver the same quantity of milk for the next year. The evidence sustains the findings, and we find no error in the rulings complained of.

The plaintiff has also appealed from the amount of damages allowed by the court on the second cause of action. It appears from the evidence that the plaintiff sold his milk to the best advantage during the ensuing year, and the court made proper findings showing the difference between the contract price of such milk for that year and the price for which the same was sold. However, in considering the contract price, the court took the same position it had taken on the first cause of action, namely, that on 85 per cent. of the milk the contract price was only 18 cents per gallon, while on the remaining 15 per cent. it was 22 cents. The court found to the effect that of the 29,200 gallons per the second year 85 per cent. or 24,820 gallons should be taken at a price of 18 cents per gallon, and the remaining 4,380 gallons at 22 cents. Accordingly, the court fixed the damage at $1,378.02. If our view on this matter is correct, an additional 4 cents per gallon should have been allowed on the contract price of the remaining 24,820 gallons. It follows that an additional $992.80 should have been allowed to the plaintiff, making his damages $2,370.82 instead of $1,378.02. All of the necessary facts have been found by the court, and the result is a mere matter of computation from the facts found. We see no necessity for a retrial, but the judgment should be modified as indicated.

The judgment is modified by increasing the amount allowed as owing on account of milk delivered from $109.92 to $733, and by increasing the amount allowed as damages from $1,378.02 to $2,370.82.

As so modified, the judgment is affirmed.

I concur: MARKS, J.

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133 Cal.App. 290

## DAMEREL v. NORTH AMERICAN BOND & MORTGAGE CO. (two cases).
## McCLAIN v. SAME.

Civ. 8558.

District Court of Appeal, Second District, Division 2, California.

July 14, 1933.

**1. Licenses 🔑39.**

Corporation's certification to corporation commissioner of employment of agent and request for permit for him to sell its securities gave notice of agency to world and estopped corporation to deny it (St. 1917, p. 673, as amended).

**2. Licenses 🔑39.**

Corporation's designation of agent under Corporate Securities Act does not automatically install him as its representative for sale of its securities; authorization and contract of employment being necessary (St. 1917, p. 673, as amended).

**3. Licenses 🔑39.**

Corporation's assent to sale of its securities by agent designated under Corporate Securities Act will be presumed, where sale was made with corporation's actual or implied knowledge (St. 1917, p. 673, as amended).

**4. Corporations 🔑80(12).**

Evidence in actions for money received for corporation stock *held* to show that corporation not only authorized person making false representations to purchaser to act as its agent in selling stock, but actually participated in sale and received proceeds.

**5. Corporations 🔑80(2).**

Stockbroker's action in holding himself out as manager of corporation's securities department, with full knowledge and acquiescence of corporation's managing officer, bound corporation by broker's confirmation of purchase of stock by persons relying on selling agent's false representations without knowledge of facts.

**6. Corporations 🔑80(12).**

Evidence in actions for money received for corporation stock *held* to show that one on whose fraudulent representations plaintiffs relied in purchasing stock dealt with them as corporation's authorized agent, thereby estopping it to deny his authority.

**7. Estoppel 🔑72.**

When one of two innocent persons must suffer by another's act, he by whose negligence it happened must suffer.

**8. Money received 🔑18(3).**

Rule that plaintiff in action for money received must show that defendant was unjustly enriched does not mean that evidence must show that defendant retained riches until time of trial.

**9. Corporations 🔑80(12).**

Corporation receiving money paid for stock in reliance on its agent's fraudulent representations was unjustly enriched, and hence liable to purchasers therefor, though its manager procured proceeds in exchange for his stock in corporation.

**10. Corporations 🔑1.**

Corporations being creatures of law, defense of corporate entity, urged as shield for wrongdoing, will not be sustained.

**11. Corporations 🔑80(12).**

Corporation cannot urge its manager's fraud in intercepting note exchanged for stock, purchasing stock himself, and reselling it to corporation to establish good faith of transaction as against purchasers; corporation's knowledge of manager's acts being presumed.

**12. Corporations 🔑80(12).**

Corporation manager's embezzlement of amount of note exchanged for stock is no de-

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fense to purchasers' claim of fraud in corporation's procurement of note.

**13. Corporations 🔑80(9).**
Corporation manager's published confession that he falsified records and misappropriated money of corporation *held* insufficient to put purchasers of stock on notice of selling agent's false representations as to corporation's assets, securities, and dividend paying record.

**14. Corporations 🔑80(9).**
Purchaser of corporation's stock in reliance on its agent's representations as to its assets, securities, and dividend paying record was not bound to examine corporation commissioner's records to discover falsity of such representations.

**15. Corporations 🔑80(9).**
Proxy, fraudulently obtained by corporation manager, to vote stock at corporation elections and stockholders' meeting, did not charge stockholder with knowledge, acquired by manager through falsification of corporation's records, as to falsity of agent's representations as to corporation's assets, securities, and dividend paying record when stock was purchased.

**16. Corporations 🔑80(10).**
Rescission of purchase of corporation stock 38 days after stockholders' meeting, at which partial report, requiring experts 39 days to prepare, was read, *held* not too late, though purchaser was put on inquiry as to falsity of agent's representations in sale of stock at such meeting.

**17. Corporations 🔑80(12).**
Failure of purchaser of corporation stock to notify selling agent or corporation's manager of rescission of contract *held* immaterial, in view of former's fraudulent representations and latter's confession of embezzlement.

**18. Corporations 🔑80(12).**
Stock purchasers' failure to tender back dividends received did not bar rescission of contract for fraud, where corporation made no objection to tender on receipt of notice of rescission, and distinctly denied liability for amount paid (Code Civ. Proc. § 2076).

**19. Contracts 🔑270(2).**
Rules regarding prompt rescission of contract and restoration of benefits received being of equitable cognizance, little importance attaches to slight delay in discovering or pursuing means of discovering fraud, where no injury results.

**20. Contracts 🔑350(3).**
While promptness in rescinding contract for fraud is primarily for trial court, finding of delay, precluding recovery of amount paid thereunder, must be supported by substantial evidence.

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Appeals from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Consolidation actions, two by Laura Belle Damerel and one by Olivia McClain, against the North American Bond & Mortgage Company. Judgment for defendant, and plaintiffs appeal.

Reversed.

Ingle Carpenter and Harold A. Fendler, both of Los Angeles, for appellants.

A. Ronald Button and Geo. T. Warren, both of Hollywood, for respondent.

PARKER, Justice pro tem.

This appeal is taken from a single judgment entered in three consolidated actions, which judgment is against the plaintiff and in favor of defendant in each case. The plaintiff Laura Belle Damerel instituted two actions, one for money had and received and the other in claim and delivery, whereby she sought recovery of a nonnegotiable note exchanged by her for capital stock of defendant corporation. The action of Olivia McClain was for money had and received.

Practically the same issues are presented in the three cases. We will take first the case of Olivia McClain. On or about July 12, 1929, Mrs. McClain purchased through one Joe Zastrow fifty shares of the preferred capital stock of North American Bond & Mortgage Company, a corporation. Throughout this opinion hereinafter the said company will be referred to as North American Company. On October 25, 1929, she purchased one hundred and seventy shares additional. In each instance she paid $100 per share and the transaction was a cash deal. It was found by the trial court that the purchase of the stock in each instance was induced by and through the fraud and deceit of Joe Zastrow, who falsely and fraudulently represented the facts to Mrs. McClain for the purpose of inducing her to buy the stock. It is further found that Mrs. McClain believed in and relied upon these fraudulent representations, and was induced thereby to make the purchase. Further, it is found that, at the time Zastrow made such representations, he (Zastrow) knew, or had reason to believe, or should have known, that said representations were wholly false and untrue. These findings stand unattacked. We might add they are amply supported by the evidence. The respondent does not question the fact that Mrs. McClain was defrauded to her injury and loss. The claim is that Zastrow had no connection with the defendant corporation. Our first task, then, is to identify Joe Zastrow. If respondent's position is sound, the case ends here. In order that the picture may be as complete as the record will permit, we may go somewhat into detail, inasmuch as our inquiry does not stop with the identification of Zastrow as an individual, but is concerned more with his relationship to or with the respondent corporation.

In June, 1922, the North American Company applied to the commissioner of corporations for a permit to sell its preferred stock. This permit was granted. On August 31, 1929, Joe Zastrow filed with the state corporation department an application for a certificate to represent North American Company. This application may be summarized as follows: Zastrow makes application for certificate authorizing him to represent North American Bond & Mortgage Company. He supplies the routine data usual in such applications by reference to the commissioner's files. He set forth that the terms and conditions of his employment, with particular reference to the commission he will receive, is "8%." This application is verified, and as a part thereof is the following:

"To the Commissioner of Corporations:

"North American Bond and Mortgage Company (Employer) hereby certifies that the statement made by J. Zastrow, applicant, in the foregoing application of the items of his employment is true and correct, and requests that said application be granted.

"Dated Sept. 10, 1929.

"North American Bond & Mortgage Co.
Employer

"Signed by M. E. McKittrick
Asst. Sec'y.
"[Corporate Seal] Title of Officer

"6331 Hollywood Boulevard—Hollywood, Cal.
Address of Employer"

That portion of the application bearing the request of the North American Company was attested by and with the corporate seal. M. E. McKittrick was the assistant secretary of the corporation. Much argument is presented on the question of this instrument and its binding effect, if any, upon the North American Company. The evidence, beyond contradiction, shows that one Beesemyer was the secretary and general manager of North American. The name Beesemyer will frequently appear herein, and it may be noted that the full name is Gilbert H. Bessemyer. As general manager, Beesemyer had full charge of everything. As secretary, under the by-laws he was the custodian of the corporate seal, and as manager he was to superintend and have control of the management of the affairs of the corporation subject to the direction and supervision of the directors. McKittrick, the assistant secretary, had charge of everything in North American Company, under Beesemyer. According to her testimony, she signed the application of Zastrow and placed the corporate seal thereon as an incident of her usual routine. Referring to the incident, she says: "It was probably brought down to me by someone, and I was asked to sign it, and as I had been signing similar papers on their request I probably did. As I remember I was told to sign it, that it was according to Mr. Beesemyer's instructions. I affixed the seal as part of the duties of secretary or assistant secretary. The seal was a part of the signature." She further testified that "where I signed for North American I thought it was all right to put the seal on, too, if it was all right to sign." This evidence also remains uncontradicted. It leaves no question but that the signing of the Zastrow application was authentic and genuine, so far at least as the corporation commissioner was concerned.

On September 20, 1929, a certificate of authority was issued to J. Zastrow to act as agent of North American Bond & Mortgage Company "in the sale of its securities within the State of California in accordance with the permit issued to it on the twelfth day of June, 1922, and any amendment thereof or supplement thereto hereafter made." It will be observed that the application and the permit tie in with the securities of North American Company, inasmuch as the permit specifically limits the agency to the securities theretofore by the corporation commissioner permitted sale. There is in the entire record not a single word of explanation on the connection of North American with the designation of Zastrow as agent. It is not denied that North American presented the application for his appointment, nor is it denied that the act of the assistant secretary, authenticated with the seal of the corporation, was an authorized act within the scope of her duties under the direction of the general manager.

[1-3] The Corporate Securities Act (St. 1917, p. 673, as amended) makes a clear distinction between agents and brokers. An agent, under the act, is one employed or appointed by a company or broker to sell securities, while a broker is one engaged in the general business of buying and selling securities. The agent must have a principal, and the very nature of his calling is one of employment. When a corporation employing an agent certifies the fact of such employment to the corporation commissioner, requesting a permit for the agent to act for the corporation in the sale of its securities, it is certainly some evidence of agency. The entire scheme of the Corporate Securities Act would be thwarted and rendered ineffective if this were not the case. Being of public record, the proceedings give notice of the agency to the world at large and estop the corporation from denying the agency thus created. However, we agree with re-

spondent's contention that the designation of an agent under the Corporate Securities Act does not automatically install the agent as the representative of the corporation for all purposes, or even for the sale of securities, until some further steps are taken. In other words, the corporation may designate one as agent and not give him any securities to sell. By the mere designation he would have no power to go out and contract for the sale of the corporation's securities. There must be an authorization and contract of employment. But with the designation of agency the assent of the corporation to a sale of its securities by the agent will be presumed where it is shown the sale was with the knowledge of the corporation or under conditions which imply such knowledge.

[4] So much, then, for Zastrow. Let us now consider his conduct in connection with the sale to Mrs. McClain. Zastrow, through the found fraud and misrepresentations, induced Mrs. McClain to purchase on the first occasion fifty shares of first preferred stock of North American at the price of $100 per share. He had with him at the time a "buy" order blank on which was printed the name of the corporation, and did represent to Mrs. McClain that she was dealing direct with the corporation. Accordingly the check for $5,000 was made payable directly to North American Bond & Mortgage Company. Within a few days the stock certificate showing ownership of fifty shares in Mrs. McClain was delivered to her. The check payable to the corporation was entered upon the books of the company, and was by it indorsed and cleared, and the canceled check returned to Mrs. McClain showed the indorsement and payment. On the second occasion of purchase by Mrs. McClain she secured one hundred and seventy shares of first preferred stock of North American at the price of $100 per share. This transaction was somewhat involved, inasmuch as it was necessary for her to dispose of other securities in order to obtain the cash with which to procure more North American stock. She had $16,900 tied up in an investment handled through a building and loan association. At Zastrow's persuasion she made out an order on such association to pay to North American Company the sum of $16,900. Pursuant to the order the building and loan company executed and delivered to Zastrow its check for $16,900, payable to North American Bond & Mortgage Company. This check was received by the North American Company, indorsed and paid, and the amount deposited to the credit of that concern. In addition, Mrs. McClain paid $100 cash, making the total $17,000. This is the story of how Olivia McClain got her stock. The mere narrative convinces us that the stock was sold to her by North American Company, and that the company not only authorized Zastrow to act as its agent in the sale thereof but actually participated therein and received the proceeds thereof. Digressing for the moment on the question of the fraud, we may note that there is no controversy on the issue, but, to bring the fraud home to North American Company, without the aid of implication, the undisputed fact is that that company, through the medium of the press and by means of paid advertisements, broadcast the same representations found to be false, and at the same time Zastrow was procuring purchasers. The foregoing sufficiently disposes of this branch of the McClain case, leaving for further discussion hereinafter other phases of the appeal equally important to her cause of action.

We may pass then to the Damerel actions. Mrs. Damerel purchased through Zastrow thirty shares of stock in North American Company, giving to Zastrow her check for $3,000 payable to North American. This check was indorsed, cashed, and deposited to the credit of the company. This transaction took place on April 24, 1930. Here we may note again the status of Zastrow with relation to North American Company. As we have already noted, Zastrow had secured the authorization as agent for North American in 1929. This expired December 31, 1929. On January 13, 1930, a renewal application was filed by Zastrow with the corporation commissioner. The former application was by reference expressly made a part of the renewal application. Zastrow again applied for authorization to act as agent for North American Bond & Mortgage Company. As a part of the application was the following:

> "J. M. Friedlander—Commissioner of Corporations
>
> "J. Zastrow hereby requests that the foregoing application be granted.
>
> "Dated January 13, 1930.
>
> "North American Bond & Mortgage Co.
> (Name of Company)
> "By Gilbert H. Beesemyer [Signed]
> "Secy-Manager
> "6331 Hollywood Boulevard, Hollywood."

Without analysis the same appears with reference to the corporation's participation in the application as in the original proceeding. The phrase "J. Zastrow requests" is meaningless, inasmuch as the corporation, under its seal and with the signature of its manager, signed the application, thereby adopting the statements therein contained. On January 20, 1930, the permit was issued by the corporation commissioner authorizing J. Zastrow to act as the agent of North American Bond & Mortgage Company in the sale of its securities, in accordance with the permit issued the corporation on June 12, 1922. We note again the specific tie-in with the securities of North American. It is beyond reason to even think that this application, as well as the former, was not on the express request and with the full knowledge of the corporation, and likewise the permits issued on the applications. It is interesting to note the comment of the trial judge, as follows: "I haven't any doubt after examining that paper that the application was as much that of the North American Bond & Mortgage Company as it is of Zastrow."

[5] And thus we find Zastrow on the dates in question, namely, during April of 1930, again presented to an investing public as the duly chosen and authorized agent of North American. The same found fraudulent representations were made and the same findings of fraud and reliance are made as to Zastrow's dealings with Mrs. Damerel as were found in the McClain case. Likewise there were exactly the same fraudulent and false statements broadcast by the North American Company during the period of the Damerel transactions. After the sale of April 24, 1930, wherein and whereby North American received the $3,000 by check, Zastrow again sought out Mrs. Damerel, on or about April 25, 1930, and finding her without further ready means he prevailed upon her to dispose of other securities she then held. Mrs. Damerel was the owner of a trust deed securing an obligation in the amount of $4,500, wherein the obligors were named Wilson, and this has been referred to as the Wilson-Damerel note. Zastrow assured Mrs. Damerel that the North American Company would buy the note and that she could then invest the proceeds in North American. Accordingly she turned the note and trust deed over to Zastrow, and in a few days he returned, assuring her that the North American Company had made investigation and found the note and security sound. Thereupon Zastrow gave to Mrs. Damerel the check of North American for $4,200, being the then present value thereof after discount to equate interest. This check she immediately indorsed over to North American, and, adding a $300 check payable to that concern, she made a purchase of forty-five shares of North American at the price of $100 per share. On April 24, 1930, Mrs. Damerel received a letter on the stationery of the North American Bond & Mortgage Company, which letter is as follows, omitting address:

> "Dear Mrs. Damerel: We wish to confirm your purchase of thirty shares of North American Bond & Mortgage Company and to thank you for your commitment. The certificate will be delivered by our Mr. Zastrow at an early date.
>
> "Very truly yours,
>
> "D. Tackaberry,
>
> "Manager Securities Department."

On April 28, 1930, after the purchase of the forty-five shares, Mrs. Damerel received an acknowledgment in practically the same form, omitting only any reference to Zastrow.

Beesemyer, upon his examination as a witness, testified that he did not recall whether he as manager of North American or the officers and directors of that company knew that Tackaberry was holding himself out as manager of the securities department of North American; that he had many talks with Tackaberry, but did not remember whether he saw any of the letters mailed out by Tackaberry to purchasers on the form noted. He stated that he may have seen such letters, but paid no attention to them. His answer, verbatim, was: "No, I don't recall. At the same time I would have had no objection to it particularly. It helped him with his business, and I was always anxious to have anybody make money." Tackaberry was a stockbroker with offices in the same building as Beesemyer. The latter's testimony regarding Tackaberry is as follows: "Mr. Tackaberry sold many stocks that the North American Bond & Mortgage Company wished to sell; other securities he didn't handle as a general rule, and being in a general stock selling business he more or less took it upon himself to consider himself as manager of securities for us, but he wasn't. Emphatically he was not an employee drawing a salary of the company." However, holding himself out as manager of securities, with full knowledge and acquiescence of the North American, would suffice, in view of the lack of knowledge on the part of those relying upon the appearances.

[6] The foregoing presents the first question on the appeal; namely, the status of Zastrow in his dealings with appellants. The trial court found that at no time was Joe Zastrow the agent of North American to sell any stock to either plaintiff, and that said Zastrow did not act within the course and scope of his authority as a stock salesman of and for North American in any of the transactions with either plaintiff. The evidence does not support nor justify such a finding. The facts are undisputed, and in passing we may note that neither side called Zastrow as a witness. The explanation of defendant was that Zastrow had been contacted and that he warned defendant that if he were called he would "fix" the defendant. He was not called. Zastrow was definitely designated to the commissioner of corporations as the agent of respondent, and he entered directly upon the work specified in the creation of the agency. By indorsements of the various checks, by acknowledgment of subscriptions, by retention of the proceeds of sale, the respondent company unequivocally held out Zastrow, not only to appellants but to the world at large, as its representative. The purpose of the Corporate Securities Act and of all similar legislation is primarily to give to the public assurance of the integri-

ty and authority of those agents or brokers licensed thereunder. And such purpose would be aborted and rendered of no avail if the solemn assertions of those seeking permission to operate under the statute were held meaningless. The evidence herein permits of but one conclusion, namely, that Zastrow, when he dealt with the appellants herein, dealt with them and each of them as the authorized agent of respondent corporation, and that the latter is estopped to deny his authority.

[7-9] We come now to the real defense of the corporation, and here too it may be noted that the main facts are in little dispute and may be narrated as illustrative of the conditions existing in so far as the internal affairs of the company may be concerned. North American, during the years 1929 and 1930, had no treasury stock for sale. No resolution or other act of its board of directors authorized the offering to the public of any of the company's treasury stock, preferred or common. Beesemyer was the manager of the corporation, and in direct and full control of the books, records, and finances thereof. The directors met every week, but seemed to know very little of the business that was transacted. The corporation, as far as its actual management went, was just another designation for Beesemyer. There were a number of employees, classed as secretaries, assistant secretaries, clerks, transfer agents, etc. Each of these worked under the supervision of Beesemyer and under his orders. It seems that Beesemyer personally owned considerable stock in the corporation. The fact is that the stock that was sold to the appellants herein was the personally owned stock of Beesemyer. The modus operandi was to send out an agent ostensibly representing the corporation, backed up by an advance advertising campaign, and have him contact prospects to whom he would unfold the story of opportunity knocking and ready and sure profits. The agent would procure a purchaser who believed he or she was dealing with the corporation. The money received would go directly to the corporation and into its funds. Then Beesemyer would dig out a certificate of his own holdings and cause to be made a transfer thereof in the amount required. Then the corporation would, under the heading in its books "Exchange," pay out the money it had received to Beesemyer. Every step in the proceeding was done by the employees of the corporation in their respective positions as employees of the company and under the specific direction of its manager. There is no evidence to support even an inference that the acts of the corporation agents and secretaries were other than routine. No suggestion of fraud or dishonesty attaches to any of these employees. In other words, each and every act done by any of them was done as part of the routine work of the corporation and under the direction of the managing agent, whose directions they were in duty bound to follow without question. And on the face of these instructions they were not warranted in assuming any irregularity. We dwell thus on this phase of the case merely to emphasize the extent to which the corporation lent itself to the accomplishment of whatever Beesemyer planned.

The Wilson-Damerel trust deed and note were purchased directly by North American Company and its check paid for the same. The method of transfer was directed, not by Beesemyer but by another official of the corporation. When purchasers of stock delivered their check to North American, and the latter acknowledged receipt thereof by indorsement and the funds derived therefrom went into the account of the corporation, the transaction was identical with one wherein the purchaser delivered at the receiving window of the corporation the money in cash. The corporation got the money, and whatever it may have done with it thereafter is a matter that does not affect the rights or equities of the appellants herein. The stock transfer books of the corporation were under the exclusive control of Beesemyer, and according to the testimony the entries in the stock book were mere matters of "automatic procedure." In fact, everything was on corporation routine and schedule, attested as to genuineness by corporate seal and entry up to the time of distribution of the spoils. The procedure parallels that of an employee taking the cash out of the till, and it seems certain that no defense would exist in favor of a merchant against his creditors from the fact that his cashier decamped with the assets.

To review all of the authorities on corporate liability, ultra vires, fraud, and ratification would be a gigantic task and one yielding naught but academic conclusions. It seems a model case for the application of the recognized rule that, when one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer. This rule is discussed in Lynch v. International Banking Corp., 68 Cal. App. 432, 229 P. 968, where many authorities in support thereof are cited. See, also, Schumann-Heink & Co. v. U. S. National Bank, 108 Cal. App. 223, 291 P. 684, 292 P. 547; Green v. Caribou Oil Mining Co., 179 Cal. 790, 178 P. 950; MacDonald v. Reich & Lievre, Inc., 100 Cal. App. 736, 281 P. 106. Respondent repeatedly asserts that in an action for money had and received it must definitely appear that defendant has been "unjustly enriched." This does not mean that the evidence must show that such riches have been retained by the defendant up to the time of trial. The evidence here shows that North American received the money and disbursed it at the instance of its manager. It is practically the same as though North American had sold the stock and then gone in the open market and purchased enough to meet the order. Let us suppose that, instead of Beesemyer transferring his own stock to plaintiffs, he, as manager and secretary, had taken from the funds of the company money sufficient to procure the necessary number of shares and then had completed the sale to plaintiffs. It could not be successfully claimed that the corporation had not received anything from plaintiffs, for the reason that, in order to consummate the fraud, it was necessary to secure the stock elsewhere and thus partially use the funds obtained. The corporation was enriched and its funds increased. How these funds were distributed does not affect plaintiffs' cause of action.

**[10]** Summing up, we find a fraudulent transaction carried on by and through a corporation in the accomplishment of which every corporate agency was involved, from the manager down to the office boy. And because, when the fraud was done and completed, one was somewhat faster and secured the profits, the corporation disclaims any liability. The entire transaction is slightly hazy. One might easily infer that, if at any stage of the proceedings up to the kill a question had been raised as to the genuineness or fairness of the transaction, or if the honesty and integrity of the management had been assailed, a chorus of indignant protest would have arisen within the sacrosanct confines of this fortress of fraud. The idea of incorporation has worked out as a convenient aid to modern business, and the efficacy and usefulness of this form of business entity cannot be questioned. But withal corporations are creatures of the law and exist only at the pleasure of the law. Whenever the corporate entity is urged as a shield for wrongdoing the courts have not been backward in beating down the defense in an endeavor to preserve the equality of simple justice. The instant case depicts a sidelight on the old, old story of human greed and lust for power and pelf. If the law is powerless to interfere merely, forsooth, because one party has clothed itself in habiliments of modest corporate pattern, supplied by the very authority it seeks to destroy, then indeed has the time arrived when the law has devoured itself and in sickened surfeit yields up its existence.

**[11, 12]** The claim is urged that the Wilson-Damerel note and trust agreement came into the hands of the North American Company as a negotiable instrument before maturity, and was by it purchased in good faith and for value from Beesemyer, and that the corporation is a holder of said note free from all claims of plaintiff Damerel. The note was purchased by the corporation itself, direct from Mrs. Damerel, and was obtained through fraudulent representations. As a matter of fact, the transaction on the note was what is commonly termed a "wash" transaction. The mechanics of purchase and sale were employed, but in fact and reality it was merely a transfer of the note for the stock sold. And, further, respondent's strenuous contention on this score almost demonstrates the weakness of all of its claims, because here it not only admits but urges the knowledge of the corporation and the regularity of the acts of its agents and employees. The transaction of purchase of the note was between the corporation and Mrs. Damerel. The purchase price was paid by a check of the corporation and the check indorsed back directly to the corporation in return for stock. On this transfer the title passed from Mrs. Damerel direct to the company. The claim of the corporation that the manager, Beesemyer intercepted the note in transit and made himself the purchaser and then resold it to the corporation presents a situation where corporate knowledge must be presumed. In other words, the corporation cannot urge the fraud of its own agent as against Mrs. Damerel to establish the good faith of the transaction. Mrs. Damerel exchanged the Wilson note for the stock of the corporation and dealt directly with the corporation. If in the internal management of the company its manager or secretary embezzled the amount paid, that is no concern of Mrs. Damerel; nor is it a defense to the claim of fraud in the procurement of the Wilson note.

We are of the opinion that appellants, and each of them, have shown that the corporation received the money and note, and, dependent upon the solution of other questions hereinafter presented, are entitled to recover in the present action.

**[13]** The final points presented regard the sufficiency and promptness of the rescission. Here again we take up the case of each plaintiff separately, for the reason that the facts differ in each, and there is not the slightest privity or jointure between the plaintiffs. We will take first the case of Olivia McClain. The finding of the trial court is as follows: "That it is not true that on or about the 27th day of February, 1931, Olivia McClain discovered for the first time the falsity and untruth of the representations set forth in plaintiff's complaint and it is not true that prior to said date said plaintiff had no knowledge whatsoever concerning the falsity of said representations; that in truth and in fact plaintiff knew, or could have known by the inspection of the financial statements of North American Bond and Mortgage Company at its office and on file in the office of the corporation commissioner of the state of California, of the falsity of said statements immediately after the purchase of her said stock at the times referred to in plaintiff's complaint. That plaintiff Olivia McClain on and after December 12th, 1930, learned of the financial condition and affairs of said defendant North American Bond and Mortgage Company and ascertained that said company had many unsecured loans and many financial losses on account thereof and owned stock in various companies, and notwithstanding said knowledge plaintiff Olivia McClain on January 20th, 1930, attended a stockholders' meeting of the defendant North American Bond and Mortgage Company and voted the shares of stock referred to in the complaint of said Olivia McClain at said stockholders' meeting." The court further found that Mrs. McClain became a stockholder on July 15, 1929, and that at all times since becoming such stockholder she exercised certain rights as such, and executed and delivered a proxy to Beesemyer to act for her in all of the affairs of the corporation; and that by the appointment of Beesemyer and his acting as her agent through the proxy she was and is charged with the knowledge of Beesemyer. The evidence in support of the first finding quoted in full may be reviewed.

It appears that in December of 1930 the collapse came and was a matter of grave public interest. Beesemyer was arrested and charged with certain criminal offenses. The whole affair was given wide publicity. On December 12 of that year Beesemyer made open confession of his delinquency. This confession was published in full in the daily press, and Mrs. McClain admits knowledge thereof. The confession was in evidence herein, and the portion thereof referring to North American Bond & Mortgage Company is as follows: "I further state that I falsified the records of the North American Bond and Mortgage Company and the Guaranty Holding Corporation and misappropriated large sums of money belonging to said institutions for my own personal use, and that such acts done by me in connection therewith were also done without the knowledge or consent of any of the directors or officers of either of these institutions." The fraud found consisted in false representations as to the assets of the North American and the nature of its securities and its dividend paying record. We fail to see where this confession could put any one on notice or convey any information on that subject. By the wildest stretch of the imagination one could not infer that there is anything particularly dishonest or corrupt in the victim of a theft. The fact that B holds up and robs A does not give rise to any suspicion that A was a thief.

[14, 15] The court in its findings holds that Olivia McClain could have learned the falsity of the representations by going to the office of the corporation commissioner and examining the records of that office. No such duty was placed upon her. McKeehan v. Pacific Finance Corp., 120 Cal. App. 578, 8 P. (2d) 213; Tatterson v. Kehrlein, 88 Cal. App. 34, 263 P. 285; Zwart v. Landfield, 93 Cal. App. 328, 269 P. 740; De Garmo v. Petitfils Confiserie, 93 Cal. App. 261, 269 P. 692; French v. Freeman, 191 Cal. 579, 217 P. 515; MacDonald v. Reich & Lievre, Inc., supra. In French v. Freeman, supra, at page 587 of 191 Cal., 217 P. 515, 518, it is said, quoting from Pomeroy's Equity Jurisprudence: "The mere existence of opportunities for examination, or of sources of information, is not sufficient, even though by means of these opportunities and sources, in the absence of any representation at all, a constructive notice to the party would be inferred; the doctrine of constructive notice does not apply where there has been such a representation of fact." The cited cases amplify this doctrine and affirm it. The finding as to the proxy given Beesemyer, having the effect of charging Mrs. McClain with all of the knowledge of Beesemyer, finds no support in law or in the facts here. The obtaining of the proxy was a part of the fraud perpetrated by and through the corporate agency. The proxy in any event simply authorized Beesemyer to vote the stock at any election of directors or at any other election held for any purpose, and to vote the stock at any meeting of the stockholders on any question voted on at such meeting. Beesemyer had no proxy to falsify or alter records, and the knowledge that he acquired through such methods was adverse to the stockholder and not imputed to her. 1 Cal. Jur. 852.

[16, 17] It appeared in evidence that shortly after December 12, 1930, the date of the Beesemyer confession, there was much activity amongst the unfortunate stockholders of North American. Mrs. McClain was much distressed, and telephoned to the corporation offices seeking information and advice both as to the condition of the company and her individual liability. She was always given encouraging reports. On January 20, 1931, there was a meeting of the stockholders, at which time and place there was a general discussion of the corporate affairs. Mrs. McClain attended the meeting. A partial audit was read and some discussion thereon had; it being expressly stated by the reporting auditor that the report was incomplete and subject to further investigation and report. The general information given was sufficient to raise a suspicion of the falsity of the representations made at the time Mrs. McClain purchased the stock. Mrs. McClain, being an elderly woman, testified that the whole proceeding was Greek to her, that there was much confusion and excitement at the meeting and that she heard nothing that was said. At the conclusion of the meeting, or at least during some part thereof, the stockholders present by ballot selected a committee to represent them. Mrs. McClain voted a ticket that was given her, voting her 270 shares of stock for seven directors. There is no evidence contradictory to that of Mrs. McClain on the question of her participation in the

stockholders' meeting, and nothing negativing her statement that she heard nothing that transpired. Shortly thereafter she did begin an investigation, and on February 27, 1931, served her notice of rescission upon the respondent company.

Conceding that Mrs. McClain was put upon inquiry on the 20th of January, the rescission on February 27th, hardly more than a month thereafter, should not of itself be held too late. It took from December 12, 1930, to January 20, 1931, for the experts to prepare a partial report for the stockholders, so it would seem rather fast for appellant to acquire full knowledge in practically the same time as it took the expert accountants. The fact that Mrs. McClain gave no notice of rescission to Zastrow or to Beesemyer is immaterial, in view of what has heretofore been stated.

[18-20] Coming now to the case of Mrs. Damerel on the question of promptness of rescission: Mrs. Damerel did not attend any stockholders' meeting; otherwise the same findings were made as to her knowledge and presumed knowledge. The same conclusion is reached by us and the same authorities applied. She, too, gave a proxy to Beesemyer. The finding of the court as to both appellants is that "in truth and in fact no rescission was effected." While this might properly be classed as a conclusion of law, it appears as a finding of fact following the findings of facts from which such conclusion was drawn. These facts are that plaintiffs did not tender back everything of value by them received by virtue of the purchase of the stock. The direct finding is that both plaintiffs, while holding the stock, received certain dividends which they did not tender back upon the attempted rescission.

There are two answers to this argument. Upon receipt of the notice of rescission respondent company made no objection to the tender, and distinctly repudiated and denied any liability. The attitude of the corporation was such as to indicate that, regardless of what was tendered, it would not recognize the rescissions. Section 2076, Code Civ. Proc. Quoting from De Garmo v. Petitfils Confiserie, 93 Cal. App. 261, 269 P. 692, 697: "If appellant fails in the present action, he would be entitled to retain the $500 dividend; if he succeeds in this action, he will be entitled to retain the $500 as a partial restoration of the $20,000 and have judgment against defendant for the balance. In no event, therefore, could the defendant possibly be injured." The same doctrine is announced in Kales v. Houghton, 190 Cal. 294, 212 P. 21. It would have been a hazardous thing for these plaintiffs to turn back to the corporation some $3,000 in cash at a time when such pandemonium prevailed. The money, once in the corporate treasury, may or may not have been sufficiently marked to permit recovery. The probability was that immediately a thousand hands would have been reaching for it. The rules regarding promptness of rescission and restoration of benefits are of equitable cognizance and intended to promote justice rather than to impede it. Accordingly, where no injury follows a slight delay in discovery or in pursuing the means of discovery, little importance will attach thereto. We concede that the question of promptness is primarily one for the trial court, but there must be some substantial evidence supporting a finding that precludes recovery on this ground.

Other questions presented by appellants require no discussion.

The judgment is reversed.

We concur: WORKS, P. J.; STEPHENS, J.

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133 Cal.App. 433

## LINCOLN v. QUICK.

Civ. 1028.

District Court of Appeal, Fourth District, California.

July 25, 1933.

Hearing Denied by Supreme Court Sept. 22, 1933.

**Automobiles** ⚷242(2).

Res ipsa loquitur doctrine *held* not available to guest in automobile accident to establish gross negligence of host, in absence of direct proof (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by E. A. Lincoln against E. H. Quick. From a judgment for plaintiff, defendant appeals.

Reversed.

Harrison G. Sloane and Fred A. Steiner, both of San Diego, for appellant.

Hillyer & Boldman, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff for damages arising from an automobile accident which occurred on July 13, 1931, while the plaintiff was riding as the guest of the defendant. At that time, section 141¾ of the California Vehicle Act (St. 1929, p. 1580), required the plaintiff in such a case to establish intoxication, willful misconduct, or gross negligence on the part of the defendant in order to recover, and the respondent contends that gross negligence was here established.

The appellant did not appear at the trial, and the only evidence as to how the accident occurred is found in the testimony of the respondent. He testified that they were riding along a paved highway on a clear dry day between 4 and 5 o'clock in the afternoon; that "we were driving so fast that I know I was very uneasy"; that he told the appellant not to go so fast; that he had been in automobile wrecks before, and "most any speed" would make him feel uneasy; that, if a car was going above fifteen miles an hour, he would rather not be in it; that the appellant did not slow up as the result of his remonstrance; that he did not know how fast the appellant was driving at the time of the accident; that he was unable to estimate how fast the car was going; that he did not know how the accident happened; that just prior to the accident he saw no other cars and heard no impact; and that as they were riding along he felt a sudden shock, became unconscious, and when he regained consciousness he was in a hospital. He also testified that on the next day the appellant told him "that the car left the road and turned over, and told me how badly the car was damaged."

The complaint alleges that the defendant drove and operated his automobile "at a speed in excess of fifty-five miles per hour, and so recklessly, carelessly and negligently that said automobile left the highway and turned over approximately three times," and that, as a consequence, the plaintiff sustained certain injuries. The court found that on the occasion in question, while the plaintiff was riding as a guest of the defendant, the defendant drove and operated his automobile "at a fast rate of speed so recklessly, carelessly and negligently that said automobile left the highway and turned over."

The direct evidence here presented was not sufficient to show negligence in the matter of speed (Diamond v. Weyerhaeuser, 178 Cal. 540, 174 P. 38; Rosander v. Market Street Railway Co., 89 Cal. App. 710, 265 P. 536), and there is no direct evidence of any other negligence. The respondent apparently concedes this, and thus states his position:

"However, under our theory of the case, we believe that the speed of the car at the time of the accident has little or no bearing on the case. The fact that the appellant was driving the car at the time of the accident is the matter of importance.

"It is our contention that the doctrine of res ipsa loquitur applies to all cases of negligence where an automobile is shown to be under the management of the defendant and the accident is such as in the ordinary course of things does not happen if the defendant used proper care."

Without considering the questions presented as to the sufficiency of the complaint and the findings for a case involving gross negligence, or whether a sufficient foundation was laid with respect to the general circumstances to make the doctrine applicable, we proceed at once to what the respondent states to be the only real point to be decided, namely, Is the doctrine of res ipsa loquitur available to a plaintiff, in the absence of any direct proof, for the purpose of establishing gross negligence? In other words while this doctrine may be invoked to make out a prima facie case of negligence, is it sufficient in itself to make out a prima facie case of gross negligence, where such a showing is required?

The doctrine referred to has always been applied in cases where the circumstances are such as, unexplained, afford reasonable evidence of want of care on the part of a defendant, and, where applicable, it creates a presumption sufficient to make out a prima facie case of negligence. Michener v. Hutton, 203 Cal. 604, 265 P. 238, 59 A. L. R. 480. So far as we are informed, the doctrine has always been applied for the purpose of proving that some negligence existed and never with respect to the amount or degree of such negligence. The respondent argues that, since the doctrine has been applied in cases involving carriers of persons both for reward and without reward, and since a higher degree of care is required in the one case than in the other, the doctrine applies to all degrees of negligence, and may therefore be invoked to make out a prima facie case for a plaintiff regardless of what form of negligence he is required to prove. Citing Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; Brown v. Davis, 84 Cal. App. 180, 257 P. 877. While this doctrine has been held to apply regardless of the degree of care required in a particular case, it has only been so applied in order to make out a prima facie case that ordinary care had not been exercised or slight negligence had been established; in other words, to show that negligence existed. It is quite different to relate the doctrine not to the degree of care required before ordinary negligence begins, but to the degree of negligence that exists, or as to how far the defendant has gone beyond the line of the care required of him.

If the respondent's contention that this doctrine may be invoked to make out a prima facie case of whatever degree of negligence the plaintiff is required to establish be correct, the 1929 amendment to the statute above referred to, forbidding recovery for ordinary negligence and requiring proof of exceptional negligence in guest cases, would be of no effect whatever in many cases where slight negligence, at the most, existed, since a plaintiff by the very paucity of his proof and by reliance on this doctrine could circumvent the statute and recover upon a showing no greater in quantity or in effectiveness than would have been necessary before the amendment was adopted. We think that this result cannot and does not obtain, and that the amendment in question placed a burden upon a plaintiff to establish a certain degree or extent of negligence which cannot be met by a mere inference or presumption that some negligence existed.

In our opinion, the use of this doctrine for such a purpose as here urged would be inconsistent with the doctrine itself. It applies only where the plaintiff does not know what caused the accident and negligence may be presumed from the fact that an accident occurred, in view of the general circumstances. But, where a plaintiff is required to prove not only negligence, but gross negligence, this very requirement would seem to imply the necessity of proving how the accident occurred and that certain facts exist which in themselves disclose the presence of gross negligence as distinguished from ordinary negligence.

For the reasons given, the judgment appealed from is reversed.

We concur: MARKS, J.; TURRENTINE, Justice pro tem.

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135 Cal.App.Supp. 791

## WINFIELD v. UNITED FRUIT CO.

No. 338.

Appellate Department, Superior Court, City and County of San Francisco, California.

July 7, 1933.

**1. Seamen** 🔑**29(5).**

Injured seaman can sue under Jones Act in state court where valid service of summons can be effected (Merchant Marine Act 1920, § 33 [46 USCA § 688]).

**2. Commerce** 🔑**81.**

That business of corporation is exclusively interstate and foreign does not render corporation immune from ordinary process of state courts.

**3. Seamen** 🔑**29(5).**

Seaman hired in San Francisco and injured on high seas could sue employer, foreign corporation, doing interstate business, in municipal court of San Francisco, by serving summons on manager in San Francisco, where corporation docked ships and maintained offices (Merchant Marine Act 1920, § 33 [46 USCA § 688]).

Facts disclosed that some 20 employees were engaged by foreign corporation in San Francisco, that employees' contract initiated in San Francisco and was to terminate there, and that corporation had at least one bank account in San Francisco, and maintained two offices there.

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Appeal from Municipal Court, City and County of San Francisco; Alden Ames, Judge.

Action by Evan H. Winfield against the United Fruit Company. From an order granting defendant's motion to quash service of summons, plaintiff appeals.

Reversed and remanded.

B. E. Kragen and Derby, Sharp, Quinby & Tweedt, all of San Francisco, for appellant.

Pillsbury, Madison & Sutro, of San Francisco, for respondent.

GOODELL, Judge.

Defendant, a New Jersey corporation, operates a fleet of three, and sometimes more, steamships between the port of San Francisco and certain ports in Central and South America. The vessels touch at Los Angeles on their north-bound trips. Appellant was hired by respondent at San Francisco as a storekeeper aboard the S. S. Chiriqui for her voyage from San Francisco to Port Armuelles, Panama, and return to San Francisco. While at sea off the Central American coast, plaintiff suffered an injury for which he brought this action in the municipal court, under the so-called Jones Act, being section 33 of the United States Merchant Marine Act of 1920 (46 USCA § 688), claiming $2,000 damages. Summons was served in San Francisco upon defendant's manager, and defendant appeared specially and moved to quash the service upon the ground that it was a New Jersey corporation, that the cause of action sued upon did not arise in California or relate to business or transactions within this state, and that the court had no jurisdiction of the subject-matter or of the person of the defendant. The motion was heard upon affidavits and oral testimony touching the operations and business of defendant in California, and was granted. Defendant has never done any of the things required by law to qualify it to transact business within this state.

The base of defendant's Pacific Coast operations is San Francisco, where it maintains a force of about twenty employees. In addition to the manager, there are a general freight and passenger agent who attends to soliciting freight and passenger business for the ships, an accountant who attends to money matters and accounts, and a purchasing agent, all under the direction of the manager. There are two offices in San Francisco; one is in the business district and the other is at the terminal on Third street. At this terminal freight is received and stored; there the gear and equipment for the loading and discharging of the ships are kept, and the men are hired for the ships. At San Francisco the vessels are provisioned and supplied, and at San Francisco bills of lading are issued for shipments to the foreign ports at which the steamers call. Bananas in large quantities are brought to San Francisco and Los Angeles from foreign ports and are marketed and sold in California by Fruit Dispatch Company, a corporate affiliation of the defendant, managed by its San Francisco manager.

Defendant maintains at least one commercial bank account in San Francisco, wherein the proceeds of the sale of bananas and other merchandise are deposited. Out of this account the seamen are paid in cash, and the account is subject to checks drawn by defendant's accountant at San Francisco under the direction of its manager. Claims for damaged cargo are adjusted at the San Francisco office, and money collected for prepaid freight on outgoing shipments is deposited in the local bank account, as are also the proceeds of passenger tickets. Advertisements are carried by defendant in shipping journals published in San Francisco. The manager reports on other than routine matters to the company's New York office; but the San Francisco office is called by the defendant its division office.

[1] Appellant's right under the Jones Act to sue in a state court where valid service of summons can be effected was settled in 1932 by the decision in Bainbridge v. Merchants', etc., Co., 287 U. S. 278, 53 S. Ct. 159, 77 L. Ed. 302, 1933 A. M. C. 32, and the trial judge so held, in reliance on Mitchell v. Pacific Steamship Co., decided by this department in 1930.

The question of a valid service of summons, however, is the real problem presented by this appeal.

We are satisfied from the facts of record, summarized above, that defendant at the time summons was served was doing business within this state; that the person upon whom service was made was its manager, within the meaning of section 411, Code of Civil Procedure [Milbank v. Standard Motor Construction Co. (Cal. App.) 22 P.(2d) 271 and cases cited]; that consequently—passing for the moment the question of interstate commerce—there was a valid service. The record surely shows that defendant ever since 1927 has been transacting "within the state some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose." Davenport v. Superior Court, 183 Cal. 506, 508, 191 P. 911. Defendant earnestly contends, however, that this business is purely interstate and foreign in character, and not at all intrastate, and that to compel it to litigate in a state court is to unduly burden interstate commerce. It is further contended that a foreign corporation, even if it is present in a state (because doing an interstate and foreign business therein), may not, unless it has consented, be sued on transitory causes of action arising elsewhere, but which are unconnected with any corporate action by it within the jurisdiction. In support of this contention, defendant relies upon a long line of cases starting with Old Wayne Mutual Life Ass'n v. McDonough, 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345, decided in 1906, and coming down to Louisville & Nashville R. Co. v. Chatters (Southern Railway Co. v. Chatters) 279 U. S. 320, 49 S. Ct. 329, 73 L. Ed. 711, decided in 1929. The Old Wayne Case holds that the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states. This principle was applied in Simon v. Southern Railway Co., 236 U. S. 115, 35 S. Ct. 255, 261, 59 L. Ed. 492, strongly relied upon by defendant, holding that service under a Louisiana statute was not "effective to give the district court of [New] Orleans jurisdiction over defendant as to a cause of action arising in the state of Alabama." The reason for the rule is thus given by Mr. Justice Lamar at page 130 of 236 U. S., 35 S. Ct. 255, 260: "Otherwise, claims on contracts, wherever made, and suits for torts, wherever committed, might, by virtue of such compulsory statute, be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carrying on business." One of the leading cases on the question of the burdening of interstate commerce by actions in state courts is Davis, Director General, etc., v. Farmers' Co-operative Equity Co., 262 U. S. 312, 43 S. Ct. 556, 557, 67 L. Ed. 996. There the Santa Fé Road, a Kansas corporation, was sued in Minnesota, where it had no railroad, by another Kansas corporation, for a grain loss in an intrastate shipment in Kansas. Process was served upon a soliciting agent of the Santa Fé Road in Minnesota under a statute of that state providing that any corporation, having an agent within the state soliciting freight or passenger traffic, could be so served. The court, in holding that the action unduly burdened interstate commerce, said: "So far as appears the transaction was in no way connected with Minnesota or with the soliciting agency located there."

In Atchison, Topeka & Santa Fé R. Co. v. Wells, 265 U. S. 101, 44 S. Ct. 469, 68 L. Ed. 928, Wells, a citizen of Colorado, employed by the plaintiff, was injured in New Mexico, and he sued in Texas, where the plaintiff had neither trackage nor an agent. It was held on the authority of the Davis Case that the suit in Texas unduly burdened interstate commerce. In Michigan Central R. Co. v. Mix, 278 U. S. 492, 49 S. Ct. 207, 73 L. Ed. 470, Doyle, a resident of Michigan, was killed in that state. His widow moved to Missouri, where she sued. The railroad company was a Michigan corporation, had no line in Missouri, had never consented to be sued there, and had never been admitted to do business there. The court held that the company was not amenable to Missouri process. In Fry v. Denver & Rio Grande R. Co. (D. C., N. D. Cal.) 226 F. 893, the action was commenced in the state court against the defendant railroad, a Colorado corporation, for personal injuries sustained by plaintiff, a passenger, in Colorado. After removal for diversity of citizenship, a demurrer challenging the jurisdiction was sustained by Judge Van Fleet upon the authority of the Old Wayne and Simon Cases. The reasons for his decision were substantially the same as those found in the railroad cases just discussed, although his decision antedated the Davis Case by some years. Weinard v. Chicago, M. & St. Paul R. Co. (D. C.) 298 F. 977, is simply an extension of the rule of the Davis Case, and differs from it only in the fact that the defendant had part of its railroad in the state of the forum. The action was brought in the federal court in Minnesota by a resident of the state of Washington against the railroad company, a Wisconsin corporation, for personal injuries sustained by the plaintiff at Tacoma, Wash. The trackage in Minnesota, the court held, made no difference in principle; the action nevertheless burdened interstate commerce, and service of summons was quashed.

Panstwowe Zaklady Graviozne v. Automobile Ins. Co. of Hartford and Baltimore & Ohio R. Co. (D. C.) 36 F.(2d) 504, 506, was commenced in the state court and thence removed. It was an action against a railroad company engaged in interstate commerce for loss on the high seas of merchandise shipped under an Illinois bill of lading to Baltimore, and thence transshipped to a European port. "So far as appears," says the court, "the transaction was in no way connected with this state [New York], or with any agency of the defendant located here." A motion to dismiss, as against the railroad company, for lack of jurisdiction was granted on the ground of the burden upon interstate commerce and on the authority of the Old Wayne, Simon, and Davis Cases and Atchison, T. & S. F. R. Co. v. Wells. In addition to the cases just discussed, the defendant relies upon Mitchell Furniture Co. v. Selden Breck Construction Co., 257 U. S. 213, 42 S. Ct. 84, 66 L. Ed. 201, a suit brought in Ohio by an Ohio corporation against a Missouri corporation upon a contract made in Illinois to be performed in Michigan. The basis for the decision was that the defendant was not doing business in Ohio, and the contract sued on was neither made, nor was it to be performed, there.

[2] It will readily be seen that in these cases cited by defendant, "where jurisdiction has been denied, the cause of action not only arose outside the state, but it was not shown to have arisen out of any business conducted by the corporation within it or to have had any relation to any corporate act there." Chatters Case, 279 U. S. 320, 328, 49 S. Ct. 329, 331, 73 L. Ed. 711. In the instant case we assume for the purpose of the decision that defendant's business in California is exclusively interstate and foreign in character. That fact, however, does not render the corporation immune from the ordinary process of the courts of a state. International Harvester Company v. Commonwealth of Kentucky, 234 U. S. 579, 34 S. Ct. 944, 58 L. Ed. 1479. In that case the state of Kentucky had instituted a criminal proceeding in its own courts against the Harvester Company for a violation of a Kentucky anti-trust law. The precise question in the case was whether or not the state court had jurisdiction, and it was held that it had. The facts were that the company had agents within the state, soliciting orders which were sent to another state, in response to which the machines of the Harvester Company were delivered in Kentucky. There was a continuous course of shipment of machines into Kentucky. Authority was vested in the agents within the state to receive payment in money or by check or draft and to take notes payable at banks in Kentucky. The course and method of dealing were shown by circulars issued by the company to its agents disclosing a clear intent and a studied plan to keep the business strictly interstate in character. The circulars opened with the order: "The company's transactions hereafter with the people of Kentucky must be on a strictly interstate commerce basis." Id., 234 U. S. 584, 585, 34 S. Ct. 944, 945, 58 L. Ed. 1479. "This course of conduct of authorized agents within the state," says Mr. Justice Day at page 586 of 234 U. S., 34 S. Ct. 944, 946, "in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state."

In the Davis Case, Mr. Justice Brandeis (at page 315 of 262 U. S., 43 S. Ct. 556, 557) amplifies the reasons underlying the interstate commerce rule as given by Mr. Justice Lamar, as follows: "That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts; that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers—these are matters of common knowledge." It is obvious that the maintenance and trial of this case in the court in which it was commenced will impose none of these burdens. San Francisco is the port at which the Chiriqui is provisioned, supplied, and manned; and, if a view or inspection of her equipment is needed, or if the testimony of her officers or crew is required, no more convenient or available place can be found than San Francisco. On the other hand, a trial of this case in New Jersey would lead to the consequences, and impose the burdens, spoken of by the justices in the quotations given above.

In the Davis Case, as has been noted, "the transaction was in no way connected with Minnesota or with the soliciting agency located there," but the author of the opinion was careful to remark, "It may be that a statute like that here assailed would be valid, although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the state" (footnote citation to the International Harvester Company Case and to "Jurisdiction over non-residents doing business within a State" by Austin W. Scott, 32 Harvard Law Review, 871, 887), and further: "These questions are not before us, and we express no opinion upon them." The questions thus left open—and, to some extent, anticipated—in the Davis Case, were squarely presented in the Chatters Case, 279 U. S. 320, 49 S. Ct. 329, 330, 73 L. Ed. 711, where the plaintiff, Chatters, a citizen of Louisiana, bought a through ticket at the office of the Louisville & Nashville Company in New Orleans for a journey to Washington, D. C., on which trip he was injured in Virginia. The Louisville & Nashville Company was a Kentucky corporation, the Southern Railway, a Virginia corporation. The action was brought in the federal court in Louisiana, process was served upon the Southern's designated agent in Louisiana (as in the Simon Case), and the Southern Company appeared specially and excepted to the jurisdiction upon the ground that the cause of action, which was transitory, arose outside Louisiana, and not out of any business done by the Southern within Louisiana. The ticket was in three parts: (1) Over the Louisville & Nashville Road from New Orleans to Montgomery, Ala.; (2) over the Atlanta & West Point Road from Montgomery to Atlanta, Ga.; and (3) over the Southern Road from Atlanta to Washington. Each of the three roads controlled the train over its own part of the trip, and the accident happened on the Southern's tracks, in Virginia. The ticket was bought by Chatters at the office of the Louisville & Nashville Company in New Orleans, that company acting as agent for the Southern in making the sale. Mr. Justice Stone points out that the Southern "carries on in the state, through an office and agents of its own there located, continuous solicitation of freight and passenger traffic," and "maintains its own office there for the sale of tickets for passage over its own and connecting lines" (citing the International Harvester Company Case). He then holds that the fact that the journey upon which the passenger was injured originated in the purchase of his ticket from the Southern Railway (acting through its agent, the Louisville & Nashville Company) in Louisiana was sufficient to render the Southern amenable to service of process in Louisiana, despite the fact that the injury was in Virginia; and thus distinguished the case from the Old Wayne and Simon Cases. As said in the recent case of American Indemnity Co. v. Detroit F. & S. Co. (C. C. A.) 63 F.(2d) 395, 397, respecting the Chatters Case, "since the passenger's injury involved a breach of duty created by the sale of his ticket within the state, the suit was held to be so connected with business done in the state as to fall under the statute."

It is self-evident under the facts that San Francisco is the natural and logical place for the trial of this case; and therefore that the case is not within the spirit or reason of the rule against the burdening of interstate commerce. It is equally self-evident that in this case the fact that plaintiff was employed at San Francisco for the voyage upon which he was injured brings the case within the rule of the Chatters Case. The making of the contract of employment in California brings the appellant's injury—suffered upon the high seas—into relation with defendant's business in this state, just as the purchase by Chatters of his ticket in Louisiana connected his injury with the business of the Southern Railway in the state of suit. Moreover, there are many factors present here which were entirely absent from the cases upon which defendant relies. Unlike the Simon, Davis, and Fry Cases, Atchison, T. & S. F. R. Co. v. Wells and Michigan Central R. Co. v. Mix (where the rails of the interstate carriers did not touch the state of the forum), the defendant's steamship line has San Francisco as its terminal port, and its business on this Coast centers here. As in the International Harvester Company Case, it has in California not only an agent soliciting business, but a large force of employees, including those in executive positions. Plaintiff's injury was sustained on the high seas and not within the territorial jurisdiction of any state. Added to these factors is the circumstance that plaintiff's contract of employment was to terminate in San Francisco where it began. As far as the relations between plaintiff and defendant were concerned, this was the home port of both parties; as far as any state jurisdiction was concerned, California was the only state with respect to which both parties dealt. Furthermore, an analogy exists between this case and that of Hireen v. Interstate Transit Lines, 52 F.(2d) 182, 183 (D. C., N. D. Cal.) where it was held that a passenger who bought a ticket in Nebraska for a trip to California, and who was injured in Nebraska, could, nevertheless, sue in this state. In so holding Judge Kerrigan cites and quotes from the Chatters Case, and says: "Since the performance of defendant's contract of carriage was to terminate in California, the cause of action is sufficiently related to the business of the defendant within this state. The cases of Michigan Central R. Co. v. Mix, 278 U. S. 492, 49 S. Ct. 207, 73 L. Ed. 470, and Missouri ex rel. St. Louis, etc., Ry. v. Taylor, 266 U. S. 200, 45 S. Ct. 47, 69 L. Ed. 247, 42 A. L. R. 1232, indicate that that is the rule when the contract of carriage or consignment is to terminate in the state of suit."

[3] Other cases than those herein cited have been presented by both sides, but it is not necessary to discuss them. We are satisfied for the reasons and upon the authority already given that the municipal court has jurisdiction of the subject-matter and of the person of defendant, and that the exercise or assertion of that jurisdiction does not unduly or unreasonably burden interstate commerce.

The judgment appealed from, together with the order quashing service of summons, is reversed, and the cause remanded to the municipal court for further proceedings looking to a trial on the merits.

JOHNSON, P. J., and CONLAN, J., concur.

218 Cal. 542

**KEYS et al. v. MOTHER LODE EXTENSION MINES, Inc., et al.**

**Sac. 4543.**

Supreme Court of California.
July 24, 1933.

**Mortgages** ⚷445.

Complaint in foreclosure *held* not defective for failing to aver performance of conditions and covenants, where they were neither precedent nor concurrent with money obligation sued on, covenant sued on was independent, and no relief was asked concerning mutual or concurrent covenants.

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In Bank.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by William A. Keys and another against the Mother Lode Extension Mines, Incorporated, and others. From the judgment, defendants appeal.

Affirmed.

Kelby & Lawson and Clyde C. Triplett, both of Los Angeles, D. A. Maclean, and Rowan Hardin, of Sonora, for appellants.

Wm. W. Kaye and Kaye & Johnstone, all of Los Angeles, for respondents.

PRESTON, Justice.

The judgment is affirmed.

The record presents a judgment roll appeal by defendants from a decree of foreclosure in favor of plaintiffs upon certain mining property in Tuolumne county. The sole question presented is whether the complaint fails to state a cause of action by the omission therefrom of appropriate allegations averring the performance of certain precedent and concurrent conditions and covenants found in the agreements of the parties, which are exhibits to the complaint, and in which is contained the mortgage in question.

The answer to the contention is that the covenants and conditions alluded to are neither precedent nor concurrent with the money obligation sued upon. The obligation to pay is definite and certain. The obligation to surrender certain documents and other property, and to procure reconveyance under a deed of trust, was to follow only upon a precedent act of appellants, to wit, the procuring by them of an abstract of title showing ownership of title to the mining property in appellant corporation (subject to certain specified exceptions). Until this was done no obligation existed on the part of respondents.

Thus we have a case where an independent covenant is sued upon and no relief is asked concerning covenants which are mutual or concurrent. The complaint, therefore, is not defective (Fresno Canal, etc., Co. v. Perrin, 170 Cal. 411, 149 P. 805); hence the conclusion above announced.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; THOMPSON, J.; SEAWELL, J.

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133 Cal.App. 389

## JONES et al. v. DAVIES et al.

Civ. 1240.

District Court of Appeal, Fourth District, California.

July 21, 1933.

Rehearing Denied Aug. 14, 1933.

**1. Automobiles** ⟹245(8, 57).

Whether automobile driver was negligent, and whether his negligence was proximate cause of collision with boy crossing street in middle of block at 8 p. m., *held* for trial judge.

**2. Automobiles** ⟹245(74).

Whether boy injured by automobile was contributorily negligent in crossing street in middle of block at 8 p. m. *held* for trial judge.

**3. Automobiles** ⟹245(74).

Where boy of ten crosses highway and is injured, even though he fails to look before crossing, contributory negligence is usually question of fact.

**4. Automobiles** ⟹245(74).

Where boy of ten does not see approaching automobile, or, seeing one, erroneously misjudges speed or distance, or for some other reason assumes he could avoid injury to himself, contributory negligence is usually for jury.

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Robert Jones, by Cecil J. Jones, his guardian ad litem, and Cecil J. Jones against Douglas D. Davies and the Cousins Tractor Company, Inc. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Ray W. Hays, of Fresno, for appellants.

Frederick W. Welsh, of Bakersfield, for respondents.

TURRENTINE, Justice pro tem.

Plaintiffs (a minor child and his father) filed suit against defendants for damages arising out of collision between plaintiff's minor child and an automobile driven by one defendant for the other defendant in the scope of his employment. Plaintiffs recovered judgment, and defendants appeal.

The minor plaintiff, a boy ten years old at the time of the accident, was playing on the east side of the highway running through the city of Delano at about 8 o'clock in the evening. He approached the easterly side of the highway, stopped, observed the traffic, watched two cars pass in opposite directions, and then started to cross the highway in the middle of the block. He testified, in substance, that he waited on the easterly side of the highway for two cars to go by, one going north and one going south, after which he looked up and down the highway and started across; that, when he was a little beyond the center of the street, he was struck by defendants' automobile, and did not see it before he was hit; that, after he started running across the street, he looked but did not see defendants' automobile. The defendant driver testified that he did not see the boy before the car struck him. He placed the speed of his automobile at between fifteen and eighteen miles per hour. Some witnesses placed it at thirty-five miles per hour. The lights on the automobile were burning. The evidence showed that there were a number of business houses along the highway in the immediate proximity of the accident, and some traffic on the highway.

[1] The record brings us inevitably to the conclusion that, under the facts of this case, it was a question for the trial judge to determine whether or not the driver was negligent, and whether his negligence was a proximate cause of the accident and injuries. "From this picture the jury could with reason conclude that defendant either was not watching the street, which it was his duty to do, * * * or did not have his car under that control which the law requires of a driver. * * * If failing in either duty, his failure was negligence proximately causing the accident." Scott v. Shaw, 115 Cal. App. 400, 1 P.(2d) 531, 532.

[2-4] We likewise are of the opinion that it was a question of fact for the trial court to determine whether or not the minor plaintiff was guilty of contributory negligence. When a boy ten years old crosses a highway, and is injured, even though he fails to look before crossing, the question of his negligence is usually and naturally a question of fact for the determination of the jury or trial court. Shannon v. Central-Gaither Union School Dist. (Cal. App.) 23 P.(2d) 769. There is evidence that he looked before he started across the street, and under such circumstances the following rule is applicable: "Where he looks but does not see an approaching automobile, or seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury." White v. Davis, 103 Cal. App. 531, on page 542, 284 P. 1086, 1091. The trial court was therefore justified in finding adversely to defendants in this case on both the question of negligence of the driver and the contributory negligence of the boy.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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133 Cal.App. 405

## STROTHER v. ADOHR CREAMERY CO. et al.

Civ. 7983.

District Court of Appeal, Second District, Division 2, California.

July 22, 1933.

Rehearing Denied Aug. 21, 1933.

Hearing Denied by Supreme Court Sept. 19, 1933.

**1. Negligence** ⟹121(2).

"Res ipsa loquitur" doctrine is that defendant's exclusive control of thing causing injury, which does not ordinarily occur with proper management, to plaintiff without his fault, affords reasonable evidence that it arose from defendant's negligence, in absence of explanation.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words & Phrases.]

**2. Negligence** ⟹121(3).

Uncontradicted evidence that driver of horse-drawn wagon standing unattended on down grade in street, failed, without explanation, to apply brake, authorized jury to infer negligence creating liability for injuries to child falling therefrom when horse moved forward.

**3. Appeal and error** ⟹930(1).

All intendments being resolved in favor of verdict for plaintiff in personal injury suit, appellate court must assume that jury concluded that defendants, admitting knowledge of dangerous conditions and their duty, knowingly permitted danger to exist without legal justification.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by William Strother, by his guardian ad litem, I. Page Strother, against the Adohr Creamery Company and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

George L. Greer, of Los Angeles, for appellants.

Koenig & Brunton, of Los Angeles, for respondent.

CRAIG, Justice.

A judgment for damages was entered upon a verdict of a jury in favor of the plaintiff, a minor child, on account of personal injuries alleged to have resulted from negligence of the defendant's employee. The defendants appealed.

[1-3] A horse-drawn delivery wagon of the appellant company in custody of its driver, a codefendant herein, stood unattended in a city street near the respondent's residence. The latter climbed upon the same and fell or was thrown therefrom as the horse moved forward. The evidence upon the question in controversy is meager. It appeared that said vehicle was supplied with hooks to which by rings in the reins the same were to be tightly drawn back and fastened. Also, there was a brake held by notches and, as testified by the driver, "when you push it up on the side it pulls it back into the notches which hold it in place." When stopping to make a delivery, the rein "pulls the horse's head back and that makes the lines taut * * * and in addition to that you had to put on the brake" to prevent the horse

from moving during the driver's absence. The appellants maintain that the fact that a child may not be capable of contributory negligence does not always render a defendant liable upon mere proof of injury. And they doubtless properly distinguish turntable cases which have been said to be exceptions to the general rule, since "if an owner became responsible merely because children were attracted, it would burden the ownership of property with a most preposterous and unbearable weight." Loftus v. Dehail, 133 Cal. 214, 65 P. 379, 380. An instruction given to the jury in the instant case and to which the appellants take especial exception stated: "If you find that plaintiff was injured by defendant's horse and wagon, and if you further find that plaintiff was too young to be negligent, that the burden of proving lack of negligence falls on the defendants and if they fail to prove themselves free from negligence, then you should find for the plaintiff." Scellars v. Universal Service Everywhere, 68 Cal. App. 252, 228 P. 879, 880, is cited as authority for argument that the rule so stated had no application. It was there observed that: "Aside from the occurrence of the accident, there is no further showing of negligence on the part of the defendant except the testimony above referred to that high motor speed could cause the damage which resulted. To hold the defendant liable under these circumstances would be to merely conjecture that he had conducted himself negligently, and thus caused the injury." But the appellant's driver testified that the respondent had to his knowledge previously been found under his wagon; that the grade of the street "is just enough there with that kind of a wagon so that without applying the brake it would go downhill. The brake would have to be applied to hold the wagon from going downhill." It appeared by positive testimony that said wagon ran over the respondent, and that he was injured thereby; and although asked repeatedly the driver failed to give any testimony from which the jury might even infer that said brake had been applied "to hold the wagon from going downhill." The doctrine of "res ipsa loquitur" is that when a thing which causes injury without fault of the injured person is shown to be under the exclusive control of the defendant and the injury is such as in the ordinary course of things does not occur, if proper management is exercised, it affords reasonable evidence in the absence of explanation that the injury arose from the defendant's want of care. Moore v. Steen, 102 Cal. App. 723, 283 P. 833. It means "the thing speaks for itself," and so speaking furnishes an inference of negligence in the absence of showing to the contrary. Where the thing is shown to be under the management of the defendant or his servant and the accident is such as in the ordinary course of events does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of proper care. Crooks v. White, 107 Cal. App. 304, 290 P. 497. The theory of the doctrine is that the defendant in charge of an instrument which causes injury either knows the cause of the accident or has the best opportunity of ascertaining it, and the plaintiff having no such knowledge is compelled to allege negligence in general terms and to rely upon proof of the happening of the accident in order to establish it. Kenney v. Antonetti, 211 Cal. 336, 295 P. 341. The rule stated by said instruction was accompanied by cautionary instructions applicable to the evidence before the jury, and if they believe from uncontradicted evidence that said driver having knowledge of the necessity for the exercise of care under the peculiar conditions related by him had not applied his brake and gave no explanation of his failure so to do, it lay within their province to infer a degree of negligence from which an absence of showing to the contrary would render the defendants liable under the rule stated in numerous cases. Having admitted knowledge of such conditions and of his duty, all intendments being resolved in favor of the verdict, it must be assumed that the jury concluded that the appellants knowingly permitted a danger to exist for which they could afford no legal justification.

The judgment is affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

## SUMMERS v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8891.

District Court of Appeal, Second District, Division 2, California.

July 24, 1933.

Hearing Granted by Supreme Court Sept. 21, 1933.

**1. Master and servant 🔑397.**

Where jurisdiction of board depends on existence of certain facts, board has authority to determine whether those facts exist, and its determination is conclusive on collateral attack.

**2. Certiorari 🔑28(1).**

Certiorari is direct attack in which existence of jurisdictional facts may be questioned.

**3. Master and servant 🔑417(7).**

"Willful misconduct" is jurisdictional question open to inquiry in certiorari proceeding to review award of Industrial Accident Commission based on employer's willful misconduct.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words & Phrases.]

**4. Master and servant** ⚿387.

"Serious misconduct" of employer means conduct which he knew, or ought to have known, was likely to jeopardize employees' safety.

[Ed. Note.—For other definitions of "Serious Misconduct," see Words & Phrases.]

**5. Master and servant** ⚿387.

Where employee was killed by exposed conduit on top of 33-foot pole, employer *held* guilty of "serious and willful misconduct" in permitting conduit to be exposed, though he did not have actual knowledge (St. 1911, p. 1037, § 1, as amended by St. 1915, p. 1058; St. 1917, p. 862, §§ 34, 35).

[Ed. Note.—For other definitions of "Serious and Willful Misconduct," see Words & Phrases.]

**6. Evidence** ⚿8.

It is common knowledge that to contact electricity or uninsulated conduit through which it is passing is dangerous.

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Proceeding under the Workmen's Compensation Act by Rena Summers, claimant, for the death of her husband, opposed by the Metro-Goldwyn-Mayer Corporation, employer, wherein compensation was awarded to claimant by the Industrial Accident Commission upon the ground of serious and willful misconduct of employer. Upon rehearing the Industrial Accident Commission reduced the award, and claimant filed petition for review, and award was annulled, and respondents apply for certiorari to annul the decision annulling the award.

Award annulled.

Prior opinion, 20 P.(2d) 762.

J. L. Kearney, of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, and Loeb, Walker & Loeb and Herman F. Selvin, all of Los Angeles, for respondents.

CRAIG, Justice.

Following fatal injury to an employee, compensation was allowed by the Industrial Accident Commission upon the ground of serious and willful misconduct of his employer. On rehearing before said commission, the award was reduced upon the ground that the evidence of such conduct was insufficient to warrant an allowance of extra compensation. The respondents have petitioned this court for a rehearing after decision upon a writ of review annulling the order last mentioned. It appeared that said employee, while engaged in removing electric wires at the top of a pole, came in contact with a metal conduit which was at the time not insulated at that point. It is contended that exposure of the conduit at the time in question constituted a dereliction amounting to serious and willful misconduct of the employer. Section 1, Statutes of 1911, c. 499, p. 1037, as amended in 1915, c. 600, p. 1058, provided that no "person, firm, or corporation shall * * * erect or maintain vertically on any pole any wire or cable used to conduct or carry electricity, without causing such wire or cable to be at all times wholly incased in a casing," etc. Sections 34 and 35 of the Workmen's Compensation Insurance and Safety Act (St. 1917, p. 862) require that every employer furnish employment and a place of employment safe for employees, and forbid a failure or neglect so to do. Orders of the California State Railroad Commission further recite that "any portion of the riser or iron pipe enclosing the riser, extending within eight feet of any supply conductor shall be covered with a casing," etc. The petitioner asserts that, even if the decedent's superiors in charge of such facilities had not known that this conduit was not insulated at the time in question, the defective condition which caused the injury was apparent, that it should have been observed, and that said employer and its agents in charge must be held to have known the law.

[1-3] Where the jurisdiction of a board depends upon the existence of certain facts, it has authority to determine whether or not those facts exist, and its determination of such question is conclusive on collateral attack. In re Grove Street, 61 Cal. 438; People v. Los Angeles, 133 Cal. 338, 65 P. 749. But certiorari is a direct attack (Vanfleet on Collateral Attack, § 2), in which the existence of jurisdictional facts may be questioned, and "willful misconduct" is a jurisdictional question in such cases which is open to inquiry in such a proceeding (Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P. 35).

[4] It has been held that serious misconduct of an employer must be taken to mean conduct which he either knew, or ought to have known, had he turned his mind to the matter; conduct likely to jeopardize the safety of employees, and involving the knowledge of a person that the thing which he does is wrong; though not necessarily shown by positive evidence that he was notified of an unsafe condition, but shown by circumstances tending to establish proof of a reckless disregard for the safety of others and a willingness to inflict injury. E. Clemens Horst Co. v. Industrial Accident Comm., 184 Cal. 180, 193 P. 105, 16 A. L. R. 611.

The official in charge of power supply and his subordinates who were superior to the decedent and his coemployees swore that they were not aware of the rules of the respondent commission nor of the Railroad Commission; and did not know of the absence of insulation near the top of said pole until after the accident. The pole was 33 feet and 10 inches in height, and by said rules and statutes the conduit in controversy was required to be insulated throughout its length. Both the supervising head of power supply and the gang foreman had been present and were about the pole which formed part of a line then for some time in existence and operation. The foregoing facts were not controverted.

[5] That the covering which had protected the upper part of the pole had fallen off on the day before Summers was fatally injured is an undisputed fact. There was evidence indicating that it had been off for some time. Winchester stated that he had no actual knowledge of this fact. He was the manager in charge of the work that was being done. He testified that he was on the ground on the 21st day of June, the day before the accident. He went out there on the evening of that day or the morning of the 22d, but could not say that he saw Summers at that time. This, of course, would have been after the covering of the upper part of the pole had fallen off. In the morning of the 21st, and before directing Summers to work on this pole, Winchester warned him to be careful and that the pole was dangerous. Under these circumstances, we think that as a matter of law it must be held that, even though Winchester did not have actual knowledge of the exposed and dangerous condition of the conduit on the 22d day of June, he could have known of it had he turned his mind to the matter. Knowing as he did the hazardous condition of this pole, the admitted facts and the failure to look and observe that this covering had dropped off was a reckless disregard for the safety of the men at work about and upon it.

In arriving at the facts as to the covering over the upper part of the pole we have disregarded the testimony of the witness Bennett. Counsel for both parties have at some period of this litigation, apparently depending on how Bennett had last told his story, questioned his reliability, and in this we concur with both. His first version was that even before the covering fell off on June 21st the upper 12 or 14 feet of the pole had been uncovered. This, he said, included the cross-arm area in the uncovered portion. Later, on the occasion of a further hearing, Bennett changed his statement, and said that, if the covering had not dropped, the cross-arm would have been covered. Subsequently, in an affidavit filed with the respondent commission, he reverts to his first testimony and avers that the upper part of the conduit which Summers contacted "was at no time enclosed."

[6] The cases of Helme v. Great Western Mill. Co., 43 Cal. App. 416, 185 P. 510, and Brown v. Lemon Cove Ditch Co., 36 Cal. App. 94, 171 P. 705, are cited as holding that, in an action based on section 12, subdivision b, of the Workmen's Compensation Act, it must be alleged and proved (1) that a failure to house gears was "gross negligence" or "willful misconduct"; (2) that it was a personal failure to act on the part of an elective officer, such as a director, of a corporation defendant; and (3) that such failure indicated willful disregard of the life, limb, or bodily safety of an employee. Since that section is not involved in this proceeding, they are not in point. The same is true of Schmidt v. Pursell, 47 Cal. App. 440, 190 P. 846. Under both commission rules and statutes this conduit, situated as it appears to have been, was undoubtedly required to be kept insulated not merely over the lower portion of the pole, but over all of the upper portion as well. The line had been erected for some time. The gang foreman Moss, and Winchester who had charge of the power supply plant of the studio, a branch of the electrical department of the studio where the work was being done, had been present and about the pole since the covering fell off the upper portion, if it was there. It is common knowledge that to contact electricity or a conduit through which it is passing and which is uninsulated is dangerous. The evidence fully established the foregoing facts and others heretofore mentioned. We conclude that the finding that the employer's misconduct was not willful is unsupported by the evidence, and that therefore the commission acted without jurisdiction in making its award based upon that conclusion.

The award is annulled.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

133 Cal.App. 408

### ENGLISH v. ENGLISH.

Civ. 962.

District Court of Appeal, Fourth District, California.

July 22, 1933.

Hearing Denied by Supreme Court Sept. 19, 1933.

**1. Appeal and error** 🔑**1011(1).**

Where there is substantial evidence in record to sustain findings and judgment of trial court, reversal will not be had because of conflict in evidence.

**2. Trial** 🔑**382.**

Trial judge, as trier of fact, must weigh evidence, determine its weight and sufficiency, and judge credibility of witnesses.

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Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action for divorce by Minnie G. English against Virgil P. English, wherein defendant filed a cross-complaint. An interlocutory decree of divorce was granted plaintiff, and defendant appeals.

Affirmed.

W. S. Staley, of San Diego, for appellant.

F. M. Cloud and Geo. A. Malette, both of San Diego, for respondent.

MARKS, Justice.

Respondent instituted her action for divorce alleging cruelty and failure to provide. Appellant filed his answer denying the allegations of cruelty and failure to provide and filed a cross-complaint seeking divorce on the ground of extreme cruelty. The trial court found against the issues of cruelty and that appellant had failed to provide respondent with the common necessities of life, granted her an interlocutory decree of divorce, and divided the community property. This decree is before us for review.

Appellant presents but a single ground upon which he urges a reversal of the judgment, namely, that there was ample uncontradicted evidence to establish extreme cruelty on the part of the respondent against appellant, and no evidence of willful neglect and failure to provide on the part of appellant. His brief is entirely inadequate to present the question of the insufficiency of the evidence to support the findings. It has no supplement containing any evidence offered in the court below on the questions presented here. The body of the brief contains detached and isolated excerpts from the evidence which are not in sufficient narrative form to give a connected idea of the testimony. Respondent's brief does not contain any of the evidence or quotations or reference to the reporter's transcript. We have, however, carefully reviewed the entire record and have reached the conclusion that while the evidence is conflicting there is substantial and material evidence to sustain the findings of the trial court. No good purpose could be served by detailing the evidence here.

[1] It is fundamental that where there is substantial evidence in the record to sustain findings and judgment of the trial court, a reversal will not be had because of a conflict in the evidence.

[2] The trial judge is a trier of fact. He must weigh the evidence, determine its weight and sufficiency, and judge the credibility of the witnesses appearing before him. When there is material and competent evidence to sustain his findings and judgment, they cannot be disturbed on appeal.

Judgment affirmed.

I concur: BARNARD, P. J.

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133 Cal.App. 403

### RICE v. SMITH et al.

Civ. 7965.

District Court of Appeal, Second District, Division 2, California.

July 22, 1933.

**1. Appeal and error** 🔑**1001(1).**

Judgment will be reversed where, under evidence, appellate court may say as matter of law that prevailing party was negligent and that such negligence proximately caused injury.

**2. Carriers** 🔑**318(7).**

Taxicab driver whose passenger was injured in intersectional collision with automobile suddenly turning without warning *held* not negligent under evidence.

**3. Appeal and error** 🔑**110.**

Order denying motion for new trial is nonappealable.

**4. Appeal and error** 🔑**714(5).**

Briefs arguing matters aliunde record and attacking expediency of denying motion for new trial presented no question on appeal.

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Appeal from Superior Court, Los Angeles County; Lester M. Roth, Judge.

Action by Marceline Rice against Rupert L. Smith, doing business under the firm name and style of the Monrovia Taxi Service, and another. From a judgment for defendants and an order denying a motion for a new trial, plaintiff appeals.

Appeal from order denying new trial dismissed, and judgment affirmed.

Joseph L. Fainer and David Tannenbaum, both of Los Angeles, for appellant.

Lon A. Brooks, of Los Angeles, for respondents.

CRAIG, Justice.

In an action for damages arising from the impact of automobiles at an intersection of public thoroughfares, a verdict and judgment were rendered in favor of the defendants, from which the plaintiff appealed.

[1, 2] The appellant was a passenger in one of the vehicles of the respondent taxi service, which, while proceeding westerly, was struck by a car driven southerly into the intersection and to the left toward the east while said taxi was crossing the same. Each was maintaining about the same speed of twenty miles an hour; the respondent driver, Thompson, had advanced to the northwesterly section of the crossing, and was not aware of the other's intended turn until the impact of the latter's left front fender with his left rear fender. The statutes provide, and the jury were instructed, that a vehicle must be driven on public highways at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, nor at such a speed as to endanger life, limb, or property; that the authorized speed is fifteen miles an hour in traversing a grade crossing or intersection when the driver's view is obstructed and in a business district, and twenty miles an hour in a residence district; and that the burden rested upon the plaintiff to establish by a preponderance of evidence that the defendants were negligent, and that their negligence was the proximate cause of injury. The jury were informed further that the primary duty of said service was to employ a competent driver, and that it was the duty of such driver to exercise with respect to the safety of passengers the highest degree of care. Insufficiency of the evidence is the only ground upon which a reversal is sought by the appellant. It appeared that the driver of the south-bound automobile suddenly and without warning turned to the left and against the taxicab while the latter was traveling at a rate of speed which the jury may have deemed reasonable and proper under the instructions of the trial court. A judgment will be reversed where the evidence shows that a party in whose favor it was rendered so far violated the standard of conduct required that an appellate court may say as a matter of law that he was negligent and that such negligence constituted the proximate cause of injury. Arnold v. San Francisco-Oakland T. R., 175 Cal. 1, 164 P. 798. The question of contributory negligence is not involved. Nor is it contended that the driver of the taxicab disregarded any duty prescribed by law or by the instructions with respect to the safety of his passenger, which a reasonable and prudent person would or could have exercised in like circumstances. The speed of his car was not shown to have had any direct connection with, nor to have been responsible for, the accident.

[3, 4] An appeal was also taken from the order denying a motion for a new trial. This ruling is not an appealable order. Matters aliunde the record are argued in the appellant's briefs, and also attack the expediency of the denying of such a motion. With these questions we are not concerned upon appeal, nor does the record as presented require that the verdict and judgment be disturbed. Godeau v. Levy, 72 Cal. App. 13, 236 P. 354; Flores v. Fitzgerald, 204 Cal. 374, 268 P. 369.

The appeal from the order denying a new trial is dismissed. The judgment is affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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133 Cal.App. 363

## GRIFFIN v. PAYNE.

Civ. 823.

District Court of Appeal, Fourth District, California.

July 19, 1933.

Hearing Denied by Supreme Court Sept. 15, 1933.

**1. Courts** 🔑**92.**

Where broker purchased shares on margin for customer before constitutional amendment prohibiting fictitious transactions, discussion in opinion concerning effect of amendment was dictum (Const. art. 4, § 26).

**2. Brokers** 🔑**94.**

Broker, in executing order for customer on stock exchange, acts as customer's agent.

**3. Gaming** 🔑**11.**

Constitution does not prohibit marginal trading on stock exchange, where it is done in good faith and broker buys stock and has it or like number of shares for delivery to customer upon full payment of purchase price and interest (Const. art. 4, § 26).

**4. Gaming** 🔑**11.**

Customer's uncommunicated intention not to take delivery of stock purchased on margin for him by broker *held* no defense to broker's action for money due on account (Const. art. 4, § 26).

**5. Contracts** 🔑**102.**

Secret intent to violate law, concealed in mind of one party to otherwise legal contract, cannot enable such party to avoid contract and escape liability under its terms.

**6. Brokers** ⚷36.

Customer who was promptly advised of purchases of stock for his account by brokers during September, 1929, and also received monthly itemized statements, but made no objection until after market crash in November, 1929, ratified such purchases.

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Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by D. L. Griffin against Della Myrtle Payne, as administratrix with the will annexed of the estate of Le Roy Payne, deceased. From a judgment for plaintiff, defendant appeals.

Affirmed.

Everts, Ewing, Wild & Everts, Dan F. Conway, and L. N. Barber, all of Fresno, for appellant.

Ackerman, Wayland & Mathews, of San Francisco, and Sutherland, Dearing & Jertberg, of Fresno, for respondent.

MARKS, Justice.

Plunkett-Lilienthal & Co. is a copartnership with its place of business in the city and county of San Francisco, transacting a general brokerage business and is a member of the San Francisco Stock Exchange. Before the commencement of this action it assigned its demand against Le Roy Payne, now deceased, to respondent for collection.

During the year 1928 Le Roy Payne purchased different stocks through the agency of respondent's assignor, paying cash for the securities and accepting deliveries of them. In the latter part of the year he had a conversation with one Sidney Clark, an employee of the assignor, in which trading in stocks on a margin was discussed. This resulted in Payne and the assignor entering into a written agreement that the assignor would act as broker for Payne in dealing in stocks on a margin. It appears that for a number of months after the execution of this contract Payne had on deposit with his brokers sufficient money and securities so that all of the stocks which he had purchased could have been more than paid for without the sale of any of the stocks purchased on margin. Several months after January 1, 1929, Payne increased his operations so that his deposit of stock and money with his brokers was not sufficient to pay for the stocks purchased for him without disposing of some of them. Up to the latter part of July, 1929, the brokers only purchased such stocks as Payne directed either in person or over the telephone. About this time, Payne, who was a resident of the city of Fresno, took a trip and was gone until the latter part of August of the same year. Before leaving he authorized his brokers to use their discretion in purchasing stock for him upon margin, which they did during his absence. He testified that upon his return he informed Clark to discontinue this practice. Clark could not recall any such instruction. On September 6, 1929, the brokers purchased fifty shares of "Curtiss-Wright" for $1,318.75, and fifty shares of "Standard Brands" for $1,975, and on September 25th, fifty shares of "General Gas & Electric A" for $5,200, all without the prior knowledge of Payne. They notified him by telegram of the purchase of the two stocks on September 6th and also sent a memorandum of purchase by mail. A similar memorandum of purchase was sent at the time of the purchase of the General Gas & Electric stock. On or about the last of each month they sent by mail a detailed statement of all transactions on his account for that month. He made no objection to the purchase of the three stocks just mentioned until November 14, 1929, after their market value had decreased as a result of the stock market crash in October of that year. Frequent demands were made upon Payne by his brokers after October 23, 1929, that he deposit with them additional cash or securities to protect his margin. This he refused to do, and in June, 1930, his brokers sold all his stocks and applied the selling price to his account and this suit was brought to recover the deficiency. Judgment was rendered against Payne for the sum of $6,039.94, from which this appeal is taken.

The margin contract executed by Payne on November 26, 1928, was as follows: "The undersigned, the customer, agrees with Plunkett and Lilienthal and Co., the broker: a. That all transactions for, or in connection with the account of the customer, shall in all respects be subject to the rules and customs of business of the San Francisco Stock and Bond Exchange, and its Clearing House, or of any other Exchange or Board of Trade on which such transactions may be executed. b. That all transactions for or in connection with the account of the customer shall be deemed to be included in a single account, notwithstanding the fact that such transactions may be segregated into separate accounts on the books of the broker. c. That all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by the broker, either separately or together with other securities, either for the sum due thereon, or for a greater sum, all without further notice to the customer. d. The customer agrees upon demand, to deposit any additional margin required by the broker and in case of his failure so to do, or whenever, without any de-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

mand for more margin, the margin on the account of the customer shall become reduced to less than five per cent (5%), or whenever in the judgment of the broker, it is necessary for his protection, the broker shall have the right to close the account or any trade or transaction included therein on the San Francisco Stock and Bond Exchange, or elsewhere, or at public or private sale, all without further notice to the customer."

The practice of San Francisco brokers in handling margin accounts where the stock was listed and sold on the San Francisco Stock Exchange may be briefly summarized as follows: When the order was received from a customer he was required to deposit with his broker the difference between the selling price of the stock and the amount banks would lend upon it as collateral. The broker bought the stock upon the San Francisco Stock Exchange. At the close of business the transaction was recorded in the books of the exchange and the following day the broker received the purchased stock. He either pledged the stock with his bank as security for a loan to pay the balance of the purchase price or carried the loan himself, retaining the stock as collateral. The stock thus transferred was what was called "Street Certificates." These were ordinary stock certificates indorsed in blank by the shareholder with the indorsement guaranteed by some responsible bank or broker. So indorsed they were regarded as negotiable and passed from person to person without further indorsement until such time as a delivery was made to a customer who had purchased and paid for them. The broker was required to keep in his possession, or pledged, a total number of the shares of stock of the corporation equal to the total number of shares purchased by him for the accounts of all of his customers dealing in such stock on a margin, so that when a customer paid for his stock and desired its delivery the transaction could be closed by delivering the number of shares purchased on margin, although the certificate delivered to him might not have been for the identical shares which the broker purchased at the time he executed the customer's order.

Where the broker was not a member of the New York Stock Exchange, and the stock purchased by the customer was not listed on the San Francisco Stock Exchange, the broker would execute the order through a San Francisco representative of a broker having a seat on the New York Stock Exchange. The "street stock" was not delivered to the broker for the customer, but was held by the member of the New York Stock Exchange or his correspondent to secure the account of the customer's broker, or it might have been pledged by the member of the New York Stock Exchange with his bank to secure that portion of the purchase price paid for the stock on such exchange by its member broker. Payne's brokers were not members of the New York Stock Exchange.

Appellant urges two grounds for a reversal of the judgment. First, that the margin contract under which the stock was purchased by the brokers was illegal and void under the provisions of section 26 of article 4 of the Constitution of California; second, that because the three purchases of stocks in September, 1929, were not expressly authorized by Payne, his account cannot be charged with them. She maintains that if her first contention is sustained, respondent cannot recover; and if her first contention is not sustained and her second contention is sustained, the judgment should be reduced to $961.75.

In support of her first contention appellant cites section 26 of article 4 of the Constitution and the cases of Cashman v. Root, 89 Cal. 373, 26 P. 883, 12 L. R. A. 511, 23 Am. St. Rep. 482; Sheehy v. Shinn, 103 Cal. 325, 37 P. 393; Kullman v. Simmens, 104 Cal. 595, 38 P. 362; Parker v. Otis, 130 Cal. 322, 62 P. 571, 927, 92 Am. St. Rep. 56; Stillwell v. Cutter, 146 Cal. 657, 80 P. 1071; Hartnett v. Wilson, 31 Cal. App. 678, 161 P. 281. The section of the Constitution in question was amended in 1908. All of the cases cited, except Hartnett v. Wilson, supra, were decided under the language of the section prior to this amendment and are therefore of little assistance in the decision of the question involved.

The original section was apparently intended to prevent marginal transactions on a stock exchange and transactions where an immediate delivery of the stock was not had. The amended section prohibited fictitious transactions on the stock exchange where there was no intention on the part of the customer and the broker to deliver the stock, and where the parties contemplated mere payment of the difference between the contract and the market price on divers days.

In the case of Hartnett v. Wilson, supra, the trial court held there was no intention on the part of either the customer or the broker to deliver the stock in question, and that therefore it was a fictitious marginal transaction and prohibited by the constitutional provision as amended in 1908. In the instant case the trial court made a contrary finding. It was here found that there was an intention to deliver the stock purchased. This sufficiently distinguishes the two cases so that the rule announced in Hartnett v. Wilson, supra, is not applicable here.

[1] The case of Willcox v. Edwards, 162 Cal. 455, 123 P. 276, 278, Ann. Cas. 1913C, 1392, involved the purchase price on margin of shares of stock on an exchange by a broker for a customer before the amendment of the section of the Constitution under con-

sideration, and a decision after the amendment became effective. Therefore, the discussion of the effect of the amendment in this opinion must, strictly speaking, be considered dicta. However, as it appears that the case was first heard in department and a rehearing granted for the express purpose of considering the effect of the amendment, this dicta would seem to be the result of careful study of the question. After quoting the original and amended sections, it was said: "'The concluding sentences of the respective sections show the changes made by the amendment which are involved in this action. The original section gives the broader description of the thing prohibited. It forbids all contracts for the sale of stock "on margin, or to be delivered at a future day." The new section forbids such sales only when they are made "without any intention on the part of one party to deliver and of the other party to receive the shares, and contemplating merely the payment of differences between the contract and market price on divers days." The contract between Sisson and Edwards, as it is alleged, was clearly a contract for the purchase and sale of stocks on margin (see Parker v. Otis, 130 Cal. 330, 92 Am. St. Rep. 56, 62 P. 571, 927), and as such was forbidden by the constitutional provision in force at the time it was made. But the allegations of the complaint do not show a contract which comes within the description of the thing forbidden by the amended section. The complaint does not aver that the sales were made without any intention to deliver or receive the stock, or that the parties contemplated merely the payment of differences between the buying price and the market price on a future day. Both the old and the new section declare that the forbidden contracts "shall be void." The contract as alleged was void under the old section, the one then in force, but it would not have been void under the new section, if it had been made after its adoption.'"

The case of Cisler v. Ray, 213 Cal. 620, 2 P.(2d) 987, 989, 79 A. L. R. 584, presents facts quite similar to the one at bar. Ray was a customer of a broker member of the San Francisco Stock Exchange, the assignor of Cisler. Ray maintained a margin account with the broker who executed his orders on the floor of the exchange. The action was brought to recover money lost in buying and selling a certain stock. A judgment in favor of the broker's assignee and against the customer was sustained. The following was said: "An additional finding that the contracts of the parties contemplated actual deliveries of shares of stock and that there was no violation of the provisions of section 26 of article 4 of the state Constitution, lifts out of the case any contention that the contracts or transactions involved were illegal."

In Mitchell v. J. H. Roth & Co., 124 Cal. App. 96, 12 P.(2d) 91, the court stated the facts and the law applicable thereto as follows: "The portion of section 26, article 4 of the Constitution, relied upon by appellants, reads: 'All contracts for the purchase or sale of shares of the capital stock of any corporation or association without any intention on the part of one party to deliver and of the other party to receive the shares, and contemplating merely the payment of differences between the contract and market prices on divers days, shall be void, and neither party to any such contract shall be entitled to recover any damages for failure to perform the same, or any money paid thereon, in any court of this State.' In the case before us both plaintiff and her assignor signed contracts in writing in which they agreed to buy the stock, each containing the following language: 'It is understood and agreed * * * that actual delivery is contemplated.' Thus on their face the contracts were not violative of the constitutional provision. It is appellants' contention, however, that the testimony shows that both plaintiff and her assignor had the oral understanding with Lowery that they were not to receive the shares of stock or pay the balance due on them, but that Lowery agreed to sell the stock on April 1, 1929, for $35 per share, and to pay them the difference between that sum and $25 per share, the price at which they had agreed to buy. Even thus nakedly stated, we are satisfied that the transaction is not in violation of the constitutional provision. The agreement was not the ordinary short-selling agreement in which the parties gamble upon the price of the stock at a fixed future date, the buyer to win if the stock goes up and the seller to win if it goes down. Here was no gamble at all. In consideration of their agreement to buy the stock and the payment of one-half of its purchase price, Lowery promised absolutely that on April 1st he would sell the stock for a definite price, $35 per share. If he could not sell it for $35 on April 1st, he was not to sell it at all, nor did he make any effort to sell it at that date at a lower price. The plaintiff testified that she understood that, if the stock did not sell for $35 on April 1st, 'then I was to get my certificates'; and plaintiff's assignor, Mrs. Riley, testified that she thought she owned the stock. We are satisfied that the constitutional provision in question is designed merely to prohibit dealing in futures with no intention to purchase or sell actual shares of stock, but merely to 'pay off' upon the rise or fall of the market between fixed days. Willcox v. Edwards, 162 Cal. 455, 459, 460, Ann. Cas. 1913C, 1392, 123 P. 276. This was not such a transaction."

[2] It is well settled that a broker in executing an order for a customer acts as the latter's agent in the transaction. Liberman v. McDonnell, 97 Cal. App. 171, 275 P. 486;

Galligher v. Jones, 129 U. S. 193, 9 S. Ct. 335, 32 L. Ed. 658. In Blankenhorn-Hunter-Dulin Co. v. Thayer, 199 Cal. 90, 247 P. 1088, 1089, 48 A. L. R. 797, it is said: "As between a broker and a marginal customer, the latter is also the owner of the stock, and the broker is a pledgee (Richardson v. Shaw, 209 U. S. 365, 14 Ann. Cas. 981, 52 L. Ed. 835, 28 S. Ct. 512 [see, also, Rose's U. S. Notes]; Thomas v. Taggart, 209 U. S. 385, 52 L. Ed. 845, 28 S. Ct. 519), and has a lien on the stock for any advances he may make thereon, and has the implied consent of the owner lawfully to repledge the same (In re J. C. Wilson & Co., supra [D. C.] 252 F. 631); that, as between the broker and his cash customer the latter is entitled to the immediate delivery of the stock (Duel v. Hollins, 241 U. S. 523, 60 L. Ed. 1143, 36 S. Ct. 615), and the marginal customer is entitled to the delivery when he pays the balance of the contract price (In re Mason [C. C. A.] 282 F. 202)."

The Supreme Court of the United States had occasion to consider the reciprocal obligations of a broker and customer under a marginal contract in Richardson v. Shaw, supra, and the following was quoted with approval from Markham v. Jaudon, 41 N. Y. 235, in that opinion: "'The broker undertakes and agrees—1. At once to buy for the customer the stocks indicated. 2. To advance all the money required for the purchase beyond the 10 per cent furnished by the customer. 3. To carry or hold such stocks for the benefit of the customer so long as the margin of 10 per cent is kept good, or until notice is given by either party that the transaction must be closed. An appreciation in the value of the stocks is the gain of the customer, and not of the broker. 4. At all times to have, in his name and under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock. 5. To deliver such shares to the customer when required by him, upon the receipt of the advances and commissions accruing to the broker; or, 6. To sell such shares, upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale. Under this contract the customer undertakes—1. To pay a margin of 10 per cent on the current market value of the shares. 2. To keep good such margin according to the fluctuations of the market. 3. To take the shares so purchased on his order whenever required by the broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the broker. The position of the broker is twofold. Upon the order of the customer he purchases the shares of stocks desired by him. This is a clear act of agency. To complete the purchase he advances from his own funds, for the benefit of the customer, 90 per cent of the purchase money. Quite as clearly he does not, in this, act as an agent, but assumes a new position. * * * In my judgment the contract between the parties to this action was, in spirit and in effect, if not technically and in form, a contract of pledge.'" In this same case, the Supreme Court of the United States quoted from Jones on Pledges, section 496, as follows: "'The broker acts in a threefold relation: First, in purchasing the stock he is an agent; then, in advancing money for the purchase, he becomes a creditor; and finally, in holding the stock to secure the advances made, he becomes a pledgee of it. It does not matter that the actual possession of the stock was never in the customer. The form of a delivery of the stock to the customer, and a redelivery by him to the broker, would have constituted a strict, formal pledge. But this delivery and redelivery would leave the parties in precisely the same situation they are in when, waiving this formality, the broker retains the certificates as security for the advances.'"

[3] From the foregoing authorities it would seem clear that the present Constitution does not prohibit marginal trading on a stock exchange where it is done in good faith, and where the broker actually buys the stock and has it or a like number of shares of the same stock for delivery to his customer when the full purchase price, charges, and interest are paid.

[4, 5] Payne testified that he at no time intended to accept any delivery of stock from his brokers, but was merely gambling on the stock market. He did not disclose this intention to his brokers during the entire time he was trading through them and until long after the break in the stock market made loss to him inevitable. A secret intent to violate the law, concealed in the mind of one party to an otherwise legal contract, cannot enable such party to avoid the contract and escape his liability under its terms.

[6] In considering appellant's second contention, that the three purchases of September, 1929, were unauthorized by Payne, and that he should not be required to pay for them, we must bear in mind that he was notified of the first two purchases by telegram and a memorandum by mail on the day they were made, and of the second purchase by mail, and that he also received by mail shortly after October 1, and November 1, 1929, itemized statements of his account showing these purchases, and that he did not object to their having been made until November 14, 1929, after their greatly reduced market values had made a loss from the purchases certain. We think these facts show a ratification of the purchases under the rule laid down by the United States Circuit Court of Appeals in the case of Leviten v. Bickley, Mandeville & Wimple (C. C. A.) 35 F.(2d) 825, where the facts involved are very similar to those of the instant case.

Appellant relies upon Pacific Vinegar, etc., Works v. Smith, 152 Cal. 507, 93 P. 85, 87, as authority supporting her second contention. Owing to the wide difference in the facts of the two cases we cannot so construe it. The following is a quotation from that authority: "If an agent with ostensible authority to sell his principal's wheat, but under instructions to sell it for not less than $1 a bushel, shall sell and deliver it for 50 cents a bushel, there is no power in the principal to rescind the sale. Shall the principal by accepting the 50 cents be held to have exonerated his agent from liability for the other 50 cents per bushel? Such a doctrine certainly does not commend itself, and is not sustained. It is limited, so far as the agent is concerned, to those cases where there remains with the principal, after his first complete knowledge of the transaction, the power to rescind, and, failing so to do, he is properly charged with full acceptance of all the responsibilities of the contract, even to the exoneration of his agent, because, with the ability to rescind, if he had rescinded, the transaction would be at an end and nobody would be injured." The latter part of the quotation is applicable here. If Payne had disaffirmed the purchases promptly upon being notified of them the stocks could have been sold. He waited until such sales must result in serious loss to someone. He should not be permitted to take advantage of his own delay and thereby cause a serious loss to his agent.

Judgment affirmed.

I concur: BARNARD, P. J.

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133 Cal.App. 789

**DRAKE, RILEY & THOMAS (a Corporation), Plaintiff and Respondent, v. Samuel MANN and Lena E. Mann, Defendants and Appellants.**

**Civ. 1037.**

District Court of Appeal, Fourth District, California.

July 19, 1933.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

F. L. Richardson, of San Diego, for appellants.

Wright & McKee and C. M. Monroe, all of San Diego, for respondents.

MARKS, Justice.

Respondent is a corporation authorized to do a brokerage business in the buying and selling of stocks on stock exchanges. Appellants were customers of respondent, who acted as their broker in marginal trading in stocks on stock exchanges. Most of the transactions here involved were made on the Los Angeles Stock Exchange. These marginal tradings resulted in a net loss to appellants, which they refused to pay, and this suit followed. The action was tried before a jury and a verdict was rendered against them in the sum of $9,899.07.

The sole question presented on this appeal is whether the transactions between the parties were illegal and contrary to the provisions of section 26 of article 4 of the Constitution. The identical question has been considered by us at length in the case of Griffin v. Payne, 24 P.(2d) 370, the opinion in which has this day been filed. The issues in the two cases are identical, with the exception that in the instant case there is no question as to the lack of authority of respondent to make marginal purchases or sales for appellants. In Griffin v. Payne, supra, we held that marginal trading in stock, under the facts there appearing, did not violate the provisions of section 26 of article 4 of the Constitution. The same conclusion must be reached in this case.

Judgment affirmed.

We concur: BARNARD, P. J.; TURRENTINE, Justice pro tem.

218 Cal. 554

## GENERAL PETROLEUM CORPORATION OF CALIFORNIA v. LOUGHEAD et al.

S. F. 14491.

Supreme Court of California.
July 26, 1933.

**Injunction 🔑59(1).**

Lessee *held* entitled to enjoin owners from occupying and using gasoline service station in manner prohibited by terms of their contract.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Injunction suit by the General Petroleum Corporation of California against S. W. Loughead and another, doing business as Baer & Loughead as proprietors of the Cupertino Service Station. From an adverse judgment, plaintiff appeals.

Reversed.

Prior opinion, 16 P.(2d) 687.

A. L. Weil, Paul T. Wolf, and Glikbarg & Wolf, all of San Francisco (Martin J. Weil, of San Francisco, of counsel), for appellant.

Louis Oneal, of San Jose, and H. D. Durst, of Redwood City, for respondents.

LANGDON, Justice.

Defendants owned land and a gasoline service station thereon. They leased the same to plaintiff corporation. By the terms of the lease the station was to be used for the purpose of selling plaintiff's products exclusively, and the building and equipment were painted in the distinctive colors used in advertising those products. A contract was also entered into by the parties, making defendants the agents of plaintiff to sell its products, and licensing the use by them of the tanks and containers. After performing for some time, defendants ceased selling plaintiff's products, changed the color and advertising of the station, and commenced to sell materials produced by a rival company, in violation of the lease and contract. Plaintiff brought this action for an injunction to restrain defendants from trespassing upon the premises and from advertising, storing, or selling any products other than those of plaintiff. It is alleged that defendants threaten to continue their activities unless restrained. The lower court sustained a demurrer to the complaint, and plaintiff appeals from the resulting judgment.

Stated briefly, the case is one in which plaintiff, having a leasehold estate in the premises, seeks to enjoin the continuing trespasses of defendants, who are occupying and using the station in a manner prohibited by the terms of their contract. No attempt is being made, either directly or indirectly, to secure specific performance of that portion of the agency contract by which defendants agree to sell plaintiff's products. In other words, plaintiff does not seek to compel the performance of personal services by defendants, and, of course, it could not do so. Plaintiff asks merely that defendants be enjoined from using the station save in the manner agreed upon; and, so far as any injunctive process is sought, defendants are free to leave the leased premises.

Under these circumstances, our recent decision in the case of Associated Oil Company v. Myers (Cal. Sup.) 18 P.(2d) 668, is controlling. We there held that the plaintiff in such a case is without an adequate remedy at law, and that equitable relief by injunction was proper. It is unnecessary to add to the full discussion of principles and authorities contained in the opinion in that case.

The judgment is reversed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; IRA F. THOMPSON, J.; SEAWELL, J.

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218 Cal. 577

## McCANN et al. v. JORDAN, Secretary of State.

S. F. 14586.

Supreme Court of California.
July 28, 1933.

**1. Corporations 🔑19.**

Where mandamus proceeding, brought to compel secretary of state, on payment of nominal fee, to file articles of incorporation for corporation having only nonpar stock, was pending when statute requiring substantial filing fee and applicable to pending applications took effect, statute *held* to apply (Pol. Code, § 409, subd. 5, as amended by St. 1933, c. 20).

**2. Constitutional law 🔑190.**

No constitutional objection exists to retroactive operation of civil statute, except where vested right or obligation of contract is impaired.

**3. Corporations 🔑17.**

Statutory conditions for incorporation do not constitute offer which results in contract on mere filing of application.

**4. Contempt 🔑21.**

Respondent secretary of state could not be adjudged in contempt for disobeying per-

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

emptory mandamus requiring him to file articles of incorporation on payment of nominal fee, where, before writ was issued, statute requiring substantial fee took effect but was not called to court's attention (Pol. Code, § 409, subd. 5, as amended by St. 1933, c. 20).

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In Bank.

Mandamus proceeding by Leo C. McCann and others, incorporators of the Lincoln Shares Corporation, and others against Frank C. Jordan, Secretary of State, in which a peremptory writ was issued [20 P.(2d) 47]. On order to show cause why respondent should not be adjudged in contempt.

Order discharged.

Ellis, Lyman & Steindorf and Howard C. Ellis, all of San Francisco, for petitioners.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for respondent.

PER CURIAM.

Petitioners, on February 5, 1932, sought to file articles of incorporation for Lincoln Shares Corporation, and tendered the nominal filing fees then required by statute for a corporation having only non-par stock. Upon refusal of respondent secretary of state to file the articles unless paid a filing fee of $1,000, petitioners sought and obtained an alternative writ of mandate from this court. Our final decision after rehearing was rendered March 15, 1933, and a peremptory writ was issued, requiring respondent to file the articles upon payment of the fees previously tendered. McCann v. Jordan (Cal. Sup.) 20 P.(2d) 47. Respondent, acting upon the advice of the Attorney General, again refused to file the articles, and on April 6, 1933, this court issued its order to show cause why respondent should not be adjudged in contempt.

The contention of respondent is that, conceding the force of this court's holding that the fee demanded was not required by the statutes in force at the time of petitioner's application, nevertheless this situation was corrected by urgency legislation which went into effect while the case was pending in this court. Stats. 1933, c. 20, amending Political Code, § 409, subd. 5. Under the amended statute the fees demanded by respondent are proper. Hence the sole question before us now is whether respondent may require compliance with the statute in its present form, notwithstanding the prior application of petitioners. This issue was not raised or considered in the former proceeding.

[1-3] In our opinion, the amended statute is clearly applicable to petitioners' application, and no satisfactory reasoning or authority has been presented to us which casts any doubt upon this conclusion. The statute in terms applies to any application now pending before the respondent; hence no question of statutory construction is presented. The retroactive operation of a civil statute is by no means unusual, and no constitutional objection exists to such operation save where a vested right, or the obligation of a contract, is impaired. County of San Bernardino v. State Industrial Accident Commission (Cal. Sup.) 20 P.(2d) 673; Los Angeles v. Oliver, 102 Cal. App. 299, 283 P. 298. Petitioner suggests that the incorporation statutes are "a general offer" by the state "to bring a group of persons into corporate being upon the fulfillment of statutory requirements then existing," and that upon "acceptance" of that offer "a substantial contract right is created." No authority is cited for this unique view, and we think it requires no discussion to dispose of the contention that the statutory conditions for incorporation constitute an offer which results in a contract upon the mere filing of the application. Petitioners certainly had a right, enforceable at law, to compel respondent to accept their articles if in compliance with statutes then in force. But, whatever may have been petitioners' right at the time of the original application, it is plain that they have no present right to have their articles filed except in compliance with existing law.

In State v. Crawford, 90 Fla. 264, 105 So. 446, 448, a foreign corporation tendered to the secretary of state of Florida the requisite fees for filing articles. The latter refused to accept them, demanding a larger fee. An alternative writ of mandate being granted, the case came before the court, but prior to decision the law was amended so as to require the larger fee. The court dismissed the writ on the ground that the new statute governed, saying: "As the relator's application for the permit gave it no vested or contract right while the former law was in force, the relator has now no right to a peremptory writ to enforce a statutory duty in the premises, when such duty on the conditions alleged no longer exists because of the change in the statute law."

This case is almost directly in point, there being no substantial distinction between the rights of foreign corporations and the incorporators of a domestic corporation, so far as the legislative power in question is concerned.

Such cases as Rose v. Estudillo, 39 Cal. 270, where petitioner held county warrants, a recognized contractual obligation, and Montgomery v. Kasson, 16 Cal. 189, where the grantee of land from the state performed work of reclamation, having a vested right in the land, are clearly distinguishable. Here we have no contract and no vested right. The situation before us here is very similar to that presented by an application for a permit to build a certain type of structure in a certain place, under the terms of an existing zoning ordinance, followed by a change in the ordinance. It is well settled that the new ordinance may operate retroactively to require a denial of the application, or the nullification of a permit already issued, provided that the applicant has not already engaged in substantial building or incurred expenses in connection therewith. Brougher v. Board of Public Works, 205 Cal. 426, 271 P. 487; Wheat v. Barrett, 210 Cal. 193, 290 P. 1033; Brett v. Building Comm. of Brookline, 250 Mass. 73, 145 N. E. 269.

[4] Had the point now urged been called to the attention of the court prior to the time the peremptory writ of mandate was issued, the writ would have been refused. Consequently, respondent cannot properly be adjudged in contempt.

The order is discharged.

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218 Cal. 580

## BORDNER v. STATE BAR OF CALIFORNIA.

S. F. 14826.

Supreme Court of California.
July 28, 1933.

**Attorney and client** 🔑**57.**

Petition to review state bar governors' order recommending petitioner's suspension from law practice must be dismissed, where not filed within statutory time (St. 1927, p. 41, § 26).

In Bank.

Application by R. O. Bordner to review an order of the Board of Governors of the State Bar of California recommending petitioner's suspension from the practice of law.

Petition dismissed.

R. O. Bordner and O. G. Foelker, both of Oakland, for petitioner.

Philbrick McCoy, of Los Angeles, A. B. Bianchi, Warren Olney, Jr., and Max C. Sloss, all of San Francisco, and Thomas C. Ridgway and Leonard B. Slosson, Associate Counsel, both of Los Angeles, for respondent.

PER CURIAM.

In this matter, the petition to review the order of the board of governors of the state bar, recommending that the petitioner be suspended from the practice of law, was not filed in this court within sixty days after the filing of the certified copy of the decision of said board of governors with the clerk of this court. Petitioner has therefore failed to comply with section 26 of the State Bar Act (Stats. 1927, p. 41) fixing the time within which petitions for the review of orders of the board of governors must be filed. For this reason the petition is dismissed.

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218 Cal. 556

## KRONE v. INSURANCE CO. OF NORTH AMERICA.

S. F. 14832.

Supreme Court of California.
July 26, 1933.

**1. Reformation of instruments** 🔑**32.**

Insured diligently bringing suit to reform fire policy after insurer made position clear and insured discovered mistake in coverage *held* not guilty of laches, though policy was issued nearly six years previously.

**2. Insurance** 🔑**328(6).**

Placing deed of trust on insured property did not violate fire policy requiring "sole and unconditional ownership" by insured.

[Ed. Note.—For other definitions of "Sole and Unconditional Ownership," see Words & Phrases.]

**3. Pleading** 🔑**245(7).**

Plaintiff having asked permission to amend complaint at trial and offered evidence, court properly authorized amendment at time of settlement of transcript when it was discovered that amendment was not made at trial.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Lottie Ruth Krone against Insurance Company of North America. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for appellant.

H. B. M. Miller, of San Francisco, for respondent.

LANGDON, Justice.

This is an action to reform an insurance policy on grounds of mistake. Plaintiff owned a two-story, shingle roof, frame dwelling house in the city of Fresno, Cal., located in fire zone No. 1. A city ordinance provided that any structure in said zone which should be enlarged or altered to an extent exceeding

20 per cent. of its value should be made to comply completely with certain building requirements applicable to this zone. Plaintiff had a fire insurance policy in the amount of $4,975 on her building with North British & Mercantile Insurance Company, by the terms of which the company was liable only for the actual cash value of the loss, without allowance "for any increased cost of repair or reconstruction by reason of any ordinance or law regulating the repair or construction of buildings." Agents representing defendant company, soliciting plaintiff's business, explained that, if damage occurred which required rebuilding in compliance with the ordinance, she would suffer an additional loss not covered by her regular policy. Thereafter, on June 29, 1928, they procured for her a "Contingent Liability" policy in the sum of $3,000, which they represented would cover the said possibility of loss for which she was not already insured. This policy was renewed some years later.

On April 23, 1931, a fire damaged the property to the extent of $1,703, which sum was paid by North British & Mercantile Insurance Company. The city building inspector, finding that the building was worth $5,000, and consequently that there was over 20 per cent. loss, refused a permit to repair the damage. Plaintiff then furnished proof of loss to defendant company, and claimed a loss of $3,297, the difference between the value of the building ($5,000) and the amount paid by the other insurance company ($1,703). Defendant refused to pay the sum demanded, relying on a clause in its policy which provided that its liability "shall not exceed * * * such proportion of the actual value * * * of the property * * * as the amount of this policy bears to the total insurance covering on the property." Defendant computed its liability under this clause as $1,075.86, though on other grounds it refused to pay the same. Plaintiff then brought this action, alleging that she had secured the contingent policy in reliance upon the representation that it would fully cover the possibility of loss for which her other policy did not insure her. The evidence to this effect was clear and convincing, and the trial court reformed the instrument and gave judgment for plaintiff in the sum of $3,000, the limit of the policy.

[1-3] Defendant raises a number of points, none of which goes to the substantial merits of the cause, and they are deserving of only brief mention. It is contended that plaintiff was guilty of laches in seeking reformation, in that nearly six years passed before she sought the relief. The obvious answer is, of course, that not until the loss occurred, and the defendant made its position clear, did she discover the mistake, and then she acted with diligence. It is further contended that, by placing a deed of trust on the property, plaintiff violated the clause of the policy requiring "sole and unconditional ownership" by the assured. It has frequently been held that the giving of a mortgage or deed of trust does not violate such a clause. Lee v. United States Fire Ins. Co., 55 Cal. App. 391, 203 P. 774; Fox v. Connecticut Fire Ins. Co. (Mo. App.) 268 S. W. 393; 3 Cooley on Insurance, p. 2181. Finally it is argued that the trial court erred in permitting plaintiff to amend her complaint after appeal was taken. The fact is that during the trial it was disclosed by the testimony that the present policy was a renewal of the one originally issued. Plaintiff thereupon asked the court for permission to amend on the face of the complaint, and proceeded to offer evidence on the issue. After judgment, and at the time of settlement of the transcript, it was discovered that by some inadvertence the amendment had not been made, and the court then made a nunc pro tunc order authorizing it. This was entirely proper, and defendant has in no way been prejudiced.

No other points require discussion. The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; IRA F. THOMPSON, J.; SEAWELL, J.

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218 Cal. 726

## FORBES v. RING.

Sac. 4748.

Supreme Court of California.

Aug. 30, 1933.

**Deeds** ⟹211(3, 4).

Evidence *held* to support finding that deed from mother to daughter was procured fraudulently and by undue influence.

In Bank.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Hattie Forbes against Elsie Ring. Judgment for plaintiff, and defendant appeals.

Affirmed.

A. J. Carlson, of Modesto, for appellant.

George F. Sharp, of Oakland, for respondent.

PRESTON, Justice.

The question here is whether the evidence sufficiently supports the findings and whether the findings support the judgment.

The cause involves a controversy between half-sisters over a purported division of property made to them by their mother during her last illness, and it follows the general trend of a family quarrel with contradictory testimony given by the opposing parties.

Plaintiff seeks the cancellation of a deed made by the mother conveying certain real property to defendant, and in her complaint she alleged that at the time said deed was executed the mother was over seventy years of age, ill, infirm, of such unsound mind as to be wholly incapable of transacting business, and had for two days prior thereto been in a state of coma from which she never regained consciousness; that defendant, who lived with the mother until her death, well knew her condition, but, with the intention of cheating and defrauding plaintiff out of her share in said property, and taking advantage of the close and intimate relation with her mother, procured her to execute and deliver said deed without knowledge of plaintiff, and immediately placed it of record.

The cause was heard by the court sitting without a jury. It found that the mother had expressed her wish to the daughters that her property be divided, but that she gave no instructions as to how or in what manner the division was to be accomplished; that defendant, without conferring with plaintiff, and leaving plaintiff in ignorance of her action, caused said deed to be drawn and executed; that defendant took advantage of her close and intimate relation with her mother to deceive the mother into the belief that defendant and plaintiff had agreed upon execution of the conveyance; that the entire matter of procuring it was done clandestinely by defendant and with the intent on her part to cheat and defraud plaintiff out of her share of said property. Judgment followed for plaintiff. Defendant appealed upon the grounds first hereinabove mentioned.

The evidence shows that the relationship between these half-sisters had long been inharmonious; that defendant was closer to and more intimate with the mother, having lived at her home for many years, while plaintiff resided in a different part of the state; that in May, 1930, the mother was suffering from a fatal malady, and, about the time of her removal to the hospital, plaintiff arrived to see her; that the mother felt that she would not recover and took occasion to tell her daughters that she desired them to "make up" and "get along" and "settle everything in a peaceable manner." It is the claim of defendant that the mother also indicated that she wished her real property to be divided, and had planned that defendant should have the family home and that plaintiff should take two unimproved lots in Richmond, Cal. These parcels of real property, together with the furnishings in the home, personal belongings, and $3,700 in a savings account, constituted the mother's entire estate.

Defendant moved to the hospital with the mother, and was in constant attendance upon her save for a few hours each day, when she was relieved by plaintiff. Two days prior to the mother's death, to wit, on May 26, 1930, defendant, during her relief period, caused deeds to be prepared conveying to her the said home and to plaintiff the said lots. She then brought these documents back to the hospital with her; took plaintiff's place at her mother's bedside, but did not mention to plaintiff what she had done or what she contemplated doing with respect to said conveyances. After plaintiff left the hospital, and during the same afternoon, while the doctor and a nurse were present in the room, defendant exhibited the deeds to her mother, explained their purport, and the mother thereupon executed them as best she could, by making her mark thereon, and the doctor and the nurse witnessed them. After execution, the deeds were handed back to defendant, who laid them aside until she again saw plaintiff. She then delivered to plaintiff the deed to the Richmond lots, but plaintiff was not satisfied with this purported property division, and soon returned said deed to defendant. The deed to the home, the cancellation of which is here decreed, remained in the possession of defendant, and she recorded it shortly after the passing of her mother. Defendant could give no real explanation of her failure to advise plaintiff of her intention to secure the signature of the mother to these deeds or for her failure to ask plaintiff to remain during the consummation of the transfer.

It is not necessary to further detail the evidence. It suffices to say that the court was warranted in believing that defendant took advantage of her mother's condition and of their intimacy to deceive the mother and to defraud plaintiff. The allegations of the complaint in effect charge incompetency of the grantor, undue influence, fraud, and deceit. The findings do not follow the wording of these allegations, but they are full and complete, and in substance and effect definitely express the conclusion that the deed was procured as the result of fraud, undue influence, and deceit practiced by defendant. We have no hesitancy whatsoever in holding that the findings as drawn support the judgment, and that the evidence sufficiently supports the findings.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.

218 Cal. 612

## GONZALEZ et ux. v. INTERSTATE GUARANTY CO. et al.

S. F. 14774.

Supreme Court of California.
July 31, 1933.

**1. Mortgages ⚷86(3).**

Evidence *held* to support findings that note and deed of trust were procured from plaintiff by employee of defendant fraudulently and without consideration.

**2. Principal and agent ⚷177(3).**

Knowledge of fraudulent intent of employee in procuring note from maker in satisfaction of employee's prior indebtedness, was imputed to payee of note, where employee obtained note through transaction in which payee was represented by employee.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Joseph Ruano Gonzalez and another against the Interstate Guaranty Company and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Ellis, Lyman & Steindorf, of San Francisco, for appellants.

Edmund J. Holl, of San Francisco, for respondents.

LANGDON, Justice.

This is an action to cancel a note and deed of trust given as security therefor. Plaintiffs, husband and wife, both unfamiliar with business transactions, were solicited by one F. Vergel De Dios, a salesman in the employ of defendant Interstate Guaranty Company, to buy an "undivided interest" in the said company for $500. Acting in reliance upon the false representations of De Dios that he would cause such interest to be transferred to them, they executed the note and deed of trust, De Dios signing the note as a joint maker. De Dios took the instruments to defendant company, which issued a check for $500 payable to plaintiffs, who thereupon indorsed them to De Dios. De Dios then delivered the check to defendant company, which took it and cashed it in payment of an alleged pre-existing indebtedness of his. It may be observed that Joseph Gonzalez denies signing the deed of trust, and Maria Gonzalez denies indorsing the check. However, these matters are immaterial in view of the other facts of the case.

[1] Plaintiffs were given judgment in the court below, canceling the note and deed of trust on grounds of fraud and failure of consideration. Appellants' contentions, that the pleadings failed to state a cause of action, and that the evidence does not support the findings, are devoid of merit. The false representation, a promise made without intention to perform it [see Masten v. Fox West Coast Theatres, 117 Cal. App. 303, 3 P.(2d) 610], is clearly established; so also is the reliance thereon, and the damage suffered. Failure of consideration is equally well established, for plaintiffs received nothing for their money.

[2] Defendant claims, however, that it is a bona fide purchaser of the note, for value, and without notice of the defects; that is, a holder in due course. But in the transaction through which it obtained the note it was represented by De Dios, and the value it gave was the satisfaction of his prior indebtedness. Under these circumstances, the knowledge of the fraudulent intentions of De Dios, defendant's agent, is imputed to defendant, his principal. McKenney v. Ellsworth, 165 Cal. 326, 132 P. 75; Live Oak Cemetery Association v. Adamson, 106 Cal. App. (Supp.) 783, 288 P. 29. Consequently, defendant cannot claim the rights of a bona fide purchaser without notice.

For this reason it is unnecessary to consider the question whether in California a payee of a negotiable instrument (in this case, the defendant) may be a holder in due course.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; IRA F. THOMPSON, J.; SEAWELL, J.

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218 Cal. 575

## CURRY v. FEIGENBAUM et al.

L. A. 14062.

Supreme Court of California.
July 28, 1933.

**1. Mortgages ⚷608½.**

In suit to have deed declared a mortgage, complaint alleging only general ownership in plaintiff, and that she caused deed to be made, when another was shown to have executed deed, *held* not to state cause of action.

**2. Pleading ⚷428(6).**

Where no request was made to amend insufficient complaint, court properly sustained defendants' objection to introduction of evidence and rendered judgment for defendants.

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph L. Call, Judge.

Action by Pleasant B. Curry against Harry Feigenbaum and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Harry J. Miller, of Los Angeles, for appellant.

Harry Lyons and Lyons & Lyons, all of Los Angeles, for respondents.

PRESTON, Justice.

In this cause the trial court rendered judgment for defendants after sustaining their objection to the introduction of testimony upon the ground that the complaint failed to state a cause of action. Plaintiff appealed.

The complaint alleged that on February 3, 1927, plaintiff became the owner of certain apartment house property, subject to a $65,000 incumbrance held by defendant Harry Feigenbaum under a deed of trust calling for payments to him of principal and interest at the rate of $600 a month; that on August 30, 1928, there was due and owing to said defendant $3,154 advanced by him for taxes and assessments on the property in addition to the $600 installment payable August 15, 1928; that plaintiff was physically and mentally ill, inexperienced in business, and financially embarrassed and said defendant, an experienced business man, induced her, through threats of a receivership and loss of her interest, to cause the property to be deeded to him in the name of his son and daughter-in-law (codefendants herein), in return for an option permitting plaintiff to purchase the property at any time up to January 2, 1929. The complaint further alleged that his deed was intended to be a mortgage, prayed that it be so adjudged, and that plaintiff have an accounting of defendants' management of the property.

The option agreement, made an exhibit to the complaint, shows that the property was subject to a first mortgage of $90,000 and said second incumbrance of $65,000, $51,200 of which remained unpaid; and that plaintiff should have the privilege of purchasing it within the above-mentioned period, subject to said incumbrances, upon payment to said codefendants of the sum of $7,753.61, which amount probably represents the aforesaid payments due defendant Harry Feigenbaum, in addition to payments of principal and interest falling due over the period of the option.

[1, 2] But said option agreement also shows that on August 30, 1928, the property was conveyed by one Marie K. Wheelock to defendants. Thus it conclusively appears that plaintiff neither had title to the property on that date, nor did she make the deed which she now claims was in reality a mortgage. Her connection with the conveyance, if any, is nowhere shown. The complaint merely alleges general ownership in plaintiff, and that she "caused" the deed to be made. How or when said Marie K. Wheelock acquired the property does not appear, nor is her relation to plaintiff explained. The terms of the trust deed and conveyance are not set forth. The option, on its face, is not an agreement to reconvey to the grantor, but an agreement to convey to plaintiff, a stranger to the deed. The insufficiency of the pleading is apparent. No request was made to amend. Therefore, the court properly sustained defendants' objection to the introduction of evidence and rendered judgment in their favor.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; IRA F. THOMPSON, J.; SEAWELL, J.

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218 Cal. 600

## TAY-HOLBROOK, Inc., v. TUTT et al.

S. F. 14758.

Supreme Court of California.

July 29, 1933.

**Landlord and tenant ⚷90(1).**

Where tenant, at expiration of lease prescribing formalities for renewal at increased rent, remained in possession, paying such increased rent, evidence warranted finding that parties intended to renew lease and waived prescribed formalities.

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Tay-Holbrook, Inc., against E. R. Tutt and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Walton C. Webb, of San Francisco, for appellant.

Fitzgerald, Abbott & Beardsley, Chas. A. Beardsley, Chapman, Trefethen, Richards & Chapman, and Eugene E. Trefethen, all of Oakland, for respondents.

CURTIS, Justice.

Suit for declaratory relief brought by plaintiff to have determined whether or not a lease entered into by the plaintiff as a tenant and the defendant as landlord had been renewed. Plaintiff contends that there had been no legal renewal of the lease, while the defendant makes a contrary contention. The lease was for a term of five years beginning on July 1, 1925, and provided for a monthly rental of $416.66. It contained a provision giving to the lessee "the right, privilege and option to renew this lease for a further period of five (5) years from and after the expiration thereof, towit: from the first day of July, 1930, to the first day of July, 1935, upon the same term and conditions as are embodied in this lease except that the rental for said premises during all of said renewed term shall be the sum of Five Hundred Dollars per month, payable monthly in advance, and it is agreed that if the Lessee determines to exercise this option he shall give written notice of his decision so to do to the lessor, or to his agent, sixty (60) days prior to the date upon which this lease expires by its terms, and in the event that the Lessee decides to exercise this option and gives to the Lessor notice of his decision so to do sixty (60) days before the expiration of this lease, then the Lessor agrees to execute and deliver to the Lessee a written lease of said premises for said extra term of five (5) years at said rental of Five Hundred Dollars per month, such lease to have incorporated therein the same terms and conditions as are contained herein, except as to the amount of rental, which rental shall be at the rate of Five Hundred Dollars per month during all of the renewed term."

The lease covered a brick building fifty by one hundred feet in size situated at the northwest corner of Tenth and Harrison streets in the city of Oakland. The plaintiff, the tenant, remained in possession of said premises for the full term of five years, and paid all rent called for by the terms of said lease. He also continued in possession of said premises after the expiration of said five-year term. He gave no notice of his decision to exercise said option for a renewal of said lease before the expiration of said original term of five years, or at any time thereafter. He did, however, pay to his landlord after the expiration of said five-year term the increased rental to be paid by him in case the lease was renewed; that is, the sum of $500 per month each month from July 1, 1930, the date of the expiration of said original term of five years, to and including the 1st day of September, 1931. These monthly payments of rent the court found were made "on and in some instances within two or three days after the first day of each month commencing with July 1, 1930." They were made by checks drawn by plaintiff in favor of defendant, and to each check was attached a voucher containing the following notation: "Rental of northwest corner of 10th and Harrison Streets, Oakland, Cal. for the month [here was inserted the month and year of the payment] as per lease." These checks together with the attached vouchers were received and accepted by the defendant. The vouchers were detached from the checks, after which the checks were indorsed by the defendant, deposited by him in the bank, and were then returned to the plaintiff through the regular banking channels. Another fact to which some importance is attached—especially by the plaintiff—is that plaintiff, in addition to the premises above referred to, and on April 1, 1929, leased a storeroom belonging to defendant and adjoining the first mentioned premises. The monthly rental called for in this second lease was $125 payable monthly on the 1st day of each month. Plaintiff's checks after the effective date of this second lease included the monthly rental under both leases, and each check given prior to July 1, 1930, was for the combined sum of $416.66 and $125, or $541.66, and each check drawn on July 1, 1930, and thereafter, to and including September 1, 1931, was for the sum of $625. The two properties together constituted the northwest corner of Tenth and Harrison streets, and, as stated before, the rental of these combined properties was paid by one check for the aggregate amount of the monthly rental thereof.

After the payment and acceptance of the rent due September 1, 1931, the plaintiff brought this action, which its attorney terms "a friendly suit for declaratory relief between the tenant and landlord brought by the tenant to have it determined whether or not a lease has been renewed or not." A trial was had at which the two leases, the checks above referred to, together with said vouchers, were before the court. There was also oral testimony received, which was to the effect that plaintiff had never expressly notified defendant in writing, or otherwise, of its exercise of its option to renew said lease of July 1, 1925, and that no written renewal of said lease had ever been executed by the parties hereto. It was also shown by evidence that, after September 1, 1931, plaintiff continued to pay the rental upon said two pieces of property by check in the same amount and in the same manner as before September 1, 1931, except that the notations on the vouchers attached to these later checks did not contain, as did the prior vouchers, the words "as per lease." This course of dealing continued to some time in December, 1931, when the lease of April 1, 1929, expired because of the expiration of its term.

The trial court made findings and rendered judgment, and declared that said lease had by the acts of the parties been extended for a term of five years from July 1, 1930. The plaintiff prosecutes this appeal from said judgment.

The facts of the case are not in dispute. In the findings of the court, the facts as detailed above are fully and rather minutely set forth. In addition thereto, the court found as facts that the provisions in said lease requiring written notice of plaintiff's decision to exercise its option for a renewal of said lease, and for the making of a new lease for an additional term of five years, had been waived by the parties thereto and particularly by the defendant, for whose benefit said provisions were inserted in said lease.

Plaintiff insists that these findings of the court regarding waiver of these provisions of the lease are mere conclusions of law and have no place in the findings of fact. It is not always an easy matter to distinguish between findings of fact and conclusions of law. But, in the instant case, we think the question presented is not of material importance. As stated above, the facts of this case are fully and rather minutely set forth in the findings. A perusal of the findings will show that practically all the material evidentiary facts in this case are to be found fully set forth therein. Under these circumstances, it is of no consequence that the conclusions of the court regarding the waiver of the said provisions of the lease are made a part of the findings of fact rather than included in the conclusions of law. If we regard them as findings of fact, then their validity is to be determined by evidentiary facts found in other parts of the findings. If we regard them as conclusions of law, then they must stand or fall dependent entirely upon the facts as found by the court. In the instant case, the result would be the same whether we regard these matters as conclusions of law or as findings of fact. The one question to be determined is whether the provisions of the lease providing for a renewal have been waived by the parties to the lease.

The evidence shows that, at the expiration of the original term of five years, the plaintiff remained in possession of the leased premises and paid the increased rental provided for by the terms of the lease. The defendant after the expiration of the lease permitted the plaintiff to remain in possession of the premises and accepted from it the increased rental which was to be paid only in case the lease was renewed. This course of business continued for a period of more than a year without either party questioning the rights of the other. Were we considering this case from the standpoint of the rights of the tenant, we would be disposed to hold that the landlord, by accepting the increased rental and by permitting the tenant to remain and enjoy the possession of the leased premises, had waived the formalities prescribed in the lease in order to effect its renewal. We can see no reason why the same rule should not govern when applied to the rights of the landlord. Whether these provisions of the lease providing for its renewal were for the benefit of the landlord or the tenant is, in our opinion, a matter of no great consequence. Neither party expressly conformed to them, but both parties conducted themselves as if these provisions had been literally complied with. That the plaintiff considered that it was operating under the terms of a lease of the corner property may be inferred by the notation which it made on the vouchers attached to its checks. This notation, as we have seen, reads as follows: "Rental of northwest corner of 10th and Harrison Sts., Oakland, Cal., for the month of * * * as per lease." This inference is not entirely overcome by the fact that it also had a second lease covering the adjoining premises. The rental under this second lease was only $125 per month, while plaintiff's checks, after July 1, 1930, were each for the sum of $625. The notation on the voucher, "as per lease," could not have referred entirely to the second lease. As the amount of the checks to which the vouchers were attached covered the rental of both premises, we must conclude that the plaintiff in drawing these checks and vouchers had in mind both premises as being under lease by it from the defendant. This construction of the checks and vouchers is in harmony with the entire conduct of the plaintiff and the defendant as well, at the expiration of the original term of said lease, and for fifteen months thereafter. It seems clear to us from the evidence in the case, as expressed in the findings, that the parties intended to and did renew the lease for this additional term of five years, and that by their acts and conduct they waived the formalities provided in said lease for its renewal.

The plaintiff contends that such a determination of the question herein involved is contrary to the doctrine announced in the cases of Howell v. City of Hamburg Co., 165 Cal. 172, 131 P. 130, and Robertson v. Drew, 34 Cal. App. 143, 166 P. 838. We do not find anything in either of these cases at variance with our conclusion announced above. In the case of Howell v. City of Hamburg Co. the question at issue was whether a certain lease between the parties had been extended or renewed. It was conceded that the original lease was void, as its provisions contravened the terms of an ordinance of the city of San Francisco. Nevertheless, the parties thereto had operated thereunder during its original term. After occupying the premises for some months after the expiration of said term and paying the increased rental provided in said lease in case the lease was renewed, the defendant surrendered possession of the premises and removed therefrom. Plaintiff, the landlord, thereafter sued the defendant, the tenant, for three months' rental accruing after defendant had vacated said premises, on the theory that the lease had been renewed by the conduct of the parties. This court held that the provision in the lease giving the tenant the right to occupy the premises for an additional term after the expiration of the original term was an option to extend the lease and not to renew the lease for this additional term, and, as the original lease was void, there could be no valid extension of a void lease. Had the original lease been a valid lease, we apprehend that the court might have held that the parties by their acts and conduct had effected a valid extension thereof. In Robertson v. Drew, supra, the plaintiff leased the premises to the defendant for one year, with the privilege to defendant of renewing the lease for a further term of from one to five years. On the expiration of the original term, the tenant served written notice that he had elected to take the premises for a further term of two years. The landlord replied for the tenant to call "at the office and we will fix it up." The tenant did not call at the office of the landlord, and nothing further was done regarding the matter. The tenant remained in possession for a period of about six months, paying the rental, which under the renewal of the lease was to be the same as under the original lease. After the tenant vacated the premises, they remained unoccupied during the balance of said two-year term. The landlord then brought action to recover the rental for something like eighteen months, being the time intervening between the vacation of said premises by the tenant and the expiration of said two-year term. A judgment in favor of the tenant was affirmed; the court (at page 145 of 34 Cal. App., 166 P. 838, 839) holding that: "We think these circumstances negative the theory that the parties understood that the defendant was entitled upon mere notice, or by remaining in possession, to hold the premises for an additional period under the original lease." It will thus be seen that the court decided the question as to whether the lease had been renewed by what the court conceived to be the intention of the parties immediately following the expiration of the original lease. In the present case the trial court was of the opinion that the intention of the parties as expressed by their conduct after the expiration of the original term of the lease was to renew the lease upon the terms expressed therein. There is at least one important respect in which the present action differs from the case as presented in Robertson v. Drew, and that is that the plaintiff herein, the tenant, paid the increased rental required under the renewal. Another material circumstance present in this action is that the tenant has continued in possession of the leased premises paying this increased rental, and was so in possession of the property at the trial of the action. These facts differentiate this case from the case of Robertson v. Drew, and justify, in our opinion, the conclusion, no doubt in the mind of the trial court, that the parties to the lease by their acts and conduct following the expiration of the original term intended to renew the lease for an additional term, and that they waived the formal requirements provided in the lease for the renewal thereof.

The trial court went further and found that the plaintiff, by sending its check for the increased rental on July 1, 1930, together with the vouchers attached, thereby gave written notice of its election to exercise its option for a renewal of said lease. Plaintiff contends that, even if the check and voucher can be construed as written notice to the landlord of the tenant's intention to exercise said option, it was sent after the expiration of the original term, and was therefore ineffective for any purpose, citing Robertson v. Drew, supra, and other authorities recited in the opinion in that case. We are not basing our opinion in this case entirely upon said checks and vouchers, but upon the entire course of conduct and the business dealings of the parties thereto, following the expiration of said original term. As stated before, we consider that the acts and conduct of said parties during said period of time as strong evidence that the parties to said lease intended to and did renew said lease for an additional term of five years.

The judgment is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

218 Cal. 589

## ROBBIANO et al. v. BOVET.

## BOVET v. RAGNO et al.

## RAGNO v. BOVET.

## MORGAN v. RAGNO et al.

S. F. 14847.

Supreme Court of California.

July 29, 1933.

Rehearing Denied Aug. 28, 1933.

**1. Automobiles** ⚷244(10).

In collision action, evidence that defendant motorist was driving without lights over one and one-half hours after sunset, and was driving in middle traffic lane of bridge, lane to his right being free of traffic, *held* to sustain jury's implied finding of defendant's negligence.

**2. Automobiles** ⚷245(81).

As bearing on contributory negligence, whether deceased motorist turning into middle lane of lighted bridge could have seen defendant's unlighted car approaching *held* for jury under evidence.

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

**3. Automobiles 🔑209.**

Statute forbidding passing of vehicle on left side by driving to left side of highway unless left side is clearly visible *held* not violated by deceased motorist's passing stalled automobile, if defendant's approaching automobile was not visible because unlighted (St. 1923, p. 557, § 122, as amended by St. 1929, p. 540, § 50).

Requirement of St. 1923, p. 557, § 122, as amended by St. 1929, p. 540, § 50, was complied with by deceased if, at time he made turn to pass stalled automobile, he had clear vision of highway and all vehicles thereon within range of his lights, and if beyond that range he had clear vision of highway and all lighted vehicles thereon.

**4. Automobiles 🔑172(2).**

Words "oncoming traffic," within statute forbidding passing of vehicles by driving to left of highway, if left side is not free of "oncoming traffic" for sufficient distance ahead, *held* not to refer to on-coming vehicles illegally operated without headlights and hence not visible to others using highway (St. 1923, p. 557, § 122, as amended by St. 1929, p. 540, § 50).

[Ed. Note.—For other definitions of "Traffic," see Words & Phrases.]

**5. Statutes 🔑189.**

Literal interpretation of statutory language which would lead to absurd result should be avoided.

**6. Automobiles 🔑245(81).**

Whether deceased motorist, turning into middle traffic lane of bridge at 30 to 40 miles per hour to pass stalled car, and colliding head-on with defendant's unlighted automobile, was contributorily negligent, *held* for jury (St. 1923, p. 557, § 122, as amended by St. 1929, p. 540, § 50).

**7. Automobiles 🔑206.**

Motorist had right to presume that others using highway were performing duty in having machines properly equipped with headlights.

**8. Negligence 🔑68.**

In absence of reasonable grounds to think otherwise, it is not negligence to assume that one is not exposed to danger which can come only from violation of law or duty by another.

**9. Evidence 🔑54.**

Basing inference on inference *held* not permissible (Code Civ. Proc. § 1960).

**10. Trial 🔑139(1).**

Directed verdict for defendant was proper, where, in case of contrary verdict, judge would be compelled, under evidence, to grant defendant new trial.

**11. Automobiles 🔑245(15).**

Evidence *held* insufficient to take case to jury on theory that defendant motorist failed to signal when suddenly turning into middle traffic lane to pass stalled automobile, and thereby caused motorist following to swerve into extreme left lane and collide with automobile approaching from opposite direction.

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In Bank.

Appeals from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Josephine Robbiano and others against Louis A. Bovet, Jr., in which defendant filed a cross-complaint against John Ragno and another, and against John Ragno, as administrator of the estate of Sylvester Robbiano, deceased, and wherein John Ragno, as administrator of the estate of Sylvester Robbiano, deceased, filed a cross-complaint against defendant; and action by Mabel Morgan against John Ragno and another. From adverse judgments, defendant and cross-complainant Bovet and plaintiff Morgan appeal.

Affirmed.

Prior opinions, 15 P.(2d) 207; 16 P.(2d) 181; 17 P.(2d) 178.

John Ralph Wilson, Aylett R. Cotton, and Bianchi & Hyman, all of San Francisco, for appellants.

Clifton Hildebrand, of San Francisco, for respondents Josephine and Marian Robbiano.

Crosby & Crosby, of Oakland, for respondents Josephine Robbiano and John Ragno.

Donahue, Hynes & Hamlin, of Oakland, for John Ragno.

CURTIS, Justice.

These are appeals from judgments in personal injury cases. All of the appeals arose out of litigation involving the same accident. The actions were consolidated for trial, and the appellants have brought up the judgment roll and a bill of exceptions.

The accident occurred on the San Mateo-Hayward bridge about 6:25 p. m. on the evening of November 13, 1930. The bridge runs in a general easterly and westerly direction, and has a railing 4 or 5 feet high on each side. It is 27 feet wide, and is divided into three lanes of equal width, the lines being indicated by six-inch markers. The bridge was lighted at the time of the accident with lights 210 feet apart staggered on opposite sides of the bridge. At the time of the accident a car occupied by the Joos family headed east was stalled in the southerly traffic lane. Although it was dark, the car was seen by the witnesses at a considerable distance. We will discuss this point in the case later in this opinion.

On the evening of the accident, Sylvester Robbiano and his brother-in-law, John Ragno, had been visiting in Redwood City and were returning to their homes in Oakland. Each had his separate car. Robbiano was driving a Buick; Ragno was driving a Nash. As they proceeded easterly across the bridge, Ragno was in front and Robbiano was following. They were in the south lane, and were traveling at a speed variously estimated at from 35 to 40 miles an hour. As they approached the Joos car, Ragno turned out into the middle lane, passed the parked car, and then returned to the south lane. Robbiano turned out to pass the Joos car, and as he did so another car was approaching from the east. The latter car was occupied by the defendant Louis A. Bovet and Miss Mabel Morgan. They were traveling 35 to 40 miles per hour in a Ford car. A head-on collision occurred between the Buick and the Ford cars. Whether the collision took place in the middle lane or the north lane, and the exact distance of the point of collision from the Joos car, were controverted facts. The collision was so violent that Robbiano suffered injuries from which he died. His widow and children commenced an action against Bovet. The latter answered and filed a cross-complaint against John Ragno as administrator of the estate of Robbiano and against John Ragno and Josephine Robbiano personally. John Ragno, as administrator of the estate of Sylvester Robbiano, filed a cross-complaint against the defendant. Mabel Morgan commenced a separate action against John Ragno and Josephine Robbiano. As above stated, the actions were consolidated for the purposes of the trial. The jury returned a verdict against the defendant Bovet. It also returned a verdict against Bovet and in favor of John Ragno as administrator of the estate of Sylvester Robbiano. From the judgments entered on the verdicts, the defendant Bovet has appealed. He also appealed from the order made by the trial court granting a nonsuit against him on his cross-complaint. But the latter appeal he abandoned in his opening brief. The trial court granted a nonsuit against Mabel Morgan in favor of Josephine Robbiano. It directed a verdict in favor of Ragno as against Mabel Morgan, and from the judgment entered thereon she has appealed.

### Robbiano v. Bovet.

[1, 2] We will first consider the case brought by the widow and children of Robbiano against Bovet. The validity of the judgment in favor of the plaintiffs in this action depends upon two propositions: First, the negligence of Bovet; and, secondly, if Bovet was negligent, the freedom of negligence on the part of Robbiano. It is not seriously contended that Bovet was not negligent, as there is direct evidence that at the time of the collision he was driving his car without lights over one hour and a half after sunset, and was also driving in the middle lane of the bridge; the lane to his right being free of traffic. The question of Bovet's negligence must be held to have been conclusively established. As to the claim that Robbiano was negligent, we have seen that the verdict of the jury was to the effect that he was not. The sole question, therefore, for us to decide is whether the evidence in the case shows that Robbiano was guilty of contributory negligence as a matter of law. In the first place, in support of his contention that Robbiano was guilty of contributory negligence, the appellant claims that the evidence shows without any contradiction that Robbiano, had he exercised due care when he turned out of the right lane into the middle lane in order to pass around the stalled Joos car, could have seen the Bovet car even though it was traveling without lights. Appellant relies upon the testimony of Ragno and Lyons, two of respondents' witnesses, to substantiate this claim. Ragno testified that he saw the Joos car when he was a block or a block and a half from it, and that he turned to his left to go around it. Lyons testified that he saw the Joos car when he was a few blocks away. It seems to be agreed that, when the witnesses refer to a block, they have in mind a block 300 feet in length. Appellant argues that, if Ragno could see the Joos car a block and a half away, and Lyons could see the same car a few blocks away, Robbiano could see the Bovet car when he (Robbiano) made the turn into the middle lane to go around the Joos car. We do not think this conclusion necessarily follows from the testimony of these two witnesses, nor from any evidence in the case. As far as Lyons being able to see the Joos car "a few blocks away," the evidence shows that the Joos car was facing Lyons, and that its headlights were burning. That he could see the headlights of the Joos car at the distance stated is really no evidence as to the distance an unlighted car could be seen, or whether it could be seen at any substantial distance under the conditions prevailing on the evening at the scene of the collision. Referring to the testimony of Ragno that he saw the Joos car a block and a half away, and his further testimony that he could not see its tail-light for the reason that some one was standing between Ragno and this light, it might, at first blush, be considered as strong evidence that an unlighted car under the circumstances related could be seen for at least the distance of a block and a half, and therefore that Robbiano could have seen, had he looked, the car of Bovet, which was probably in the neighborhood of a block and a half away at the time Robbiano made the turn into the middle lane. However, there is one factor which appellant has not taken into consideration in arriving at the above conclusion, and that is, that the bridge was lighted at the time of the collision with lights 210 feet apart staggered on its opposite sides.

The evidence does not show but that the Joos car had stopped immediately under one of these lights. If it had, then it could be seen a greater distance than if it were some distance removed from any of these lights. The conditions may have been entirely different as to the location of the Bovet car at the time Robbiano made the turn into the middle lane. For aught the evidence shows, it may at that time have been some distance from any light, and in that case its visibility would have been much less than if it were directly under one of said lights. Under these circumstances, we think the jury were justified in inferring that Robbiano could not see the approaching Bovet car, and particularly would this be so where there was evidence before them from a number of witnesses that the night was dark. It was near the middle of November an hour and a half after sunset. There was no evidence that the moon was shining. Taking all these facts into consideration, we are of the opinion that there was no compelling evidence before the jury that would make it their duty to hold or find that Robbiano saw the Bovet car at the time he made the turn into the middle lane or thereafter in time for him to avoid the collision.

[3] This brings us to the main contention of the appellant, and that is, conceding that Robbiano did not see, and could not by the exercise of reasonable care have seen, the Bovet car in time to avoid the accident, nevertheless Robbiano was guilty of negligence in turning into the middle lane of the bridge while the Bovet car was being driven thereon, even though it was being driven without lights, and for that reason it was not visible to Robbiano. In support of this contention appellant relies upon section 122 of the California Vehicle Act, as amended by St. 1929, p. 540, § 50, the applicable portions of which read as follows: "The driver of a vehicle shall drive the same upon the right half of the highway and close to the right hand edge or curb of such highway * * * except when overtaking and passing other vehicles, in which event the overtaking vehicle may be driven on the left side of the highway, *if such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety;* and providing that such overtaking vehicles shall return to the right hand side of the highway before coming within one hundred feet of any vehicle approaching from the opposite direction." Appellant lays great stress upon that portion of this statute which we have italicized, and his contention is that Robbiano violated said section of the act by turning into the left lane when it was not clearly visible as required by said section, and when there was on-coming traffic thereon. That the violation of a statute is generally negligence as a matter of law may be conceded. But did Robbiano actually violate any of the terms of this statute? It is the position of the appellant that he did violate said section because the middle lane was not clearly visible, and further that it was not free of on-coming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety. There is no evidence, nor even a reasonable inference from the evidence, that Robbiano at the time he made the turn to pass the Joos car did not have a clear vision of the highway and of all vehicles thereon within the range of his lights, and that beyond that range he did not have a clear vision of the highway and all lighted vehicles thereon. The only object on the highway of which he did not have a clear vision was the unlighted car of Bovet. Did the section of the act quoted above require Robbiano to see something which, under the conditions prevailing at the time he turned into the left lane, he could not see? We hardly think any one will contend that the Legislature intended any such impossible feat.

[4, 5] The further contention that Robbiano violated said section of the act by turning into the lane to his left when said lane was not free of on-coming traffic seems equally tenuous. The contention that said lane was not free of on-coming traffic is based solely upon the fact that Bovet's unlighted car was being operated thereon. Evidently the Legislature, when referring to "oncoming traffic" in this section, did not have in mind vehicles that were being illegally operated thereon without headlights, and which for that reason were not visible to others using the highway. To adopt the construction contended for by the appellant would render the passing of machines upon the highway at nighttime, no matter how slowly they be traveling, extremely hazardous if not practically impossible. No driver during the nighttime would be safe in turning to his left to pass a machine in front of him for fear that there might be some unlighted machine approaching him. One of the cardinal rules to be followed in the construction of a statute is that its language must be given a reasonable interpretation, and a literal interpretation should be avoided which would lead to absurd results.

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character." Extract from opinion of Mr. Justice Field in United States v. Kirby, 74 U. S. (7 Wall.) 482, 486, 19 L. Ed. 278.

In the case of People v. Ventura Refining Company, 204 Cal. 286, 290, 268 P. 347, 349, 283 P. 60, this rule is approved in the following language: "Where the interpretation claimed leads to injustice, oppression, or to absurd consequences, the general terms used in a statute will be limited in their scope so as to avoid such a result." Continuing on page 292 of 204 Cal., 268 P. 347, 350, the court further stated: "General terms should be so limited in their application as not to lead to an absurd consequence. People v. Earl, 19 Cal. App. 69, 124 P. 887. * * * When a statute is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consisting of sound sense and wise policy, the former should be rejected and the latter adopted. San Joaquin & K. R. C. & I. Co. v. Stevinson, 164 Cal. 221, 128 P. 924."

"The fact that the enforcement of a statute according to its literal import will have the effect of prohibiting otherwise necessary and useful acts may also furnish an entirely sufficient reason for concluding that the intent of its framers was not that it should so operate." People v. Earl, 19 Cal. App. 69, 72, 124 P. 887, 888.

The principle enunciated in the foregoing authorities not only justifies, but in our opinion compels, us to limit the phrase, "oncoming traffic" used in section 122 of the California Vehicle Act as referring to lighted vehicles, or those vehicles on the highway equipped with proper lights so that they are visible to others using the highway. Under this construction of the section of the act, it is clear that Robbiano was not guilty of violating the terms thereof in making the turn into the middle lane for the purpose of passing the Joos car.

[6-8] Neither do we think he was necessarily guilty of negligence in traveling at a speed of 30 to 40 miles per hour as the evidence tends to show he was traveling at the time he turned to pass the Joos car. Not only does the statute permit such rate of speed, but it is apparent that at the time he passed the Joos car he could see all visible objects on the highway in front of him. The only object not within his vision was the unlighted car of Bovet. The question of his negligence was therefore a question of fact for the jury. Robbiano had the right to presume that those using the highway in front of him were obeying the law and were performing their duty in having their machines properly equipped with headlights. "The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable grounds to think otherwise, it is not negligence to assume that he is not exposed to danger which can come to him only from violation of law or duty by such other person." 29 Cyc. 516; Medlin v. Spazier, 23 Cal. App. 242, 137 P. 1078; Harris v. Johnson, 174 Cal. 55, 58, 161 P. 1155, L. R. A. 1917C, 477, Ann. Cas. 1918E, 560; Moreno v. Los Angeles Transfer Co., 44 Cal. App. 551, 186 P. 800.

Other questions were presented and discussed in the briefs of the parties. These questions were fully considered in the opinions rendered by the District Court of Appeal when this cause was before that court. While the decision of the District Court of Appeal has been set aside by the order of transfer to this court, the discussion of those questions by the District Court of Appeal convinces us that they were not of sufficient consequence to entitle them to any detailed consideration by this court.

The judgment is affirmed.

Ragno, as Administrator, etc. v. Bovet.

This action, as we have already seen, was brought by the plaintiff as the administrator of the estate of Robbiano, deceased, to recover damages for the injury to the machine of said decedent by reason of said collision. The decision herein is controlled by and must follow that in the case of Robbiano v. Bovet.

The judgment is affirmed.

The other two cases herein involved were also before the District Court of Appeal, and opinions were rendered by said court in each of said cases. We are in complete accord with said opinions, and hereby approve and adopt them as the opinions of this court. They are as follows:

Morgan v. Ragno.

"The plaintiff asserts that the action of Mabel Morgan against John Ragno was based upon the contention that Ragno in passing the parked Joos car suddenly swerved to the left, thereby causing Robbiano, driving behind him at great speed, in order to avoid hitting the Joos and Ragno cars, to swerve into the north lane and collide with the Bovet car. In her closing brief she reinforces her contention by asserting that, when Ragno made the turn around the Joos car he gave no signal.

"In her complaint with much care the plaintiff alleged the positions of the different cars on the bridge immediately before the accident. She alleged that Robbiano was following Ragno three car lengths in the rear. Continuing she alleged: '* * * And said Ragno as he was near the point of the passage of the automobile being driven by him in an easterly direction to his right of said Bovet, driving his Ford automobile in a westerly direction as aforesaid, observed another automobile parked upon said bridge partially to the right of said Ragno's automobile and partially in the path of said Ragno's automobile, as it was then being driven by Ragno, and that in order safely to attempt to pass said parked automobile, said Ragno suddenly and without warning to any person slowed the speed of his Nash automobile and swerved towards the middle of the lane of traffic upon said bridge, whereupon the said Robbiano, driving said Buick automobile, in order to pass at an excessive speed between said Bovet's automobile and the said Ragno's automobile, swung the said Buick automobile to said Robbiano's left of said Ragno's automobile in a careless and negligent manner and in so doing ran into and collided with said Bovet's Ford automobile proceeding westerly on said bridge and on said Bovet's right-hand side of said bridge as above set forth.' Those allegations were denied in the defendants' answer. On the trial no witness testified that at any time Robbiano overtook, and attempted to pass, Ragno. The witnesses testified without conflict that Ragno was at all times ahead, and Bovet testified the Ragno car at no time interfered with him. No witness testified Ragno slowed down his car until after the accident. No witness testified the accident occurred when the Ragno car, the Bovet car, and Robbiano's car were at the same instant attempting to pass each other and to pass the Joos car. The witnesses Morgan, Bovet, and Lyons each testified they saw the Ragno and the Robbiano cars when they were as much as three-quarters of a mile away. No witness testified that Ragno did not give a signal before attempting to pass the Joos car. Bovet testified he did not see a signal if one was given. The plaintiff called Ragno as a witness. The defendants also called him as a witness. He was examined and cross-examined; nevertheless he was not asked whether he gave a signal or did not give one. The plaintiff was called as a witness in her own behalf, and testified that she was at all times looking directly ahead. The witness Lyons also testified that he was at all times looking at the movements of the Ragno car and the Robbiano car. Neither witness testified that Ragno did not give a signal.

[9-11] "As we understand the brief of the plaintiff, her reasoning is that the witness Bovet testified he did not see Ragno signal. Relying solely on that proved fact, she contends that it will be inferred Ragno did not signal; that it will then be inferred Robbiano did not know Ragno was going to make the turn; that it will be inferred Robbiano did not see the Bovet car coming from the east; and therefore that Ragno caused the acts of Robbiano. In the absence of more facts legally proved, that line of reasoning is not permissible. Code Civ. Proc. § 1960. When the defendants made a motion for a directed verdict, the record does not disclose that the plaintiff called to the attention of the trial court the theory which she now presents. In ruling on the motion, the trial court remarked: 'If the case went to the jury on the present testimony and the jury found against Ragno I would be compelled on motion for a new trial to grant it as to him.' The court applied the proper rule. Estate of Baldwin, 162 Cal. 471, 473, 123 P. 267. We think it did not err in applying the rule to the facts before it."

The judgment is affirmed.

Bovet v. Ragno.

"In this action, as stated above, the trial court ordered a nonsuit in favor of the defendant upon Bovet's cross-complaint. While the cross-complainant appealed, nevertheless he admitted error in his opening brief and has not pressed the appeal."

The judgment of nonsuit should be, and therefore is, affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

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218 Cal. 543

## KELLY et ux. v. SMITH et al.

## SMITH v. KELLY et ux.

S. F. 14780.

Supreme Court of California.

July 25, 1933.

**1. Vendor and purchaser 🔑101.**

Where notice of forfeiture because of purchaser's failure to pay installments due October 6, 1929, was not given until February 16, 1930, and performance was demanded on or before April 16, 1930, no forfeiture occurred for failure to pay until time last specified.

**2. Appeal and error 🔑1010(1).**

Finding of trial court on substantial testimony will not be disturbed.

**3. Vendor and purchaser 🔑44.**

Finding that buildings destroyed by fire after contract for purchase and possession by purchaser were of no value and formed no material inducement for purchase *held* not sustained by evidence.

**4. Vendor and purchaser 🔑203.**

Purchaser in possession under contract requiring fire insurance for vendor's benefit, and retaining title in vendor solely as security, must bear fire loss, and could not rescind because of such loss.

In Bank.

Appeal from Superior Court, Santa Cruz County; Maurice T. Dooling, Jr., Judge.

Action by E. E. Kelly and Alice H. Kelly against Esther Smith and another, wherein the named defendant filed a cross-complaint, and action by Esther Smith against E. E. Kelly and Alice H. Kelly which were consolidated for trial. From two separate judgments for E. E. Kelly and Alice H. Kelly, Esther Smith appeals.

Judgments affirmed.

Thomas Butler, of Watsonville Junction, for appellants.

Louis B. De Avila, of Oakland, for respondents.

IRA F. THOMPSON, Justice.

On January 6, 1927, the respondents Kelly and wife agreed to sell to the appellant certain real property located in Watsonville, together with the improvements thereon for the sum of $24,000, payable $5,500 cash, $600 on April 6, 1927, and $600 every six months thereafter until the whole was paid, together with interest on deferred payments at the rate of 6 per cent. per annum, interest payable quarterly. The written instrument evidencing the contract of the parties required appellant to provide fire insurance, and in the exact language thereof said she would "cause the improvements on said premises to be insured against loss by fire, in the sum of $4000.00, loss if any payable to the parties hereto as their interests may appear, and pay all premiums to become due on account of said insurance. In the event that said second party shall fail to effect said insurance as hereinabove provided, first [party] may purchase said insurance and charge the cost thereof to the said second party. The premiums on said insurance to be added to the next instalment of principal or interest to become due on account of this agreement, and be paid therewith." The appellant entered into possession of the premises under the agreement. On October 6, 1929, she made default in the payment of the installment of principal and interest due on that date amounting to $841.50. On December 6, 1929, a fire destroyed one of the buildings, which was insured for the sum of $2,000, the policy being made payable, in case of loss, to appellant and respondents and the Bank of Italy Savings & Trust Association, as their interests might appear. The banking concern had loaned some money on the property, the note therefor having been signed by both the Kellys and Mrs. Smith.

In order to clarify the situation with respect to the proceeds of the policy, it is necessary to recite that appellant was leasing from respondents other and different property for hotel purposes, and, according to the claim of respondents, was in default in her payments of rental therefor. Regardless of the merits of that contention, which was not tried in either of the present cases, the respondents caused an attachment to be levied upon the interests of appellant in the proceeds of the policy amounting to the sum of $1,300, that being the amount at which the loss by fire was adjusted.

During the latter part of January, or the early portion of February, the fire chief of Watsonville notified Mr. Kelly, one of the respondents, that the burned improvements constituted a fire hazard, and that the building would have to be razed and the débris removed. Kelly replied that the matter should be referred to Mrs. Smith, as she was the owner of the property. Consequently, on February 17, 1930, the fire chief sent a similar notice to her, inclosing a copy to Kelly. Thereafter, in a conference between them, Mrs. Smith informed Kelly that a Mr. Whitsett had a man named Manning who would do the work for the lumber he could salvage. Mr. Whitsett had been representing Mrs. Smith as a real estate agent. Mr. Kelly instructed his representative, a Mr. Taylor, to contact Mr. Whitsett for the purpose of having the buildings razed by Mr. Manning. This was done, and during the early part of March, 1930, the partially destroyed building was torn down and the débris removed. On February 16, 1930, Mrs. Smith being still in default and having also failed to pay the installment of interest due on January 6, 1930, the respondent Kelly served a notice on her requiring her to fulfill all the covenants of the contract and to pay the delinquencies mentioned, together with certain unpaid taxes on or before April 16, 1930, or, in the event of her failure so to do, he would forthwith forfeit and cancel the contract and all her rights thereunder. Appellant made no payment, and on April 18, 1930, respondents Kelly commenced the first action involved herein to quiet title to the property. The appellant Smith answered, denying that her claim was without right and alleging the contract, and by way of cross-complaint she alleged that there had been a complete failure of consideration for three reasons, as follows: (1) The failure of respondents to either repair the building or credit her with the proceeds of the fire insurance, (2) the tearing down of the improvements without her consent, and (3) the disposal of the materials realized from razing the buildings without her consent, and sought recovery of the sum of $12,500 which she said she had paid on account of the contract. The second action was commenced by Mrs. Smith, alleging that the buildings were torn down without her consent, and the rentals she had been receiving thereby caused to cease, and that the consideration for the contract had entirely failed, and praying for judgment in the sum of $12,011.85.

The actions were consolidated and judgment entered for plaintiffs in the quiet title action and against defendant upon her cross-complaint, and another judgment denying any recovery to the appellant, the plaintiff in the second cause of action. Two appeals are prosecuted from the judgments so entered.

In brief, the court found that appellant had made default in the payment of installments under the contract, and had thereby forfeited all right to the property and to the moneys theretofore paid on account of the contract, and, in substance, that the default had occurred October 6, 1929. Also it was found that respondents had not entered upon the property and razed the buildings without appellant's consent, but that the entry and work of destruction and removal of the débris was expressly consented to, authorized, and directed by Mrs. Smith. It was further found that appellant had elected to and had affirmed the contract by filing, on April 11, 1930, an action based on her ownership and possession of the real property (the subject of the contract) to recover from the respondents here and the city of Watsonville damages aggregating $30,250, for alleged trespass upon the property and the razing of the buildings, which said action, at the time of the trial herein involved, was still pending in so far as the respondents were concerned. There is also a finding that the destroyed buildings formed no material inducement to Mrs. Smith, for the execution of the agreement, but that said improvements were old and of no value whatsoever.

The appellant contends that she was not in default under the contract because strict compliance therewith had been waived by respondents by the acceptance previously of late payments, and that the notice to perform was not sufficient to require prompt payment by her, and that the partial destruction of the building, followed by its demolition, constituted a failure of consideration.

[1-4] The evidence does not disclose a waiver by the respondents of the terms of the contract. But we cannot agree that the default which is found to have occurred on October 6, 1929, worked a forfeiture of her rights under the contract. The exact language of the agreement in this particular is as follows: "It is further understood and agreed that should the said second party fail to make any payment at the time and in the manner hereinbefore agreed, or fail to perform any covenant and condition on her part to be paid, kept and performed, then the said parties of the first part may terminate all the rights of second party under this agreement by notice personally served on the said second party, or mailed to her by registered mail addressed to her at Watsonville, California, and may re-enter upon said premises and remove all persons therefrom." Under this stipulation of the parties a notice of forfeiture was required which was not given until February 16, 1930, demanding performance on or before April 16, 1930. We entertain no doubt that the notice was sufficient to accomplish the desired purpose upon the expiration of the date specified. But it must also follow that there was no forfeiture or any attempted forfeiture prior to the expiration of the time designated. Hence, we are compelled to inquire into the effect of the fire upon the contract of the parties. We may ignore the effect, if any, of the subsequent demolition of the buildings, because upon substantial testimony the court found that Mrs. Smith had consented thereto. We cannot, in like manner, accept the finding of the court that the buildings were old and of no value whatsoever and formed no material inducement to Mrs. Smith to enter into the contract. True, it is, according to the testimony, that the buildings were very old. Likewise, Mr. Kelly gave it as his opinion, while testifying, that the property was just as valuable, if not more so, with the buildings destroyed as with them standing. Yet the fact remains that Mrs. Smith had been receiving $100 a month rental therefrom and the insurance company adjusted the loss at $1,300. It is obvious therefore that they were valuable as income producers and also had considerable intrinsic worth. We are therefore faced with the question of whether, under all the circumstances of the case, the loss of the property by fire should fall upon the vendor so as to enable the vendee to rescind or at least to be entitled to a credit upon the payments due upon her contract. Had the legal title to the premises been conveyed to appellant at the time of the contract, and respondents accepted back a mortgage or deed of trust for the balance of the purchase price, there would be no question. It would readily be admitted that the loss should fall upon the holder of the legal title. Nor can it be gainsaid that the reservation of title in this particular case was designed to serve the same economic purpose as a mortgage or deed of trust. There is therefore strong reason, as was recently indicated in the case of Bank of Italy v. Bentley (Cal. Sup.) 20 P.(2d) 940, 945, why the law applicable to the rights, duties, and responsibilities of the parties should be the same, rather than being made to depend upon "the more or less accidental form of the security." Further, it is to be remembered that the parties to the contract contemplated the possibility of the destruction of the buildings by fire, and, in order to safeguard themselves against such contingency, included a provision in the contract that the vendee should cause the buildings to be insured against fire and pay the premiums therefor. In other words, the vendor by such requirement indicated a plain intent, accepted by the vendee, that he was not expected to bear the loss. In view of these facts, we should have no difficulty in arriving at a conclusion which would be in harmony with most of the jurisdictions of the country, were this a case of unquestioned first impression. However, there are authorities in our own state that must be critically examined. We may summarily dismiss the case of Smith v. Phoenix Ins. Co., 91 Cal. 323, 27 P. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191, by calling attention to the fact that the question there involved was whether a lease of a building

for hotel purposes, for a term of five years, at a fixed rental and an option to purchase at the end of the term with possession in the lessee, constituted such a change of title as to avoid an insurance policy made payable to the owner—where, at the time the insurance was written, the insurance company had knowledge that the building was being erected with the intent of leasing it for hotel or rooming house purposes. The court answered the question in the negative, but it is interesting to note from a reading of the case that the opinion was rendered upon rehearing, and that the first conclusion was to the contrary. We note the case and the real question involved therein at this juncture because of the reference to it in subsequent authorities. Perhaps we ought also to observe that the District Court of Appeal, in Finkbohner v. Glens Falls Ins. Co., 6 Cal. App. 379, 92 P. 318, 321, viewed the Phoenix Case in the same light as we have just indicated, taking occasion to quote therefrom as follows: "For the purpose of this decision, it is sufficient to say that no case has been cited, and we have discovered none, in which the vendee has been held bound to pay the purchase price where a valuable part of the property has been destroyed before the day fixed for payment and conveyance, unless he has taken possession under the contract of sale or has the right to such possession under the contract before the occurrence of the loss."

Next we refer to Conlin v. Osborn, 161 Cal. 659, 120 P. 755, 760, in which case the contract was not consummated, nor had a change of possession occurred, but the vendee had borrowed from the vendor an abstract of title for use in having the title searched, and prior to the expiration of the time allowed for that purpose the improvements on the property were burned down in the great conflagration of 1906 in San Francisco. It was held that the loss fell on the seller and that there was a failure of consideration. The court, however, approved the reception of evidence relating to possession in these words: "The questions relating to possession were proper, however, because possession by a vendee is sometimes evidence that the parties consider the contract substantially completed and plaintiff was seeking to show that there was no basis for any such presumption in this case."

The case of Potts Drug Co. v. Benedict, 156 Cal. 322, 104 P. 432, 25 L. R. A. (N. S.) 609, is entirely beside the question here involved, although general expressions are therein contained which would seem to bear upon the problem. In that case there was an assignment of a leasehold with intent to then and there vest title in the assignee, and, although the assignor retained possession for a short period during which the premises were destroyed by fire, it was held that the loss fell upon the assignee, he being the owner of the title to the leasehold estate.

Higbie v. Shields, 27 Cal. App. 536, 150 P. 801, is to be classified with Conlin v. Osborn, supra. The contract was wholly executory and possession had not been delivered. The loss was held to fall upon the vendor, the court basing its opinion almost exclusively upon the fact that possession had not changed.

In Wong Ah Sure v. Ty Fook, 37 Cal. App. 465, 174 P. 64, the vendee, under a contract which called for payments subsequent to the initial one, was held to be entitled to recover the value of reconstructing a burned building, but in that case the court found an agreement on the part of the vendor immediately following the fire that, if the vendee would rebuild, he would be allowed by the vendor the cost of reconstruction. A like special agreement was involved in LaChance v. Brown, 41 Cal. App. 500, 183 P. 216.

In Kirtley v. Perham, 176 Cal. 333, 168 P. 351, personal property was sold, but title reserved until the total purchase price was paid. Upon the authority of many of the cases already examined, it was held that the loss fell upon the seller, although the court quoted from Mr. Williston's treatise on Sales to the effect that the majority rule is contrary, upon the theory that the rule in this jurisdiction was established. The case, however, is no longer of any authority, for the reason that the rule was changed by legislative enactment in 1931 (St. 1931, p. 2242). Section 1742, Civil Code, now reads in part as follows: "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that: (a) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery." It will be observed that this legislative enactment is in keeping with the extensive use of the so-called conditional sales contract and the great expansion of credit which has accompanied it. The same reasons which prompt the application of the majority rule respecting risk of loss in California to personal property ought to be given consideration when considering the loss of improvements to real property. Besides bearing in mind the great development of trade through the medium of such contracts with reservations of title as security, we ought to consider upon whose shoulders devolves the responsibility of so caring for the property that fire will not occur, and how improper care will contribute to the hazard thereof.

The observations just indulged bring us to a consideration of the case of Cooper v. Huntington, 178 Cal. 160, 172 P. 591, 592, in which case the Coopers (a mother and son) purchased from defendants ten acres of land of which four were washed away by a flood. The case originally grew out of misrepresentations respecting the available water supply for the property. After the filing of the complaint for fraud the parties arranged for a settlement, and a check was given by plaintiffs, but payment thereon was stopped because the flood came and washed away the soil from the four acres. And in order to minutely observe the distinction drawn by the court we quote the following sentence: "We are of the opinion that before partial consummation of this contract by a payment of any of the purchase price under it, the Coopers were in a position to withdraw from it." This language was followed later on in the opinion by saying that the statements in Conlin v. Osborn, supra, "* * * did not amount to a decision that under no contract may there be a failure of consideration, of which a vendee in possession may avail himself." Whatever comfort appellant might otherwise find in the case just discussed is largely dissipated by that of McCarty v. Wilson, 184 Cal. 194, 193 P. 578, 580, also involving erosion. It is there said: "Defendant finally insists that he is excused from performance by the circumstance that the property suffered a 10 per cent. depreciation in value by reason of a flood occurring between the time of the confirmation of the sale and the date of the commencement of the action. Bearing in mind that prior to the injury to the property defendant was in equity the owner of the land; that he was unquestionably entitled to the possession of the land under the contract with the estate, and that he had actually gone upon the land with men and teams and done about $1,700 worth of grading, we have no doubt that the risk of loss was upon him." In denying a petition for rehearing it was said the fact that the entire purchase price became due upon the confirmation of the sale distinguished it from cases relied upon by petitioner. We have already discovered, however, from the analysis of all the prior cases, it was not out of harmony with them.

We now come to the case which is most nearly in point, that of Lubarsky v. Chavis, 99 Cal. App. 610, 279 P. 205, 207. There a complaint in two counts, its first framed on fraudulent representations for rescission, and the second alleging failure of consideration arising by reason of the destruction by fire of a house on the property and asking that the agreement be rescinded, was filed. A demurrer was sustained, and, upon plaintiff's refusal to amend, judgment was entered for defendant. On appeal it was reversed, the court saying that the first count was sufficient, and also deciding, solely upon the authorities heretofore discussed, that the loss fell upon the vendor, even where the possession was in the vendee. The case cannot be considered as authoritative upon the point here, for the reason that the conclusion is founded upon the following language used in referring to Conlin v. Osborn, supra: "The vendor had not yet delivered possession, but that fact has not been considered a distinguishing circumstance in California. The case has been followed where the vendee was in possession and where title had not passed." We have already ascertained that the reason cited for the conclusion does not in fact exist. We also direct attention to an article by Professor Cockerill in 1 Southern California Law Review, 309–321, where many of the cases heretofore mentioned are reviewed, and it is pointed out that they do not in fact depart from the doctrine, the conclusion of the writer being stated as follows: "No criticism is intended to be made of the decisions in the cases discussed. They are, it is believed, correctly decided on their respective facts. The suggestion made is only that, disregarding the loss, the vendor was not entitled in any of them to a decree for specific performance. If this distinction be admitted the doctrine of equitable conversion was in no way involved."

The discussion of the prior decisions should not be closed without a reference to Owen v. Pomona Land & Water Co., 131 Cal. 530, 63 P. 850, 856, 64 P. 253, which case involved the sale of land and water stock, with possession in the vendee during the completion of the contract. The water supply failed, and the purchaser sought to rescind on the ground of failure of consideration as well as for other reasons. With respect to the contention regarding the water this court said: "Whether or not, in the final adjustment of this controversy, it may be held that the plaintiff can claim or recoup damages for any actual failure of the supply of water which his stock purported to represent,—a point as to which we express no opinion,—it is certain that the failure which occurred was not a cause for rescission. *If this part of the consideration for plaintiff's obligation failed in any degree, the failure was due to no fault of the defendant, and so was not a ground of rescission.*" (Italics ours.)

There can be no doubt about the rule generally. In a note to Sewell v. Underhill (197 N. Y. 168, 90 N. E. 430, 134 Am. St. Rep. 863, 18 Ann. Cas. 795) 27 L. R. A. (N. S.) 233, will be found a citation of numerous authorities to the proposition that the loss falls upon the vendee in those cases where in equity the vendee becomes the owner of the property. Reference may also be made to Good v. Jarrard, 93 S. C. 229, 76 S. E. 698, 43 L. R. A. (N. S.) 383, and note thereto. See, also, article by Professor Vanneman, 8 Minnesota Law Review, 127. Some differences of opinion will be found to exist with respect to those cases where the vendee is not in possession, but where the vendee is in possession, enjoying the entire beneficial use of the property, having acquired an estate which he may convey or incumber, and which to all intents and purposes is his; the great majority of opinion holds that the loss should fall upon him, such being the manifest intent of the parties where title is retained solely as security. And, in view of the insurance provision in this case, it should be particularly true. And this result is arrived at not by the legerdemain involved in the doctrine of equitable conversion so much as it is by the contract and the manifest purpose of the parties. By which we conclude that appellant was not entitled to rescind, by reason of the partial destruction of the premises by fire. This conclusion renders further discussion unnecessary.

Judgments affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; SPENCE, Justice pro tem.

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218 Cal. 641

## POHL v. MILLS et al.

Sac. 4485.

Supreme Court of California.

Aug. 1, 1933.

Rehearing Denied Aug. 31, 1933.

**1. Contracts 🔑259.**

If party would not have entered into contract except for a material misrepresentation, he is entitled to rescind and to be placed as nearly as possible in original position.

**2. Landlord and tenant 🔑34(5).**

Evidence in action to rescind showed that lessors of roadside stands with option to lessee for perpetual renewal falsely represented that structures were protected by copyright, and that such misrepresentations were inducing cause of leases.

**3. Contracts 🔑99(1).**

Where misrepresentations were calculated to induce making of contract, presumption is that they did, and nonreliance in fact must be shown to defeat relief for fraud.

**4. Landlord and tenant 🔑34(5).**

Evidence in action to rescind for fraud showed that lessee of roadside stands which lessors falsely represented were protected by copyrights was not afforded opportunity to examine papers in connection with alleged copyright.

**5. Landlord and tenant 🔑28(1).**

Caveat emptor did not apply where lessors of roadside stands falsely represented that they were protected by copyrights, and did not show lessee copyright papers which would have disproved their claim.

**6. Contracts 🔑94(3).**

Whether material misrepresentation was made with intent to deceive is immaterial, where it induced contract to injury of another.

**7. Landlord and tenant 🔑28(1).**

Where lessors of roadside stands knew that copyright had been refused for structure, copyright of photograph of structure could not afford reasonable basis for honest belief that such copyright protected structure itself so as to warrant representation to lessee that structure was copyrighted.

**8. Landlord and tenant 🔑28(1).**

Where lessors knew that copyright of roadside stand had been refused, it was their duty to so advise lessee instead of representing that stand was protected by copyright when only photograph of stand was copyrighted.

**9. Fraud 🔑17.**

Though one may be under no duty to speak, if he undertakes to do so, he is bound to speak truly without suppression of known material facts.

**10. Landlord and tenant 🔑34(2).**

Lessee of roadside stands with option for perpetual renewal *held* entitled to rescind for lessors' false representation that stands were protected by copyright, though no competitor had used similar stand.

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In Bank.

Appeal from Superior Court, Glenn County; H. S. Gans, Judge.

Action by F. E. Pohl against James Mills, Jr., sometimes known as James Mills, and Robert A. Rankin, copartners, doing business under the firm name and style of Jumbo Lemon Company, and the Jumbo Lemon Company, who filed a cross-complaint. From a judgment for defendants, plaintiff appeals.

Reversed and remanded.

For prior opinion, see 17 P.(2d) 1039.

W. T. Belieu, of Willows, and Percy S. Webster, of Stockton, for appellant.

R. M. Rankin, of Willows, Wm. S. Graham, of San Francisco, and Marvin J. Rankin, of Red Bluff, for respondents.

PER CURIAM.

This action was brought by plaintiff for the purpose of rescinding four separate contracts for the leasing by him, with the option of perpetual renewal, of four roadside booths for the dispensing of nonintoxicating drinks, known as "Jumbo Lemons," together with the exclusive territorial right to operate said Jumbo Lemons in the district designated in each separate contract. Plaintiff claims the right to rescind and cancel said contracts because of certain alleged misrepresentations and fraud practiced upon him by defendants which induced him to enter into said contracts. Defendants filed a cross-complaint alleging that the repudiation of said contracts constituted a breach thereof. Judgment went for the defendants who were awarded damages in the sum of $2,947 with costs. From this judgment plaintiff appeals.

In 1924, James Mills, Jr., and Robert A. Rankin, employees of the James Mills Orchard Company, a large grower of lemons and other citrus fruit, built and operated what they termed a "Jumbo Lemon," which was a structure some twelve feet long and about six feet in diameter, shaped to resemble a lemon and painted a lemon color, and having in all respects the general appearance of a giant lemon. It was intended as a roadside booth for the dispensing of nonintoxicating drinks, and soft drinks were sold through openings in each side by an operator who worked inside of the structure. In 1925, the two defendants formed a partnership for the purpose of building and operating Jumbo Lemon booths and leasing them to operators. Application was made by the attorneys for said partners for a patent on the design of the booth. This application was rejected upon the ground that it was no invention, the design being merely a simulation of a well-known object. The rejection of the patent was brought to the knowledge of the partners in January, 1925, by a letter from the patent attorneys handling the application. Shortly thereafter an application was made for a copyright of the structure itself. Apparently, even before the application was made, one at least of the partners was representing that the structure was a copyright structure as the following letter, dated February 5, 1925, was written by James Mills, Jr., to the attorneys in San Francisco: "We have your letter of the 3d concerning the Jumbo Lemon Sales Booth. If it is impossible for us to patent or copyright the design of the lemon booth could we copyright the title 'Jumbo Lemon?' We are contemplating establishing a line of these stands and do not wish to start business going and then have others in the position of being able to duplicate both the stand and the name and cut into the business. Several have asked how the lemon was constructed already and stated that they contemplated putting some in, and we *by telling them the same was copyrighted* have sidestepped the issue to date." (Italics supplied.) On July 7, 1925, the attorneys notified the partners that the application to register a copyright for the "Jumbo Lemon" sales booth had preliminarily been rejected upon the ground that a sales booth which was lemon shaped in configuration was not a work of fine art, and suggested that an application for a registration of a *photograph* of the booth be made. The partners were informed on August 6, 1925, that the application for a copyright of the booth itself had been finally rejected. The only procedure possible, therefore, was a registration of a photograph of the booth, and this was done, and on August 25, 1925, a certificate of copyright registration was issued in the name of James Mills, Jr. The certificate stated, "This is to certify * * * that one copy of the photograph named herein, not reproduced for sale, has been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years, has been duly made in the name of James Mills, Jr. * * * Title of Photograph Jumbo Lemon Booth. * * *" Thereafter the partners commenced to establish a chain system of these booths throughout the state of California. The Jumbo Lemon booths were leased to persons interested by written lease contracts, four of which contracts are involved in this action. In November, 1926, the plaintiff negotiated with the defendants for the leasing of four of the structures to be operated at or near Gilroy, Kings City, Redwood City, and Paso Robles, Cal.

The contracts are in writing and are in evidence. They are identical in form and substance except for the fact that each of said contracts specifies a different territory granted for the operation of said booths. The contracts commence with the statement that: "Whereas the lessors are the owners of the exclusive right to maintain and operate Jumbo Lemons, a form of roadside stand for mixing and dispensing nonintoxicating drinks, which Jumbo Lemon is a structure copyrighted by James Mills, and lessors are establishing a chain of said Jumbo Lemons throughout the State of California and other states to operate the same through lease contracts, and to maintain a standard system of operation, and whereas the lessee is desirous of operating one of said stands at or near [specifying the location of the stand] upon the terms and conditions imposed by the lessors and hereinafter set forth; Now Therefore, * * * the lessors hereby let and lease to said lessee and lessee hereby hires and takes from lessors one of the said Jumbo Lemons, together with the right to maintain and operate the same at a location in or near said above described city." The contracts then set forth the obligations of the lessors, the most important being: (1) To place upon the location secured by the lessee one of said Jumbo Lemon structures completely equipped, and (2) to sell and deliver all lemons, oranges, other fruits and nut products to be used by lessee in said business and to charge therefor prices which would not exceed the wholesale prices of fruit of like grade and quality at San Jose. (In this regard it was set forth that the lessors had contracted with the James Mills Orchards Corporation to supply lemons, oranges, and other fruits and nuts for the use of the lessors in operating their chain of Jumbo Lemons, and when the supply from that source was not available the lessors could at their option discontinue the purchase of supplies from other sources and lessee should make his own arrangements for supplying lemons, oranges, and other fruits and nuts.) Then follows a statement of the obligations of the lessee, the principal ones being: (1) To pay to the lessor for said structure and equipment, and the right to operate the same at the location selected by him, $1,200, payable in installments; to pay for the transporting, delivering, and locating of said lemon structure, and to pay in addition, for the seasons commencing with 1928, a royalty of 6 per cent. on the gross income from the proceeds of said business; (2) to lease a lot for the location of said structure; (3) to keep the grounds, the structure, and equipment clean, neat, and attractive, and in every way co-operate with the lessors in standardizing Jumbo Lemon system; (4) to purchase from the lessors all lemons, oranges, and other fruits and nuts which might be used in said business; (5) "to operate and keep open said Jumbo Lemon each season as long as weather conditions permit the operations thereof at a profit to the lessee"; (6) to keep the Jumbo Lemon structure and equipment painted and in good repair and condition, and during the closed season to properly protect it against damage and loss, and at the end of the term or sooner termination of said lease to deliver up said structure and all equipment in good condition; and (8) to furnish the lessors with a correct statement of the accounts of said business. The contracts expressly provide that: "In the event that all of the covenants and conditions of this lease are performed and kept by the lessee, the lessors hereby grant to the lessee the option of renewing this lease for an additional term of five years from the date of termination hereof, and at the end of each five-year period thereafter, under the same terms and conditions except that the rental shall consist only of a royalty or percentage amounting to six per cent. of the gross income derived from the operation of said business, payable monthly in the same manner and under the same conditions as is herein provided for the payment of such royalty."

Plaintiff operated the four Jumbo Lemon structures leased by him during the seasons of 1927 and 1928 and paid to the defendants the sum of $1,200 for each of said Jumbo Lemons, and paid a 6 per cent. royalty on the gross income of said business. Thereafter, plaintiff ascertained to his own satisfaction that the defendants did not own a copyright of the structure of the Jumbo Lemon booths, and on December 7, 1928, he gave the defendants a written notice that he rescinded said lease contracts, "by reason of your fraudulent misrepresentations in regard to a material fact, in that you fraudulently and knowingly misrepresented to me that said Jumbo Lemon structure is copyrighted by you and that you were the owner of the exclusive right to maintain and operate said Jumbo Lemon structure." The notice of rescission contained the further statement that plaintiff offered to restore to defendants everything of value received from them by reason of said lease upon the condition that they should do likewise, and contained a demand for the restoration to him of everything of value received by defendants by reason of said leases. Defendants refused to consent to the rescission of the leases, and thereafter, after the commencement of this action against them, served upon plaintiff a notice of default in the performance of the conditions of said contracts, and on June 4, 1929, took possession of the four Jumbo Lemon structures, together with whatever equipment was contained therein.

Plaintiff's complaint is framed upon the theory that the misrepresentation was made to him during the negotiations for the leasing of the Jumbo Lemon structures that the defendants owned an exclusive right to operate and maintain said Jumbo Lemons based upon a copyright of the structure itself, and that by virtue of said copyright no one could duplicate the structure and enter into competitive business against him; that this misrepresentation was in fact false, since the defendants did not own a copyright of the design of the structure itself; that the defendants at the time of making this misrepresentation knew that it was false; that relying upon such statements by the defendants he was induced to enter into the lease contracts, and he was thereby induced to expend money in the establishment of the business which he would not have expended had he been aware that the defendants did not own a copyright of the Jumbo Lemon structure. In short, it is the gist of plaintiff's cause of action that he bargained for the use of an exclusive right to operate and maintain a business adequately protected by a copyright upon the *structure* itself, and that he was entitled to receive that for which he bargained, and that no other form of protection such as a copyright of a *photograph* of the structure, or a *possible* exclusive right of use based upon prior user by defendants of said structures, could be substituted therefor. Being entitled to exactly what he bargained for, the plaintiff insists that, since he did not receive the precise thing for which he bargained, he is entitled to rescind his contracts and it is not necessary for him to show any loss of income caused by an encroachment upon his business, as his loss consists of the money expended by him in the acquiring of something which he had no desire to acquire, and which he would not have acquired had he been aware of the truth of the situation and had not been misled by the misrepresentations of the defendants.

It is apparently defendants' theory that, notwithstanding the fact that the defendants did not own a copyright of the structure, they had "something just as good," and that as the plaintiff, up to the time of the action, had not suffered pecuniary loss to his income, he could not complain and could not rescind said contracts.

Defendants' cross-complaint alleges that on the 7th day of December, 1928 (the date of the notice of rescission by plaintiff), the plaintiff, "without any valid reason or ground therefor, repudiated and abandoned said lease and the business established in accordance with the terms thereof, and refused to further perform many of the terms and conditions of said lease." It alleges that on said day the plaintiff converted to his own use all of the articles of personal property described in said leases, and that said plaintiff has refused to deliver the same to the defendants. Defendants prayed for the value of said equipment, the loss of royalty upon said business for the term of three years due to the abandonment of said business by the plaintiff, for the loss of profits upon the sale of fruits during the term of said leases, and for the loss sustained by the fact that plaintiff did not keep said structures in good repair and deliver them to the defendants in good condition. The defendants in addition sought damages for the "malicious conduct" of plaintiff in attempting to break up the Jumbo Lemon chain organization by stating that said leases were invalid and procured by misrepresentations and could not be enforced by the lessors, thereby causing dissension and differences among the operators of Jumbo Lemons and destroying the co-operation among said lessees and operators.

There is in the record the testimony of Chester Vaughan, the agent for the defendants who had first contacted the plaintiff, that a booth similar to the Jumbo Lemon booths had been operated by an outsider in San Diego county and was still operating, but it was conceded by the plaintiff that during his operation of said Jumbo Lemon booths there had been no other identical or similar booths operated in the territory granted to him by the leases. It also seems to be conceded that the plaintiff operated at a loss, and that this loss was occasioned rather by the lack of business than by any intrusion or encroachment upon his exclusive right to operate. It is apparent from a perusal of the findings that the judgment of the trial court rendered in favor of the defendants was predicated upon the theory that the protection afforded by the defendants, based either upon the copyright registration of a *photograph* of the structure, or a possible right based upon a prior user by the defendants, was an adequate substitute for the protection arising out of an ownership by defendants of a copyright of the structure itself, coupled with the additional fact that there had been no encroachment upon plaintiff's business by the use of any identical or similar structure by any competitor in plaintiff's territory. In other words, the trial court accepted the defendants' theory that no injury resulted to plaintiff by virtue of the fact that he had suffered no loss of income.

The trial court expressly found that "defendants did state to plaintiff prior to the execution of said lease and in said lease that the said lessors were the owners of the exclusive right to maintain and operate 'Jumbo Lemons' a form of roadside stand for mixing and dispensing nonintoxicating drinks, *which Jumbo Lemon was a structure copyrighted* by James Mills, Jr. (italics supplied) and that lessors were establishing a chain of said Jumbo Lemons throughout the State of California and other states, to operate the same through lease contracts and maintain a standard system of operation." There are also findings to the effect that the plaintiff "did take and accept" the leases from defendants set out as exhibits, and "did make certain payments therefor as provided in said leases," and that he did give the notice of rescission, setting it out in full. Then follows, however, findings which negative the claim that such representations were false and fraudulent and were knowingly made to deceive the plaintiff or did induce him to enter into said contracts. There is in addition the finding that "plaintiff took possession of said Jumbo Lemon as lessee thereof and as a licensee under defendants' copyright and other forms of lawful protection afforded by defendants and advantages secured as an operator in the so-called 'Jumbo Lemon' chain organization." There is a finding that plaintiff paid to defendants and in the operation of plaintiff's business a total sum of $6,646.69, and that he received from the operation for the seasons of 1927 and 1928 the gross sum of $4,969, but there is the further finding that "no person has interfered with his said right or infringed upon the same," and that plaintiff "has not sustained a pecuniary loss or injury in the sum of $1,667.69, or in any sum or amount whatever, or any manner whatever, by reason of any representations of defendants or either of them." The final finding is to the effect that "said copyright registered in the name of James Mills, Jr., was not and is not invalid, and that the said plaintiff had at the time prior to the execution of said lease ample opportunity and means of investigating and determining the rights of defendants to construct, own, lease and operate Jumbo Lemons and the protection afforded them under the law and by its copyright." It is apparent that the court in this final finding was dealing with the copyright of the *photograph* of the structure, rather than the copyright of the structure itself, and that, although it is true that "the copyright registered in the name of James Mills, Jr. [meaning the copyright of the photograph] was not and is not invalid," neither this finding nor the other findings squarely meet the issue of whether or not plaintiff was entitled to rescind by virtue of the failure of a material consideration—a copyright of the structure itself.

[1] We are of the opinion that plaintiff was entitled to rescind said contracts, and that the judgment based upon these findings cannot be sustained. There can be no doubt that the representation made was a material one and was the inducing cause of the plaintiff's entering into the contracts. If he would not have entered into the contracts if such a misrepresentation had not been made, he is entitled to rescind the contracts and be placed as nearly as possible in the same position as he was in before entering into the contracts. He was entitled to receive that for which he bargained and cannot be compelled to accept, in lieu thereof, "something just as good." Moreover, if he entered into the contracts by virtue of such misrepresentation, it cannot be said that he suffered no pecuniary loss because he suffered no loss of income. If he paid more for the right to operate a business protected by a copyright structure than he would have paid for the use of the structure without a copyright protection, as there can be no doubt he did, he suffered a pecuniary loss. And if, upon a resale of the business, he would be unable to secure as high a price for the business which was not protected by a structure copyrighted as he would for a business adequately so protected, he would undoubtedly suffer pecuniary loss. Moreover, we do not believe that he should be compelled to continue in the business under the apprehension of possible competitors after he learned that the business was not protected by a copyright of the structure against such competitors.

In this regard it should be stated that we see no good reason for distinguishing between those cases in which a purchaser is permitted to rescind by reason of the fact that by misrepresentation he has been induced to purchase something other or different from that which he intended to purchase, and a case such as the instant case in which the right secured by the plaintiff was a lease for a period of years with an option for perpetual renewal. In the instant case, the plaintiff invested money in the securing of a definite thing, the use of the structures and the right to an exclusive operation of the business, which right was represented to him to be protected by a copyright of the structure. He invested, not only in the use of the structures and the right to operate them, but in the sense of security that he would be undisturbed in his operation, and the possibility of selling his business at a profit because it was adequately protected.

[2-5] Upon an examination of the record we are convinced that the plaintiff has made out a good cause of action. The uncontradicted evidence in the case demonstrates the following facts: (1) The representation was repeatedly made to the plaintiff prior to the execution of the contracts that the defendants owned an exclusive right to the use of the Jumbo Lemon structures, based upon a copyright of the structure itself. Since this statement appears on the face of the contracts themselves, any attempt to deny the making of such representation would be useless. Moreover, three witnesses for the defendants, including James Mills, Jr., Robert A. Rankin, and Chester Vaughan, who first contacted the plaintiff, testified that they had represented to the plaintiff that the structure was copyrighted, and that no other person could use such structure in a competitive business. James Mills, Jr., in his testimony stated that he informed the plaintiff that they had copyright protection, and, while he did not use the words, "structure copyright," in his testimony, he stated that he intended the statement in the contract, "which is a structure copyrighted" as a representation to the plaintiff. Chester Vaughan, agent for the defendants, testified that: "In conversation with Mr. Pohl I stated that I had always been informed that we had structure copyright protection and no one could build or in any way jeopardize our operations." And Robert A. Rankin testified that: "I remember very distinctly I showed him the statement that the contract had in it. That was the most convincing and conclusive argument I had." In fact, the trial court expressly found that such a representation had been made. (2) The Jumbo Lemon structure was not in fact a structure copyrighted. The evidence is clear that the application for a copyright of the structure had been rejected by the copyright department. The procurement of a copyright registration of a photograph of one of the structures was obviously only a subterfuge and in the face of the rejection of the copyright of the structure itself obviously cannot be considered to be an equivalent to it. (3) The representation that the Jumbo Lemon was a structure protected by a copyright, and that the right to operate under a lease from the

defendants was an exclusive right, and that there was no possibility of any one else engaging in a competitive business, was the inducing cause of the plaintiff's entering into the contracts. In De Garmo v. Petitfils Confiserie, 93 Cal. App. 261, 270, 269 P. 692, 695, it was said: "The representations made to appellant were ones calculated to induce him to buy the stock, and he did, in fact, make the purchase; therefore the presumption is that the representations induced him to do so, and, in order to take away his right to relief on the ground of fraud, it must be shown that he did not rely upon said representations. Troy, etc., Co. v. Drivers', etc., Co., 14 Cal. App. 152–155, 111 P. 121; 12 Cal. Jur. 827." Moreover, the record clearly shows, from the testimony of the witnesses for the defendants themselves, that the plaintiff carefully inquired into the question of whether or not the structures were adequately protected by a copyright. As above noted, Robert A. Rankin testified that this was the "most convincing and conclusive argument I had." Entirely eliminating from consideration the testimony by the plaintiff that the representation that the Jumbo Lemon was a copyrighted structure was the inducing cause of his entering into the contracts, the record clearly shows that this was in fact the inducing cause, and that, if he had not been led to believe that the structure was copyrighted, he would not have invested his money in the business. (4) The plaintiff was not afforded an opportunity to examine the papers in connection with the copyright. James Mills, Jr., testified that, when plaintiff inquired about the copyright papers during the negotiations at Maxwell, he informed him that they were at Hamilton, or in the safe deposit box in the bank at Chico. It is apparent that it was impossible for the plaintiff to make an examination of the papers without the co-operation of the defendant, James Mills, Jr., and that such co-operation was not afforded him. In such a situation the doctrine of caveat emptor has no application. Bechtold v. Coney, 42 Cal. App. 563, 183 P. 841. In Ferguson v. Koch, 204 Cal. 342, 268 P. 342, 344, 58 A. L. R. 1176, it is said: "Where parties deal fairly or at arm's length, the rule of caveat emptor applies, but, where honest dealing is departed from by the vendor making false statements as of his own knowledge, the falsity of which is not known to the purchaser, such purchaser has the undoubted right to rely implicitly upon such statements, and the principle has no application. In other words, the vendor must stand mute, or at least refrain from making statements calculated to deceive."

[6-9] It is not necessary for us to determine whether or not the representations made to the plaintiff were made with the intent to deceive. In Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011, it is held that a defrauding party making statements which he knows to be untrue, or, having no grounds for believing them to be true, will not be protected by the absence of an intent to deceive. There can be no question that the statement that the Jumbo Lemon was a structure copyrighted was knowingly made. It would appear from the testimony of James Mills, Jr., that he was under the impression that a copyright of a photograph of one of the Jumbo Lemon structures was equivalent to a copyright of the structure. A copyright of a photograph only protects the owner from a reproduction or sale by others of the original photograph. Gross v. Seligman (C. C. A.) 212 F. 930. In Bleistein v. Donaldson Lithographing Co., 188 U. S. 239, 23 S. Ct. 298, 299, 47 L. Ed. 460, it was said: "Others are free to copy the original. They are not free to copy the copy." It is self-evident that a copyright of a photograph of one of the structures falls far short of being a copyright of the structure itself. And, in the face of the fact that defendant knew that a copyright of the structure had been refused, such substitute could not afford a reasonable basis for an honest belief that such copyright did in fact afford protection to the structure itself. At any rate, by virtue of the fact that he was aware that a patent of the design of the structure had been denied, and that the application for a copyright of the structure had been refused, it was incumbent upon him to disclose such facts to the plaintiff in order that the plaintiff should have an opportunity of arriving at his own conclusions and making his decision with reference to investing his money and entering into the contracts based upon the facts as they actually existed—not upon half truths. "Though one may be under no duty to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all, he must make a full and fair disclosure." Sullivan v. Helbing, 66 Cal. App. 478, 226 P. 803, 805.

[10] It is apparent from the above discussion that all the elements necessary to establish plaintiff's case for rescission were adequately made out, and that a judgment in his favor should have been granted. It follows that the defendants' cause of action, based as it was upon the ground that the plaintiff was not entitled to rescind said contracts, finds no support in the record.

Judgment is reversed, and the case is remanded for a new trial.

## In re HOWARD'S GUARDIANSHIP.

## HOWARD et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

S. F. 14718.

Supreme Court of California.
July 31, 1933.

Rehearing Granted Aug. 30, 1933.

**1. Trusts 🔑231(2).**

Trustee is not permitted to purchase trust property or acquire any interest therein.

**2. Guardian and ward 🔑62.**

Guardian of estate of minor should be entirely disinterested person.

**3. Guardian and ward 🔑25.**

Relatives of minor *held* entitled to removal, as guardian of minor's estate, of bank which, as trustee under trust in which minor had remainder interest, had itself purchased trust securities without knowledge of remaindermen (Civ. Code, §§ 2230, 2234; Probate Code, § 1580, subd. 5).

> The evidence indicated that bank, as trustee, in its report to adult remaindermen, had not disclosed that it was the purchaser of United States bonds of the trust estate which had been sold, and the adult remaindermen disaffirmed the transaction and brought action for accounting and removal of the trustee. It further appeared that the trust was for the benefit of the life beneficiary as well as for the remaindermen, and that the trustee's compensation was based on income derived from the trust.

**4. Guardian and ward 🔑10.**

Statute giving preference in appointment of guardian of minor to trustee of fund applied to minor's support applies only where trust is for minor's exclusive benefit (Probate Code, § 1407).

**5. Guardian and ward 🔑25.**

It is within power of appointing court to remove guardianship of minor from any antagonistic person or influence (Probate Code, § 1580, subd. 5).

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In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Proceedings by Charles S. Howard and others against the Bank of America National Trust & Savings Association. From a judgment nonsuiting petitioners and dismissing the petition, petitioners appeal.

Reversed, with directions.

See, also, 24 P.(2d) 486.

Orville R. Vaughn, of San Francisco, Ross & Ross, of Redwood City, and McCutchen, Olney, Mannon & Greene, of San Francisco, for appellants.

Sullivan, Roche, Johnson & Barry, of San Francisco, Edmund Scott, of Redwood City, and Keyes & Erskine and Louis Ferrari, all of San Francisco, for respondent.

WASTE, Chief Justice.

Appellants, the father and brothers of Robert Stewart Howard, a minor, petitioned the superior court to remove the respondent bank as guardian of the minor's estate. The bank answered, and the proceeding was tried upon the issues thus joined. At the conclusion of petitioners' evidence, the bank moved for a nonsuit, which was granted. Thereafter, the court rendered a judgment of nonsuit and dismissal of the petition. This appeal followed.

Charles S. Howard, one of the petitioners, and his wife, now Mrs. Herrscher, had three sons, Charles S. Howard, Jr., Lindsay C. Howard, and Robert Stewart Howard, the two former being of age and engaged in business, the latter, a minor, attending school. On March 7, 1930, Charles S. Howard, the husband and father, one of the appellants, created a trust by the terms of which a trust company other than the respondent was named as trustee. To this trust, Charles S. Howard transferred United States government securities worth in excess of $2,100,000 and cash approximating $400,000, a total of $2,500,000. By the terms of the trust, the income was to go to Mrs. Howard as life tenant, with remainder to the three sons. There is a provision in the trust by which Mrs. Howard is given the right to withdraw $50,000 per year from the corpus of the trust, and provisions providing for failure of survivorship among the sons. Reinvestment of the trust funds was committed to the trustee, subject to the right of the life beneficiary, Mrs. Howard, to disapprove contemplated reinvestments. She was also authorized to change the trustee, and, if she elected to do so, she might appoint some third person whose approval of reinvestments by the trustee was also required. The power of sale, however, was vested solely in the original and successor trustees.

On or about the 24th of November, 1930, the mother was appointed guardian of the person of the minor, and the Bank of America National Trust & Savings Association, respondent here, and hereinafter referred to as the bank, was appointed guardian of the estate of the minor. After the appointment and qualification of the bank as guardian of the estate of the minor, the trustee of the trust was changed, and the bank was appointed trustee of the fund and assumed the trust. Almost immediately there occurred the events which are relied upon by the appellants as justifying the removal of the bank as guardian of the estate of Robert Stewart Howard, the minor. Mrs. Howard had, in the meantime, named Edmond E. Herrscher, an attorney, as the third person whose approval of reinvestments by the new trustee should be required. By the end of January, 1931, two months after the appointment of the bank as guardian, United States bonds, property of the trust, of the face value of $1,736,200, had been taken out of the trust account and disposed of. It is the contention of the appellants that this property was transferred from the trust estate and was actually sold and transferred to the bank itself, and that the transfer resulted in great loss to the estate of the ward. The respondent contends that the transaction was one in which, in the contemplation of banks and financial houses, the bank did not buy the bonds in the sense of an ordinary purchase and sale transaction, but that, as a convenience to its customer, they were changing one form of currency or money, to wit, Liberty bonds, into another form of money, to wit, cash at the prevailing rate of interest between them, but the record supports the contention of appellants. The proceeds were invested, with Herrscher's approval, in municipal, utility, and railroad bonds, which, at the time of the hearing on the petition for removal of the guardian, were worth $1,590,537. It is contended, and the evidence apparently shows, that at the time of the hearing the corpus of the trust was $110,000 less in value than it would have been had no United States bonds belonging to the trust been sold.

The life tenant, Mrs. Howard, was overpaid by the bank through its paying to her full interest on bonds bought at premiums, without amortizing the premiums as required by law, upon her agreeing that, if any claim were made by the remainder interests for the amount of such premiums, such demand should be a valid claim against her estate in the event of her demise. The bank subsequently restored to the trust fund the amount of money thus wrongfully paid to Mrs. Howard.

Under the terms of the trust, the bank's compensation was to be measured by the income of the trust. In the course of buying and selling securities, the bank from time to time bought and sold bonds between interest dates. In such cases, it received accrued interest as part of the price of the bonds sold, and paid accrued interest as part of the price of the bonds bought. In computing and collecting its own compensation, the bank included interest on bonds sold, and added the interest accruing on the bonds purchased from date of purchase and also the interest accruing and unpaid prior to that time. By this computation, it paid to itself as compensation, more than it was entitled to receive. The bank admits the making of this error in computing its compensation, but explains it as having been made "through a simple mistake" by failure of a clerk to segregate accrued interest from interest on the bonds after their acquisition.

Appellants also contend that respondent's interest as trustee is adverse to its faithful performance as guardian of the ward's estate; that respondent cannot faithfully serve two masters, and that it may not legally do so. The foregoing are the principal facts relied upon by the appellants in seeking removal of the guardian.

In support of the judgment and order of the lower court, the bank contends that the question here is not whether the bank violated the trust or owes the trust estate anything, but whether or not the lower court was justified in refusing to remove it as guardian of the estate of the minor. It argues that the question of removal was one of discretion with the lower court, and, on the evidence, contends that the court did not abuse its discretion in refusing to remove the bank, and that, even if the minor's estate has suffered from any mistake, neglect, or unintentional wrong of the bank, the court should refuse to remove the bank as guardian, but surcharge its account with the loss, if any, suffered by the estate. We are of the view that the real question presented by the appeal is that suggested by appellants, and is whether or not the bank, as trustee, has such an adverse interest as to interfere with the proper discharge of its duties as guardian of the estate of the minor, and whether or not the foregoing facts, which the evidence supports, are sufficient to warrant the conclusion that the acts, either rightful or wrongful, of the bank show such antagonistic interest.

Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for him who acts as agent has an interest adverse to that of his beneficiary, when, the beneficiary not having capacity to contract, the proper court, upon information of the facts, has not granted permission for such transaction. Civ. Code, § 2230. In this case, of course, the minor beneficiary had not the capacity to contract, and no application was made to the probate court having jurisdiction of his estate for the transfer and sale of property belonging to the trust estate in which the minor had a definite remainder interest.

[1] Every violation of these provisions is a fraud against the beneficiary. Civ. Code, § 2234. In one of the very early decisions of this court it was said "that one who is a trustee, or who stands in a situation of trust and confidence, cannot purchase or deal with the subject of the trust, * * * nor place himself in an attitude antagonistic to the trust." Page v. Naglee, 6 Cal. 241, 245.

This court also later declared that: "For the reason that it is against public policy to permit persons occupying fiduciary relations to be placed in such a position that the influence of selfish motives may be a temptation so great as to overpower their duty and lead to a betrayal of their trust, the rule is unyielding that a trustee shall not, under any circumstances, be allowed to have any dealings in the trust property with himself, or acquire any interest therein. Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary, but will set the transaction aside at the mere option of the cestui que trust. [Citing authorities.]" Wickersham v. Crittenden, 93 Cal. 17, 29, 28 P. 788, 790. Quoting from an accepted and approved authority, the court continues: " 'So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is or may be impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the interest of the cestui que trust which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee have been as good as could be obtained from any other person; they may even at the time have been better, but still so inflexible is the rule that no inquiry on that subject is permitted.' " In another case the court said: "The philosophy of this rule is quite apparent and its inflexibility is the strongest safeguard which the law can offer for the protection of the interests of the beneficiary. The great purpose of the law is to secure fidelity in the agent. When one undertakes to deal with himself in different capacities—individual and representative—there is a manifest hostility in the position he occupies. His duty calls upon him to act for the best interests of his principal. His self-interest prompts him to make the best bargain for himself. Humanity is so constituted that, when these conflicting interests arise, the temptation is usually too great to be overcome, and duty is sacrificed to interest. In order that this temptation may be avoided, or, if indulged in, must be at the peril of the trustee, it has been wisely provided that the trustee shall not be permitted to make or enforce any contract arising between himself as trustee and individually with reference to any matter of the trust, nor will the court enter into any examination of the honesty of the transaction." Pacific Vinegar, etc., Works v. Smith, 145 Cal. 352, 365, 78 P. 550, 554, 104 Am. St. Rep. 42. We deem it unnecessary to quote further from or cite authorities on this subject, for, as was said in the case last cited, "so harmonious is the law on this subject that authorities might be cited indefinitely."

Considerable evidence was introduced by the respondent in explanation of its actions concerning the sale of the trust property; but we think that it definitely appears that while Charles S. Howard, Jr., and Lindsay C. Howard must have known that the bonds were being sold (the minor, Robert Stewart Howard, not being chargeable with notice because his guardian was acting), the remaindermen did not know that the bank was selling the bonds to itself. The real facts of the situation do not appear to have been discovered by them until they were brought to their attention by accountants employed by them to examine the records of the bank nearly one year after the transactions took place. The reports made by the bank to the adult remaindermen, meanwhile, merely indicated that the United States bonds were no longer a part of the trust, but did not show to whom they were sold. The fact that Mrs. Howard, the life tenant, and Herrscher, whom she selected to represent her in dealings with the bank, may have had full knowledge of and consented to the transactions resulting in the sale of the securities, does not, in our opinion, alter the situation so far as it relates to the other beneficiaries, one of whom was the minor incapable of acting except through his guardian.

[2] The guardian of the estate of a minor should be an entirely disinterested person. Estate of Bedford, 158 Cal. 145, 147, 110 P. 302. This is essential in order that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust. Barnsback v. Dewey, 13 Ill. App. 581, 584. The confidence reposed in a guardian rests upon the undivided loyalty that the law expects and requires the guardian to give to his ward's interest. In Matter of Stillman Infants, 117 Misc. 61, 190 N. Y. S. 495, 496, the court declared that because the father was the custodian of property belonging to the infant "renders it advisable, because of the possible adversity of interest, that some one other than the father be appointed general guardian of the infants' estate, as occasion may arise which may render it necessary that inquiry into the investment of such property should be made on behalf of the infants."

In Re Snyder's Will (Sup.) 136 N. Y. S. 670, 673, the court held that the appointing court should "designate a disinterested person, and not appoint the present petitioner to such position [as trustee], for the reason that she has already been appointed general guardian of the minor who is the beneficiary of one-third of the net income of the trust, and her appointment would place her in a position where her interest and duty might conflict." Along this same line see In re

Wallace's Estate, 206 Pa. 105, 55 A. 848; Barnsback v. Dewey, supra.

[3] As guardian of the estate of one of the remaindermen of the trust here involved it is the respondent's duty to carefully supervise its conduct as trustee of said trust. Should the respondent as trustee negligently or deliberately credit amounts to income which belong in corpus, thereby benefiting the life beneficiary and itself (the trustee's compensation being based on the income derived from the trust), but at the same time depleting the estate of the ward, a remainderman, it would be the respondent's duty, as guardian, to detect its error or discover its malfeasance as trustee and thereupon compel restitution. That such a situation would prove embarrassing, if not fatal, to the proper discharge of the guardian's duties, must be admitted. Moreover, respondent, as trustee of a trust, created for several beneficiaries other than the minor, may be called upon to perform acts inimical to its discharge of the duties incident to its office as guardian of the estate of the minor, one of the remaindermen of the trust. The interest of the life beneficiary is to rack the property for present income at the expense of the inheritance. In re Myer's Estate, 205 Pa. 413, 54 A. 1093. In its desire to produce an adequate income for the life beneficiary, the respondent's activities as trustee might well prejudice and detrimentally affect its conduct as guardian of the estate of the remainderman.

The errors and improprieties in respondent's past management of the trust, briefly referred to above, tend to indicate that respondent, as guardian, has been derelict in its duty, and has wholly failed to exercise that supervision required of its conduct as trustee. The transactions by which the trustee transferred to itself approximately $1,700,000 of the Liberty bonds and treasury notes constituting a part of the corpus of the trust were, as already shown, in violation of the fundamental rule prohibiting a trustee from dealing with himself, and cannot be defended. The evidence tends to show that respondent did not disclose these transactions to the remaindermen or to the guardianship court. Upon discovery of the facts, the adult remaindermen disaffirmed and brought an action for an accounting and removal of the trustee, an action still pending. Necessarily, the minor's interests and rights are identical with those of the adult remaindermen, and should be protected by the guardian of his estate. To fully and properly discharge this duty owing to its ward it may be necessary for the respondent, as guardian, to bring suit against itself as trustee. Obviously, this would necessitate that respondent exercise inconsistent and antagonistic duties. Regardless of respondent's good faith in the premises, it would therefore appear necessary, in view of what has been said, that the minor have a guardian whose course of action cannot possibly be swayed or influenced by an inconsistent or hostile interest.

[4] Respondent cites us to section 1407 of the Probate Code as indicating an absence of conflict between the duties of trustee and guardian. The section reads: "Of persons equally entitled in other respects to the guardianship of a minor, preference is to be given as follows: * * * (3) To one who already stands in the position of a trustee of a fund to be applied to the child's support." We find nothing in this section opposed to the conclusion herein announced. In our opinion the section can have application only when the trust is for the sole and exclusive benefit of the minor, thus precluding the necessity for two officers where one can properly serve. The section was not intended as an exception to the rule prohibiting a guardian from having interests and duties that may be opposed to and in conflict with his duties as guardian. The history of the section bears out this construction. The code commissioners' notes to our former section 246 of the Civil Code, the counterpart of the present Probate Code section, indicate that the section was based on the New York rule to the effect that the trustee of a trust to be applied to the support and education of a minor, having substantially the same duties as the minor's guardian and exercising the same discretion and keeping the same accounts, might also serve as guardian of the minor's estate. Bennett v. Byrne, 2 Barb. Ch. (N. Y.) 216; Matter of McGuire, 114 Misc. 81, 186 N. Y. S. 243; sec. 127, Field's Draft, New York Civ. Code. Obviously, for one person to serve in both capacities in such a case would simplify matters. However, while recognizing and giving effect to this rule, the New York courts have held that the trustee of a trust in which the minor is only one of the beneficiaries is not a proper person to be appointed guardian of the minor's estate because of a possible conflict of interest and duty and because it may be required that the guardian inquire into the conduct of the trust in behalf of his ward. In re Snyder's Will, supra. We therefore conclude that section 1407, supra, can have application only when there can be no possible inconsistency or antagonism between the duties of the trustee and guardian. Such is not this case.

Subdivision 5 of section 1580 of the Probate Codes provides that a guardian may be removed "for having an interest adverse to the faithful performance of his duties." This principle finds expression in Windsor v. McAtee, 2 Metc. (59 Ky.) 430, 433, wherein it is said: "The law makes it the duty of a guardian to look after and protect all the interests of his ward, and emphatically condemns any act of his, or even the acquirement of any right by him, inconsistent with this duty. His fidelity to his ward forbids it. He cannot serve himself and his ward where their interests conflict. And this principle is applicable to all trusts of this character. Whenever a guardian assumes such an attitude towards his ward, it seems to us he then becomes unsuited for a faithful discharge of his trust, and should be removed and another appointed."

In Robertson v. Epperson, 78 Neb. 279, 110 N. W. 540, it is held that, "where a guardian places himself in a position with respect to the estate which brings his interests in conflict with those of his ward, he should be discharged and his letters revoked."

[5] It is within the power of the appointing court to remove the guardianship from any antagonistic person or influence. In re Dodson's Guardianship, 135 Wash. 625, 238 P. 610.

Under all of the circumstances above narrated, we are of the opinion that the court below erred in nonsuiting the petitioners and dismissing their petition for removal of the respondent as guardian of the estate of the minor. This being so, the order and judgment appealed from is reversed, with directions to the court below to proceed in accordance with these views.

We concur: IRA F. THOMPSON, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; SPENCE, Justice pro tem.

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218 Cal. 607

## In re HOWARD'S GUARDIANSHIP.

**HERRSCHER v. HOWARD et al.**

**S. F. 14753.**

Supreme Court of California.

July 31, 1933.

**1. Guardian and ward ⊂⇒29.**

Guardian of person of minor stands in place of parent, and must supply watchfulness, care, and discipline.

**2. Guardian and ward ⊂⇒25.**

In proceeding for removal of mother as guardian of person of minor, finding that mother's absence was not necessary for her health *held* not against evidence.

**3. Guardian and ward ⊂⇒25.**

Order removing mother as guardian of person of minor, for nonperformance of duties, and appointing minor's father, *held* justified under evidence (Probate Code, §§ 1408, 1580, subds. 2, 6).

**4. Guardian and ward ⊂⇒25.**

Court, in proceeding for removal of guardian of minor, is not foreclosed from considering minor's personal desires (Probate Code, § 1406).

**5. Guardian and ward ⊂⇒25.**

Appointing court in exercise of judicial discretion, having due regard to rights of all concerned, may remove guardian of minor and put another in his place (Probate Code, § 1580).

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Proceedings by Charles S. Howard and others for the removal of Fannie May Herrscher, as guardian of the person of Robert Stewart Howard, a minor. From orders removing Fannie May Herrscher, mother of the minor, as guardian, and appointing minor's father in her stead, the mother appeals.

Affirmed.

See, also, 24 P.(2d) 482.

Louis Oneal, M. J. Rankin, and William F. James, all of San Jose, for appellant.

McCutchen, Olney, Mannon & Greene, of San Francisco, and Ross & Ross, of Redwood City, for respondents.

WASTE, Chief Justice.

Appellant, mother of the above-named minor, appeals from an order removing her as guardian of the person of said minor and an order appointing the respondent, father of the minor, in her place and stead.

After hearing, upon the petition for removal, the court below found that the minor was of the age of sixteen years; that appellant was appointed guardian of his person on November 24, 1930; that on October 7, 1931, the appellant removed from this state and went to Europe, where she remained until on or about May 10, 1932, a period of approximately seven months; that it was not necessary for appellant to go to Europe for her health; that from the date of her departure until January 25, 1932, when her powers as guardian were suspended by the court and temporarily vested in the father of the minor, there was no person in the state legally authorized to supervise the minor; that since her departure for Europe the appellant has "continuously failed to perform her duties as guardian of the person of said minor and at all of said times continuously neglected and violated her duties and obligations as such guardian, to the detriment of said minor"; that appellant "is incapable to perform her duties as guardian of said minor suitably under the present conditions"; that in May, 1932, the appellant remarried;

that such marriage was and is disapproved by the minor, who objects and refuses to live with the appellant and her present husband; that it is necessary for the best interests of the minor that appellant be removed as guardian; that the respondent, father of the minor, is a fit and proper person to be appointed guardian of the person of the minor; that the minor has in writing nominated his father to be his guardian; and that the minor is to be permitted to visit his mother at any and all times agreeable to them.

Appellant's principal contention is that a guardian may not be removed except on proof of one or more of the causes specified in section 1580 of the Probate Code. We find it unnecessary to here determine whether, as urged by appellant, the cited Code section furnishes the exclusive grounds for removal of a guardian. Even if this were so, a point we do not decide, the order in the present proceeding, under the evidence and findings in the record before us, would find ample support in that section. Under subdivisions 2 and 6 of section 1580, supra, a guardian may be removed for continued failure to perform his duties and for removal from the state. The evidence indicates, and the court found, that shortly after her appointment the appellant left the state for Europe, where she remained seven months, leaving her ward without the care and attention of any one legally authorized to supervise him. Appellant introduced evidence tending to show that during her sojourn abroad the minor was in attendance at a private school, where he was continually supervised and required to remain except on week-ends; that her home was left open with instructions to the housekeeper to look after the minor's wants on week-ends; and that steps had been taken to insure medical and dental aid should the minor require them during her absence.

[1] We are satisfied that the appellant made all arrangements which, in her opinion, were essential to the minor's welfare during her stay in Europe. However, this did not constitute a proper discharge of her duties as guardian. A guardian of the person of a minor stands in the place of a parent, whose duty it is to supply that watchfulness, care, and discipline which are essential to the young. Guardianship of Taylor, 3 Cof. Prob. Dec. 105; 13 Cal. Jur. 140, § 3. These are duties calling for the personal attention of the guardian. They cannot be indirectly discharged through the agency of others. During her stay in Europe there was, within the meaning of subdivision 2 of section 1580, supra, a "continued failure" on appellant's part to perform her duties as guardian.

[2] Appellant attempts to justify her absence in Europe on the ground that it was indispensable to her health. The evidence on the point is incomplete and unsatisfactory. It consists solely of appellant's testimony to the effect that "Dr. Warren advised me to go away for my health, he said to get away from all the dirt and scandal, and my health would never be better until I did go away." In the face of this meager evidence on the subject, we cannot say that the court below erred when it found that appellant's absence from the state was not "necessary for her health." The court may well have concluded that her absence was induced by a desire to avoid all the "scandal."

[3, 4] There is an abundance of evidence in the record tending to indicate that the minor desires to be with his adult brothers and father, all of whom are associated in business and whose interests are more or less identical with those of the minor. Section 1408 of the Probate Code declares that, other things being equal, the father is to be preferred as guardian if the minor "is of an age to require education and preparation for labor and business." The order of removal and appointment of a new guardian appear to find support in sections 1580 and 1408, supra.

It should be added that the minor has expressed a dislike for the appellant's present husband and an unwillingness to live with him. While, as contended by the appellant, a minor having nominated a guardian of his person is not free, at his whim and caprice, to nominate another, the court is not foreclosed from considering his desires. At all times the court is to be guided "by what appears to be for the best interest of the child." Section 1406, Probate Code; In re Hawkins, 183 Cal. 568, 573, 192 P. 30.

[5] The power of the appointing court to direct, restrain, and control a guardian in the performance of his duties, and even to remove him and put another in his place, is settled beyond controversy. However, the removal of guardians is not an arbitrary or capricious, but a judicial, discretion, to be exercised with due regard to the legal rights of all concerned. Lord v. Hough, 37 Cal. 657, 664; De Greayer v. Superior Court, 117 Cal. 640, 645, 49 P. 983, 59 Am. St. Rep. 220. We cannot say that the record here discloses an abuse of that discretion.

The orders appealed from are, and each is, affirmed.

We concur: CURTIS, J.; IRA F. THOMPSON, J.; SEAWELL, J.; SHENK, J.; SPENCE, Justice pro tem.

218 Cal. 658

## GRAHAM v. KINGWELL, Agricultural Commissioner, et al.

Sac. 4778.

Supreme Court of California.

Aug. 8, 1933.

**1. Constitutional law 🔑81.**

In exercise of police power, state may prescribe regulations to promote public health, safety, morals, and welfare, and legislate to increase industries, develop resources, and promote welfare and prosperity.

**2. Constitutional law 🔑70(3).**

Necessity of invading property rights for health, safety, or welfare of people is question for Legislature, and if reasonably determined is conclusive on courts.

**3. Animals 🔑29.**

Act for prevention of bee diseases, *held* proper exercise of police power, though bee diseases are not harmful to humans (St. 1927, p. 1724, as amended).

St. 1927, p. 1724, as amended, provides that county inspector should notify owner to eradicate disease in his apiary, and that he should eradicate it himself if owner failed to do so, thus adding to welfare and prosperity of state by lessening transmission of diseases in bee industry.

**4. Constitutional law 🔑293.**

Act for prevention of bee diseases, being within police power, *held* not to deny due process (St. 1927, p. 1724, as amended; Const. U. S. Amend. 14).

**5. Animals 🔑29.**

Act for prevention of bee diseases vesting authority in county inspector to eradicate diseased apiaries as nuisance *held* not excessive vesting of authority, since owner had right to appeal to director of agriculture, and inspector was liable for wrongful acts under color of office (St. 1927, p. 1724, as amended).

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In Bank.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by C. I. Graham against H. M. Kingwell, Agricultural Commissioner of Colusa County, and others. From an order and judgment, plaintiff appeals.

Affirmed.

C. I. Graham, in pro. per.

U. S. Webb, Atty. Gen., Jess Hession, Deputy Atty. Gen., and Ralph W. Rutledge, Dist. Atty., of Colusa, for respondents.

WASTE, Chief Justice.

Alleging that the California Apiary Inspection Act (Stats. 1927, p. 1724, as amended; now part of Agricultural Code, Stats. 1933, ch. 25) is unconstitutional, plaintiff brought this action to enjoin the defendants, in their official capacities, from enforcing its provisions. The defendants demurred both generally and specially. Plaintiff appeals from an order and judgment sustaining the general demurrer without leave to amend and dismissing the action.

[1] On this appeal plaintiff urges that the act in question does not constitute a proper exercise of the police power, and that it contravenes the Fourteenth Amendment to the Federal Constitution. The point is not well taken. In the exercise of its police power the state may prescribe regulations tending to promote the public health, safety, morals, and welfare of the people. It may also legislate so as to increase the industries of the state, develop its resources, and promote its welfare and prosperity. People v. Associated Oil Co., 211 Cal. 93, 99, 294 P. 717. In its inception "the police power was closely concerned with the preservation of the public peace, safety, morals, and health, without specific regard for 'the general welfare.' The increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by the courts to be a legitimate object for the exercise of the police power. As our civic life has developed so has the definition of 'public welfare' until it has been held to embrace regulations 'to promote the economic welfare, public convenience, and general prosperity of the community.'" Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 383, 38 A. L. R. 1479.

[2] Whether it is reasonably necessary, in the interest of health, safety, or welfare of the people, to invade property rights, is primarily a question for the legislative department of the government, and its determination, if reasonably exercised, is conclusive upon the courts. Hornblower v. Masonic Cem. Ass'n, 191 Cal. 83, 91, 214 P. 978.

As stated in its title, the act here under consideration was enacted "to promote the agricultural interests" of the state and "to prevent the introduction and spread of [bee] disease." Examination of its provisions indicates that they reasonably tend to the accomplishment of this purpose. In order to prevent the transmission of bee diseases from one location to another, provision is made in section 6 of the act (St. 1927, p. 1726, § 6, as amended by St. 1931, p. 2136, § 6) for inspection of apiaries by the county inspector, for notice to the owner to eradicate disease, if found, and for the eradication of American foulbrood by burning. This same section also declares all diseased apiaries to be public nuisances, makes provision for their abatement by the county inspector in the event the owner, after notice, fails to abate them, reserving to the owner a right to appeal the field inspector's diagnosis. These and other provisions of the act reasonably tend to promote the bee industry by lessening, if not precluding, the transmission of bee diseases, thereby adding to the welfare and prosperity of the state.

[3] This being so, there is no merit in plaintiff's contention that because the bee diseases which the act aims to eradicate are not such as are harmful to human beings, the act cannot be justified under the police power. As already indicated, the act tends to promote the public welfare, and therefore constitutes a proper exercise of that power.

[4] The act does no violence to the Fourteenth Amendment to the Federal Constitution, for it is elementary that, "where the exercise of the police power is applicable, the provisions of the constitution declaring that property shall not be taken without due process of law is inapplicable." Ex parte Elam, 6 Cal. App. 233, 237, 91 P. 811. See, also, In re Gilstrap, 171 Cal. 108, 113, 152 P. 42, Ann. Cas. 1917A, 1086.

Other statutes, analogous in principle and similar in purpose to the one here under review, which have been declared to constitute a proper exercise of the police power, are: An act providing for the abatement as public nuisances of orchards and nurseries infected with insect pests (County of Los Angeles v. Spencer, 126 Cal. 670, 59 P. 202, 203, 77 Am. St. Rep. 217); an act providing for the destruction of cedar trees infected with cedar rust (Miller v. Schoene, 276 U. S. 272, 48 S. Ct. 246, 72 L. Ed. 568); an act providing for the destruction of diseased fruit trees (Carstens v. De Sellem, 82 Wash. 643, 144 P. 934); an act declaring certain trees when diseased with "yellows" to be public nuisances and providing for their destruction without compensation (State v. Main, 69 Conn. 123, 37 A. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30).

In County of Los Angeles v. Spencer, supra, the following appears: "It is known that the existence of the fruit industry in the state depends upon the suppression and destruction of the pests mentioned in the statute. The act in question is therefore a proper exercise of the police power which the legislature has, under section 1 of article 19 of the constitution, to subject private property to such reasonable restraints and burdens as will secure and maintain the general welfare and prosperity of the state." See, also, County of Contra Costa v. Cowell Portland Cement Co., 126 Cal. App. 267, 14 P.(2d) 606.

[5] We perceive no excess of authority in those provisions of the act under consideration which have to do with the prompt and summary eradication of disease in apiaries. The efficiency of many police regulations depends upon their prompt and summary execution. From necessity, certain discretion must be given to the officers who are to make the regulations effective. County of Los Angeles v. Spencer, supra. As already indicated, the right to appeal the inspector's diagnosis to the director of agriculture is reserved to the owner by section 6 of the act, and, as indicated in the last above-cited case, "the acts of the commissioner are not clothed with that sanctity and protection which accompanies the judicial acts of courts and judges, and the commissioner would be liable officially and personally for wrongful acts done under the color of his office."

The judgment appealed from is affirmed.

We concur: PRESTON, J.; LANGDON, J.; CURTIS, J.; IRA F. THOMPSON, J.; SEAWELL, J.; SHENK, J.

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218 Cal. 568

## SCAVENGERS' PROTECTIVE ASS'N v. SERV-U-GARBAGE CO. et al.

S. F. 13936.

Supreme Court of California.

July 28, 1933.

1. **Injunction** 🔑56.

Equity will, at instance of former employer, enjoin competition by former employees which involves unfair or fraudulent use of trade secrets which constitute valuable part of good will of employer's business.

2. **Injunction** 🔑56.

Equitable power of preventing person from freely carrying on lawful business will be exercised with great caution.

3. **Injunction** 🔑128.

Evidence in action to enjoin unfair competition by former employees of scavenger association sustained finding that plaintiff owned valuable trade secrets known to defendants, and that defendants used such secrets in soliciting business.

Evidence disclosed that plaintiff scavenger association's employees, not only learned the names, addresses, and rates of ordinary users of scavenger service, but also learned confidential information relating to preferred customers whose patronage was particularly profitable; that defendants made use of such information in soliciting business from plaintiff's customers; and that defendant corporation was organized as a cloak for the operation of plaintiff's former employees.

**4. Injunction** ⚷128.

Evidence in action by scavenger association to enjoin unfair competition of its former employees sustained finding that former employees organized defendant garbage company as cloak for their operations.

**5. Injunction** ⚷128.

Evidence in action by scavenger association to enjoin unfair competition of its former employees failed to establish that plaintiff had, and was seeking to maintain, monopoly of scavenger business in city involved.

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In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by the Scavengers' Protective Association against Serv-U-Garbage Company and others. From a decree for plaintiff, defendants appeal.

Affirmed.

Brobeck, Phleger & Harrison and Walter E. Hettman, all of San Francisco, for appellants.

Frank I. Barrett and John J. Barrett, both of San Francisco, for respondent.

LANGDON, Justice.

This is an appeal by defendants from a decree in favor of plaintiff, enjoining defendants from soliciting the scavenger business of persons and firms who were customers of plaintiff at the time certain defendants were in the employ of plaintiff.

Plaintiff is a corporation engaged in the garbage and scavenger business in the city and county of San Francisco, its business consisting of the collection and disposal of refuse, waste paper, bottles, junk, etc. It operates through scavengers and drivers assigned to specific routes throughout the city, who use the vehicles furnished by plaintiff, and whose duties include solicitation of customers, picking up of the garbage and other waste materials, and in most instances the collection of charges.

Defendant Cavagnaro was president of plaintiff corporation from January 1, 1920, to December 31, 1923; superintendent from January 1, 1924, to March 1, 1928; and general manager from March 1, 1928, to February 1, 1929. Defendant Ponzini was secretary of plaintiff from January 1, 1924, to March 1, 1928. Defendant Wilkinson was bookkeeper and assistant office manager from March 1, 1924, to February 15, 1929. Defendant Chiapellone was a driver and scavenger for plaintiff from June 1, 1923, to January 1, 1924, and president from January 1, 1925, to January 1, 1929. Defendant De Martini was a driver and scavenger for plaintiff from June 1, 1923, to February 18, 1929. Defendant Neri was never in plaintiff's employ. Defendant Serv-U-Garbage Company was incorporated February 6, 1929, and commenced operations in the scavenger business February 21, 1929. It does business also under the fictitious name of Pacific Waste Paper Stock Company. The organizers were defendants Ponzini, Wilkinson, and Neri, who hold all of the stock. Defendant De Martini, upon leaving the employ of plaintiff, went to work for defendant company as a waste paper collector. The connection of defendants Cavagnaro and Chiapellone with defendant company is disputed, but there is abundant evidence that they were involved in and actively aided its formation and operations.

The trial court found, in substance, that plaintiff had, in connection with its business, certain valuable trade secrets, known to certain of the defendants; that these defendants entered into a conspiracy with others to solicit customers of plaintiff, using the said trade secrets for such purpose; that, in pursuance of this object, they organized the defendant corporation as a screen for their activities; and that they did, in fact, solicit such customers, and in some cases received the business of said customers. Judgment was thereupon rendered, permanently enjoining defendants Cavagnaro, Ponzini, Wilkinson, and Chiapellone, and their agents, from soliciting any garbage, junk, or other such commodities "from any of the customers of plaintiff with whom they became acquainted or of whose address, or identity, they learned, while in and by virtue of, and in the course of, their employment by or official position with plaintiff, or of whose identity or address they learned from any of their codefendants or fellow employees who learned the same while in, and by virtue of, and in the course of employment by or official position with plaintiff." These defendants were further enjoined from receiving any such solicited garbage, or divulging to the defendant company names or addresses of customers, or other trade secrets of plaintiff, acquired while in its employ. Defendants Serv-U-Garbage Company, and Pacific Waste Paper Stock Company are permanently enjoined from soliciting garbage, etc., from customers through knowledge acquired or communicated by the individual defendants as aforesaid, and from receiving said solicited garbage. Defendants Neri and De Martini were given judgment in their favor and against plaintiff for their costs. The appeal of defendant Chiapellone was dismissed, and the remaining appellants are Cavagnaro, Ponzini, and Wilkinson.

[1, 2] Appellants contend that the evidence is wholly insufficient to support the findings

and judgment. They call attention to certain well-settled principles governing the granting of equitable relief in cases of this character, with which principles this court is in entire agreement. The basic proposition is that equity will, at the instance of a former employer, enjoin competition by former employees when such competition involves the unfair or fraudulent use of trade secrets which constitute a valuable part of the good will of the employer's business. The equitable power thus to prevent a person from freely carrying on a lawful business will be exercised with great caution. If, for example, it appears that there were in fact no trade secrets or data regarded as confidential, or that such secrets existed but were unknown to the particular employee; or that no use was made of them by him in the solicitation of business, then no ground for an injunction exists. See, generally, Pasadena Ice Co. v. Reeder, 206 Cal. 697, 275 P. 944, 276 P. 995; New Method Laundry Co. v. MacCann, 174 Cal. 26, 161 P. 990, Ann. Cas. 1918C, 1022; Avocado Sales Co. v. Wyse, 122 Cal. App. 627, 10 P.(2d) 485. Such would be the case where the customers are not scattered members of the public whose identities and addresses are generally unknown, but are retail dealers whose shops are recognizable by any one, who advertise their businesses openly, and whose identities and addresses can be readily ascertained by a total stranger, by simple observation, or by reference to telephone or business directories. See Avocado Sales Co. v. Wyse, supra; see, also, Newark Cleaning & Dyeing Works v. Gross, 97 N. J. Eq. 406, 128 A. 789.

[3] With these principles in mind, we turn to the record to discover whether there is evidence, first, that plaintiff owned valuable trade secrets known to those defendants who were its employees; and, second, whether, in soliciting business, defendants made use of these trade secrets. In our opinion the record sustains the findings and judgment of the court in this regard.

A number of witnesses, including some of the defendants, testified to the information concerning customers which had been compiled by plaintiff. It appears that plaintiff served some 30,000 persons and firms, through drivers and scavengers operating in various routes. The drivers kept "Black Books," in which were listed the names, addresses, rates, collection days, quantity of garbage and other waste material, accessibility of the refuse, its profitableness, etc. There were 52 of such books in current use. They were brought into the office periodically to be checked. The drivers were admonished to keep their contents secret. In addition to these collection books, there were similar records kept in the office, such as the "Bill Book" and "Cash Book," which contained names, addresses, and rates; the "Box of Cards" and "Recap Book," containing similar information. Most of these records were installed by defendants Ponzini and Wilkinson, and were at all times open to their inspection. Moreover, in many cases bills were mailed from the office, and checks were received there; complaints of customers as to rates or service were adjusted by telephone, mail, and personal interviews at the office. At corporate or drivers' meetings, general business was discussed, including details concerning desirability and character of different customers. In short, the record conclusively shows that all of the appellants had abundant opportunity to familiarize themselves with all of the important details concerning the customers of plaintiff, and in many instances had personal contacts with them.

Appellants assert that there was nothing confidential in any of the information or sources of information alluded to. They argue that, under the city ordinance, every one is required to secure scavenger service; that practically all persons in the districts served by plaintiff without competition are its customers; that the rates are fixed by the ordinance; and that, consequently, there is nothing confidential in the names, addresses, or rates. On the matter of customers, the evidence shows, and the court found, that in many instances people do not employ a scavenger, but dispose of their garbage in other ways, notwithstanding the ordinance. One scavenger estimated that on his route there were about 1,700 customers, and 2,000 nonusers of the service. As to the rates, the ordinance prescribes a maximum, leaving the scavenger free to charge less if he desires, and in many cases, due to differentiating circumstances among customers, lower rates were charged by plaintiff. Besides, the ordinance rates are only applicable to "dwellings, households and apartment houses," and not, for example, to business firms.

Much more important, however, than the mere names, addresses, and rates of ordinary users of scavenger service, was the confidential information relating to the "preferred customers" of plaintiff. It appears that, from the refuse and discarded materials of some customers, a profit is made by salvage and resale of the commodities. Those customers who habitually offer waste paper and junk for collection are greatly prized, and the handling of their refuse constitutes the most valuable part of plaintiff's business. To some, very low rates are charged; to others, free service is given; and to others a bonus is paid for the privilege of removal. The facts concerning these special customers, the usual quantity and value of the waste material collected from each, the specially adjusted schedule of charges and bonuses, are treated as highly confidential. Appellants seek to show that this information also is generally known, for the reason that department stores and printing firms are the customers of such special value. There is evidence, however, that, while in general those businesses predominate in the list of preferred customers, not every department store and not every printing establishment is of equal value or is even a valuable customer; and that frequently other businesses are profitable sources of resalable waste material. There can be no doubt that the list of preferred customers, ascertained originally by continuous solicitation and investigation, and the specially arranged list of charges and bonuses, developed by long experience, constituted a trade secret of value. That this information was in great part known to defendants is indicated, not only by the fact that the data was always available to them, but by the further fact that contracts with some 150 of the important customers were in Cavagnaro's name, and a written list thereof, prepared by Wilkinson, was kept in the office of plaintiff.

On the issue of solicitation, the evidence likewise warranted the findings of the court. Plaintiff called 32 of its customers as witnesses, and with a few exceptions they testified that they had been solicited by some one of the defendants, and many did in fact leave plaintiff and become customers of the defendant company. It is noteworthy that defendants selected in nearly all cases preferred customers of plaintiff having valuable resale materials, chiefly waste paper; and that they uniformly underbid plaintiff, or offered free service for the privilege of removal. While they claim that they solicited the better prospects only by use of the telephone directory and other such means, there are several instances where it was shown that this was not so. Thus, in the matter of soliciting one Weisinger, a furrier, the witness testified that Wilkinson told him that he knew he was a customer of the plaintiff because of his (Wilkinson's) former position as bookkeeper. And in the attempt to secure a contract for the removal of materials at Fort Mason, Chiapellone, knowing of the value of this customer, obtained information from the driver as to the current bonus paid by plaintiff, and thereupon the defendant company made a lower bid. Other examples of the use of confidential information in their solicitation were before the court, and served to discredit the claim of defendants.

[4, 5] We need not go into detail on the further finding of conspiracy, although the record amply supports the trial court's conclusion that the defendants organized the Serv-U-Garbage Company as a cloak for their operations. Nor do we find any merit in the contention that plaintiff now has and is seeking to maintain a monopoly of the scavenger business in San Francisco. The facts, as disclosed by the testimony, show that, in the removal of garbage from dwellings and apartment houses, plaintiff operates without competition in a large number of districts, though, in others, it competes with several firms. To operate in this phase of the business, a scavenger must secure a permit from the board of health; and the ordinance requires the granting of such a permit whenever 20 per cent. of the residents of a district petition, alleging inadequate or improper service, or overcharging. But in the field of collecting waste paper, junk, and other resalable materials, there is no legal restriction, and plaintiff has numerous competitors.

A careful study of the record has convinced us that this case falls within the rules established by such decisions as Pasadena Ice Co. v. Reeder, supra, and not within the exceptions urged by appellants and discussed in Avocado Sales Co. v. Wyse, supra. The attack upon the findings and judgment is, we think, without substance.

The judgment is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; CURTIS, J.; SEAWELL, J.; SPENCE, Justice pro tem.

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218 Cal. 634

## EDEN TOWNSHIP COUNTY WATER DIST. v. CITY OF HAYWARD.

S. F. 14803.

Supreme Court of California.

Aug. 1, 1933.

**1. Waters and water courses ⚿143.**

Extent of previous beneficial use is measure of city's prescriptive right to use underground water supply, and not city's future needs (Civ. Code, § 806).

**2. Waters and water courses ⚿143.**

Greatest amount of water diverted by city from underground supply in any calendar year during prescriptive period *held* limit beyond which city could not claim (Civ. Code, § 806).

**3. Waters and water courses ⚿143.**

To fix definite prescriptive right of city to underground waters, rate of pumping and amount taken over given period must be considered, and maximum daily rate and maximum amount taken in any calendar year during prescriptive period were measure of city's right (Civ. Code, § 806).

**4. Waters and water courses ⚿144.**

Where city had prescriptive right to use certain amount of underground waters, use

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

of part of water on lands outside water basin was immaterial.

**5. Waters and water courses ⚷143.**

City could not claim intervention of public use in more water than it had actually taken from underground supply and beneficially used during prescriptive period, notwithstanding capacity of system was greater, where city never intended to use amount in excess of reasonable requirements (Civ. Code, § 806).

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In Bank.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by the Eden Township County Water District against the City of Hayward. From a judgment for defendant, plaintiff appeals.

Modified and affirmed.

Treadwell, Van Fleet & Laughlin, of San Francisco, for appellant.

C. W. White, of Hayward, and H. M. Wright, of San Francisco, for respondent.

PRESTON, Justice.

The sole question of importance on this appeal is the proper standard by which to measure the conceded prescriptive right in the city of Hayward to pump water and divert it for daily use from an underground or percolating water supply found in a basin in that vicinity. Plaintiff is a county water district acting pursuant to section 12 of the act of 1913. Stats. 1913, p. 1049 et seq.; Coachella Valley, etc., Dist. v. Stevens, 206 Cal. 400, 274 P. 538. Defendant is a municipal corporation of the sixth class.

The questioned provision of the judgment appealed from by plaintiff is as follows: "That the defendant City of Hayward is the owner of the right to and has the right to take, pump, divert and appropriate water from out of the bodies of underground and percolating water underlying certain lands by it owned and possessed (describing them) * * * by means of pumps and machinery owned by said defendant City of Hayward and located on its said lands above described and to carry the water by it so taken, pumped, diverted and appropriated off of and away from said lands and furnish and supply the same to the inhabitants of the City of Hayward and of territory surrounding and adjacent to the City of Hayward for domestic and other useful and beneficial purposes, including municipal purposes and for fire protection, to the extent and amount each day as the daily needs of the inhabitants of the whole territory served with water by said defendant through its municipal water system of necessity reasonably each day require, but not exceeding, however, in any one day more water than 828,000 gallons, and the said right of the defendant City of Hayward to so take, pump, divert and appropriate said water for said purposes is not limited as to any amount within said maximum quantity of 828,000 gallons per day which may be so furnished and supplied each day either east or west of Castro street, and that the said right of the defendant City of Hayward is a right superior and paramount to any right or rights of said plaintiff district or of any and all landowners within said plaintiff district."

The chief finding in support of this portion of said judgment is as follows: "The maximum quantity of water so pumped by defendant and so carried through said pipe line in any one day and so furnished and supplied to its consumers of water and so used by its consumers of water in any one day is 828,000 gallons per day, and the maximum average monthly quantity of water so pumped by said defendant and so carried through said pipe and so furnished and supplied to its consumers and so used by its consumers of water is 679,200 gallons per day, and the maximum average annual quantity of water so pumped by defendant and so carried through said pipe line and so furnished and supplied to its consumers and so used by its consumers of water is 500,400 gallons per day."

This cause was instituted May 7, 1931, the five years next preceding this date being the prescriptive period in question. From the above-quoted finding appellant contends that a daily maximum limitation of 828,000 gallons and a monthly maximum limitation of 679,200 gallons per day and a yearly maximum limitation of 500,400 gallons per day, must be fixed in order to properly define the prescriptive right. Respondent, on the other hand, insists that the only limitations properly imposed are the daily maximum rate of 828,000 gallons and the unmeasured, reasonable, daily, future needs and requirements of said city.

[1] It must be manifest, in the absence of an express definition and description of the present or prospective needs and requirements of the city, that this latter limitation is void for uncertainty. San Bernardino v. City of Riverside, 186 Cal. 7, 23, 198 P. 784. We thus have left merely the limitation of 828,000 gallons per day. This maximum could be used each day of the year without doing violence to said judgment. It is possible, under this situation, that respondent would be allowed 302,220,000 gallons per annum. It seems altogether possible that the increasing needs of the city might be such that in the near future such a continuous draft throughout the year might be beneficially used. In San Bernardino v. City of Riverside, supra, at page 31 of 186 Cal., 198 P. 784, 794, it is well said: "The judgment should not make any declaration of the right

of any party to take in the future any water to which it has no present right." Again, all agree that the prescriptive period under section 806 of the Civil Code is measured by "the nature of the enjoyment by which it was acquired."

In Weil on Water Rights (3d Ed.) § 581, it is said: "The principle declared by these authorities is that the rights of a party who has acquired a prescriptive title, and the rights of one against whom said title is acquired, are mutual, and each is entitled to demand that the prescriptive right be exercised in the same manner that it was exercised while it was being acquired."

In Kinney on Irrigation and Water Rights (2d Ed.) page 1895, § 1056, it is said: "The right acquired by prescription is only commensurate to the rights enjoyed during the full prescriptive period; and the extent of the enjoyment measures the permanent right. The rule declared by the authorities is that the rights of the party who has acquired a prescriptive title, either to a water right or to an easement for the same over the lands of others, 'and the rights of the one against whom the title is acquired are mutual, and each is entitled to demand that the prescriptive right be exercised in the same manner that it was exercised while being acquired.'"

This principle, under various sets of facts, has been uniformly applied in this state. On this basis, how can respondent city claim a right in excess of the water actually pumped and diverted for public use? The future need of the city is not a measure of the servitude upon the lands represented by plaintiff. The right of these lands cannot be made to decrease with the future increasing needs of the city. The only safe rule is that defendant be restricted to the maximum amount of water heretofore actually diverted and beneficially applied during a given period of time. In other words, the extent of its previous beneficial use is the measure of its existing right.

[2, 3] It seems clear also that the greatest amount diverted and used in any one calendar year of the prescriptive period should likewise be the limit beyond which the city may not claim. An hourly, daily, or monthly total would not seem to be so just or reasonable. During the year are witnessed all the seasons, and consequently the periods of peak or low requirements. To restrict respondent to such annual maximum is not to measure the right by averages, as contended by it, but is to measure it by the highest exact volume of water previously used. It seems plain that to fix a definite prescriptive right in these waters two factors, instead of one, must be considered: (1) Rate of pumping, and (2) amount taken over a given period. To fix a maximum rate of 828,000 gallons per day and to fix the maximum amount that may be taken in any calendar year, at the highest amount pumped during any year of the prescriptive period, is to satisfy both these factors.

To discuss the further subsidiary questions raised by counsel, it is necessary to say further that the said underground and percolating water is found in gravel strata over an area described as extending from the bay of San Francisco to the base of the hills east of Hayward in one direction, and from San Leandro creek on the north to Alameda creek on the southeast in the other; that the sources of said underground waters are a number of natural watercourses rising in the hills to the north and east of this basin. Plaintiff's lands overlie a part of this natural underground basin or reservoir; likewise the small area of lands belonging to the city of Hayward, upon which exist the five or more wells which are producing the water here in question, also overlie this underground basin and are situated near the town of Alvarado in Alameda county. Not only this, but all that portion of the city of Hayward itself lying west of Castro street therein overlies this water strata. That portion of said city lying east of said street is not over said basin.

Appellant insists that a distinction must be preserved between the right belonging to the lands of said city overlying the water basin and those beyond it; the idea being that the lands to the west of said street have an inherent right under the law in said underground waters and those to the east have no such right. The court in this connection found: "The court finds by reason of admissions made by the pleadings the fact to be that of said maximum daily quantity of 828,000 gallons of water so pumped by defendant and carried through said pipe line, 364,000 gallons per day was used by the consumers of water furnished water by defendant within the territory overlying said bodies of underground and percolating water, to-wit: within the territory lying to the west of Castro street in the City of Hayward and the balance of said water was used by the consumers of water furnished water by defendant on land to the east of said Castro street and beyond the land overlying said said bodies of underground and percolating water, and that of said maximum monthly average quantity of water so pumped by defendant and carried through said pipe line, to-wit: 679,200 gallons per day, a monthly average of 329,000 gallons per day was used by the consumers of water furnished water by defendant within the said territory overlying the said bodies of underground and percolating water and the balance thereof was used by the consumers of water furnished water by defendant on land to the east of said Castro street and beyond said bodies of percolating water."

[4] We are not impressed with the materiality of the particular place of use by the city of the water so taken by it. Such water, when taken and reduced to possession, is impressed with a public use, is carried to reservoirs of the city for distribution, and is there sold and used without reference to the underlying basin from which it was taken. This act of the city is that of a genuine appropriator, and when the prescriptive period runs the right is vested. To use the water, or any part thereof, on lands overlying the basin, is not to render to such lands a right to which they are by law entitled; likewise, to use more or less of the water on lands outside the basin is not to shift the place of use. The right of respondent in said underground waters, within the limits imposed, is plenary and without restriction as to place of beneficial use.

[5] Lastly, respondent insists that if a prescriptive right to the extent claimed cannot be sustained, nevertheless it may claim that a public use has intervened as to the amount of water fixed by the judgment, and for that reason an injunction must be denied and the individual landowners of plaintiff district relegated to a suit at law for damages suffered by this taking for public use. In this behalf we are likewise at a loss to see how respondent may claim the intervention of a public use in more water than it has actually taken and beneficially used of said waters. It is true that the capacity of its system of pumps has been enlarged at a considerable expense to carry the amount of 864,000 gallons per day, but the court expressly found that said city never intended to claim beyond 828,000 gallons per day nor any amount in excess of the reasonable requirements of said city. This amount it has had. These facts distinguish the instant case from Collier v. Merced Irr. Dist., 213 Cal. 554, 2 P.(2d) 790.

By the judgment as interpreted herein, and by the limitations fixed above, respondent will enjoy to the full extent its sustained claim to said waters. There is therefore no distinction in this cause between the amount to which a prescriptive right has attached and the amount as to which a public use has intervened.

Section two of the judgment (following the property description) is therefore modified by inserting after the word "gallons," in the phrase "but not exceeding however in any one day more water than 828,000 gallons," these words, "and not exceeding in any one calendar year more water than 182,646,000 gallons"; also by inserting after the word "day," in the phrase "within said maximum quantity of 828,000 gallons per day," these words, "and 182,646,000 gallons per annum." Section three of said judgment is modified by striking out the period at the close thereof and adding the words, "or in excess of 182,646,000 gallons in any one calendar year." And, as so modified, the judgment is affirmed; appellant to recover its costs on appeal.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; LANGDON, J.; CURTIS, J.; SHENK, J.

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218 Cal. 559

## COLORADO POWER CO. v. PACIFIC GAS & ELECTRIC CO.

Sac. 4565.

Supreme Court of California.
July 28, 1933.

**1. Waters and water courses** 🔑78, 133.

Seasonal storage of water for power purposes is not proper riparian use, but constitutes appropriation, which may ripen into prescriptive right.

**2. Waters and water courses** 🔑85.

Lower riparian owner, whose riparian use is substantially disturbed by upper riparian owner's seasonal storage of water for power purposes, may have injunction or damages.

**3. Waters and water courses** 🔑53.

Use of stream for power purposes, notwithstanding necessity of damming stream and temporarily detaining water, where water is presently returned to stream, is proper riparian use.

**4. Waters and water courses** 🔑87.

Finding that lower riparian owner, besides release of water impounded by upper riparian owner, was entitled to $1,000 damages, *held* not inconsistent with finding that former's land would be physically benefited.

From consideration of all findings, it appeared that monetary damage was allowed fairly to compensate lower riparian owner for difference in market value of its property, as distinguished from physical effects if water was actually released by upper riparian owner in accordance with its proposed plan of operation, and if such released water actually reached lower riparian owner's property.

**5. Appeal and error** 🔑907(2).

In absence of evidence on which findings were based, findings, fairly construable as consistent with each other, *held* conclusive on appeal.

**6. Appeal and error** 🔑907(3).

In appeal on judgment roll alone, appellate court must assume that evidence supported findings.

**7. Waters and water courses ⚷87.**

Judgment *held* not erroneous because commanding upper riparian owner, whose seasonal storage of water damaged lower riparian owner, to release water pursuant to plan proposed by upper riparian owner.

**8. Equity ⚷39(1).**

If possible, equity awards full and final relief.

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In Bank.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

On rehearing.

Judgment below affirmed.

Prior opinion, 19 P.(2d) 498.

Wm. B. Bosley, of San Francisco (Thos. J. Straub and Robert H. Gerdes, both of San Francisco, of counsel), for appellant.

Corbet & Selby, Frank J. Solinsky, Edward R. Solinsky, and Robert M. Searls, all of San Francisco (Glenn West, of Lodi, of counsel), for respondent.

T. P. Wittschen and L. W. Irving, both of Oakland, amici curiæ, for East Bay Municipal Utility Dist.

PER CURIAM.

Defendant appeals, on the judgment roll alone, from all but two specified portions of a judgment in an action brought by the plaintiff to enjoin defendant from interfering with the natural flow of the north fork of the Mokelumne river in violation of plaintiff's riparian rights. The action was tried before the court without a jury, and resulted in a verdict denying the injunction on condition defendant pay the plaintiff $1,000 as damages, and giving the plaintiff the further right to compel the defendant to release and discharge the waters involved, substantially in accordance with a plan submitted by defendant and pleaded as a special defense in its amended answer. The trial court retained jurisdiction of the cause for this purpose. Plaintiff does not appeal.

The judgment specifically provided: "If said sum of $1,000 and plaintiff's costs of suit, together with legal interest thereon from the date of entry of this judgment, shall not be recovered by, or paid to, plaintiff within ten days after the judgment herein shall have become final, then defendant, its successors and assigns, shall be and hereby are enjoined and restrained from impounding or storing" any of the waters in question.

The facts as found by the trial court and so far as pertinent here are as follows:

The plaintiff, a California corporation, is the owner of certain lands riparian to the Mokelumne river. These lands are located about ten miles downstream from Electra. So far as defendant is concerned, plaintiff possesses the full riparian rights incidental to its ownership of these lands, subject only to certain vested appropriation rights of defendant, which rights were fully protected by the judgment in this case. The physical characteristics of plaintiff's lands are such as to admit of the economical construction and operation thereon of a low head hydroelectric power project. Plaintiff, for some time has been planning to construct such a plant on its lands, using the unregulated flow of the stream as motive power. The trial court found that the construction of such a plant was feasible, and was economically justified by the agricultural and industrial demands for electric energy in the territory adjacent to plaintiff's proposed project.

Defendant, also a California corporation, is the owner of a hydroelectric power plant located on the Mokelumne river at Electra, about ten miles upstream from plaintiff's lands. For many years, defendant, by means of reservoirs, ditches, and canals, has impounded a portion of the flow of the Mokelumne river for power purposes and for other public purposes. These water rights were gained by defendant by virtue of valid appropriations, and are not involved on this appeal, the judgment herein fully recognizing defendant's rights therein. Defendant owns certain other lands, upstream from Electra and riparian to the north fork of the Mokelumne river and some of its tributaries. The north fork is a tributary of the Mokelumne river and joins the latter a short distance upstream from Electra. For some time prior to the commencement of this action defendant has been in the process of constructing several large dams and reservoirs on these upper riparian lands for the purpose of impounding, storing, and regulating all of the usual, periodic, and natural flow of the north fork and some of its tributaries for power purposes. In anticipation of this proposed power development, defendant acquired certain permits issued by the state water commission, acquired a license from the Federal Power Commission, and a certificate from the State Railroad Commission to the effect that public convenience and necessity required the construction and operation of this project. It is defendant's plan to impound and store the water of the north fork and some of its tributaries in these proposed reservoirs annually, to their capacity, and, by means thereof, to regulate artificially the flow of the stream in the manner as specifically set forth in its amended answer, in a special defense. In this defense, defendant set forth that it was its intention to impound and store in its proposed reservoirs during the seasonal periods of high flow so much of the waters of the north fork and its tributaries as would be necessary to fill the reservoirs to their respective capacities, and to release the same in dry seasons of the year so as, at all times, so far as possible, to maintain a regulated flow throughout the year. It should be here mentioned that the usual and ordinary flow of the north fork is very irregular.

The trial court also found that the proposed storage would produce artificial changes in the natural and periodic flow of the Mokelumne river where it flows over plaintiff's lands; that such storage "would necessitate changes in plaintiff's present plans for the construction of a power plant, and the use of the waters of the Mokelumne river for the operation of such plant on plaintiff's said riparian lands, and would necessitate changes in plaintiff's proposed beneficial riparian use of the waters of said river, and would cause substantial damage to the plaintiff through the invasion and violation of plaintiff's riparian rights by the establishment of an artificial control of the principal tributary of the Mokelumne river above the lands of the plaintiff, adversely to plaintiff's right to the natural flow of said river."

The court also found that defendant, by means of its dams and reservoirs and gates and works to be installed therein, will have the power "to impound and store waters in said reservoirs to the capacity thereof, and to release and return the stored water to the river according to its will and convenience. There is no assurance, except such as is afforded by nature and by the law of the land, that the waters to be impounded and stored in said reservoirs and to be discharged therefrom, and to be used and returned to the Mokelumne river at or above the tail-race of Electra power plant by the defendant, will actually flow down to and over the lands of the plaintiff and other lower riparian proprietors."

The lower court also found that, "considered solely with reference to physical effects," the proposed storage and artificial regulation of the stream, if carried out as proposed by defendant, will not "interfere with any actual or anticipated beneficial use of the waters of the Mokelumne river by the plaintiff upon its said riparian lands, or damage or diminish the value of said lands" if defendant shall actually return the regulated waters into the Mokelumne river in accordance with its proposed plan, and if such waters so released actually shall flow down to plaintiff's riparian lands.

A portion of another finding reads: "[S]uch storage and defendant's proposed regulation of the natural flow of water in said North Fork by means of such storage and the discharge of stored water from the last mentioned reservoirs would constitute a violation and invasion of plaintiff's riparian rights, as owner of its said riparian lands, to the use thereon of the waters of the said Mokelumne river, as such waters would naturally flow, and, if continued for the period prescribed by the statute of limitations, would irreparably impair such riparian rights, and would thereby damage the plaintiff, and therefore ought to be enjoined, unless defendant shall pay to plaintiff just compensation for the damage to be caused by defendant's violation and invasion of plaintiff's said riparian rights."

Also a part of finding XXIV is as follows: "Plaintiff is entitled to recover from defendant just compensation for all damage suffered and to be suffered by reason of the violation and invasion of plaintiff's riparian rights by defendant's impounding and storage of waters in said Salt Springs, Deer Valley and Lower Bear River Reservoirs, and defendant's regulation of the natural flow of the Mokelumne river by means of such impounding and storage of water, and the subsequent discharge of stored water from said reservoirs, as proposed by defendant in its said additional defense. The amount of such just compensation is hereby ascertained and determined to be the sum of one thousand dollars ($1,000), together with the right to compel defendant, its successors and assigns (a) to release and discharge [here follows the amount of water to be released and the conditions thereof]."

[1-3] The major contention of defendant is that under the facts of this case the seasonal storage of water for power purposes constitutes a legitimate riparian use. This point has been so recently before this court and so fully and completely disposed of adversely to defendant's contention that no necessity exists for a lengthy discussion here. Seasonal storage of water for power purposes is not a proper riparian use, but constitutes an appropriation, so that, if continued for the time prescribed by the statute of limitations, it will ripen into a prescriptive right. The lower riparian proprietor, in such a case, when such storage substantially interferes with any existing or prospective riparian use of the waters of the stream, is entitled to an injunction to restrain such use, or damages for the invasion of his riparian rights. The above propositions were fully and completely settled in Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607, and in Seneca Con. Gold Mines Co. v. Great Western Power Co., 209 Cal. 206, 287 P. 93, 70 A. L. R. 210. These two cases set at rest the question of whether an upper riparian owner can, in the exercise of a riparian right, dam the entire flow of a stream and hold the water from the wet season to be used in the dry season, and return the water to the stream at its own will and convenience. These two cases determined that such sequestration of the waters of a stream was not

authorized by the riparian right and constituted an appropriation of the waters of the stream. In the Herminghaus Case, the action was by a lower riparian against an upper riparian owner who proposed to store seasonally and artificially the flow of the waters of the stream. The upper riparian owner contended that this was a proper riparian use. The point presented for decision was whether or not seasonal storage was a proper riparian use, and this court squarely held that it was not. An injunction in favor of the lower riparian owner was affirmed. In that decision this court recognized, and now recognizes, that the use of the stream for power purposes, even where it is necessary to dam the stream and temporarily detain the water, where the water so detained is presently returned to the stream, is a proper riparian use, but in no uncertain language held that rule had no application to seasonal storage, resulting in an artificial regulation of the entire flow of the stream.

If there were any doubt as to the holding and effect of the Herminghaus Case, it was fully set at rest by the decision of this court in the Seneca Case. In the Seneca Case, the upper riparian owner had stored the water for the period required by the statute of limitations. During this entire period the plaintiff, a lower riparian proprietor, had enjoyed the use of all the water of the stream which it needed for riparian purposes. The lower riparian owner complained that, so far as it was concerned, the storage by the upper riparian owner was in the exercise of the riparian right, and that therefore no prescriptive rights had been acquired by the upper riparian owner. The trial court, in effect, so held. In reversing the lower court, this court, following the reasoning of the Herminghaus and other cases, unequivocally held that seasonal storage was not a riparian use.

The reasoning used in the above two cases and the decisions therein, completely dispose of the contentions of appellant in the present case. It must therefore be held that seasonal storage is not a proper riparian use but constitutes an appropriation of the waters.

We do not find it necessary to discuss the question of whether an upper riparian owner may appropriate water when such water is in excess of all the reasonable present or prospective needs of lower riparian owners. In the present case the trial court found that the proposed storage would cause substantial damage to plaintiff.

[4-6] In accordance with the proceeding approved in Collier v. Merced Irrigation District, 213 Cal. 554, 2 P.(2d) 790, the trial court ordered the defendant as part compensation to release and return to the channel a minimum amount of "not less than 475 cubic feet of water per second, whenever conditions of rain and snowfall and storage shall permit," but the court was very patently of the opinion that such requirement did not fully or fairly compensate the plaintiff for the damage done by the defendant in asserting a right to withdraw from the stream a part of its natural flow, and that such compensation would not be complete until $1,000 additional was paid. The finding to this effect is not contrary to, or inconsistent with, the finding that, if defendant actually releases the stored water in accordance with its proposed plan of operation, and if the stored water so released actually reaches plaintiff's property, plaintiff's lands *"considered solely with reference to physical effects"* (italics ours) will not be injured, but benefited. From a reading and consideration of all the findings, together with the italicized words in the last sentence, it seems plain to us that the monetary damage was allowed to fairly compensate the plaintiff for the difference in the market value of its property as distinguished from the "physical effect" if the water is released and if it reaches plaintiff's property. The findings being fairly susceptible of such construction are conclusive upon the questions in the absence of the evidence upon which they are based. In fact, we are bound to assume that the evidence adduced before the trial court sustained the proposition that the difference in market value of plaintiff's lands with the natural flow of the stream and the flow commanded by the court was the sum of $1,000.

[7, 8] Defendant likewise complains of that portion of the judgment commanding it to operate its reservoirs in a prescribed manner. It contends that it was error thus to enjoin defendant in the absence of any finding that it intended to operate its reservoirs in any other manner. Defendant cites cases holding, in accordance with well-settled principles of equity, that a plaintiff cannot obtain an injunction against mere fancied wrongs nor against possible wrongful acts which the defendant has never attempted or threatened to do. See International Register Co. v. Recording Fare Register Co. (C. C. A.) 151 F. 199; Fackler v. Cincinnati, etc., Co., 229 Ky. 339, 17 S.W.(2d) 194; Lorenz v. Waldron, 96 Cal. 243, 31 P. 54. The rule of those cases has no application to the case at bar. In the instant case, the defendant in its answer, as amended to conform to proof, in a special defense to plaintiff's petition for an injunction, set forth in detail its proposed plan of storage and release of the waters, and prayed that the trial court ascertain and determine the respective rights of the parties. The defendant, in effect, asked the trial court to permit it to store the water upon its offer to release the water stored according to a certain plan. The right of plaintiff to compel defendant to release the waters substantially in accordance with this plan, which was granted by the judgment, was given to plaintiff as a part of the compensation for the

damage to its riparian rights. This type of award is substantially in accordance with the procedure authorized by this court in Collier v. Merced Irrigation District, supra. Moreover, it is a fundamental principle of equity that, if circumstances will permit, the equity court will strive to determine the entire controversy, and will award full and final relief so as to bring all possible litigation over the subject-matter within the compass of one judicial determination. That principle applies with particular force to the instant case. Defendant, having succeeded in limiting the monetary award of $1,000, upon its announced intention to release the water in accordance with a proposed plan, is objecting to the force of the judgment binding it to so release the water, and would remit the plaintiff to a series of separate actions to protect the benefit which defendant offered plaintiff as a means of reducing the monetary compensation. The judgment as rendered was clearly within the powers of the equity court.

The other contentions made by defendant are so unsubstantial as not to require comment. For the foregoing reasons, those portions of the judgment appealed from are affirmed.

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218 Cal. 662

## AMERICAN SECURITIES CO. et al. v. VAN LOBEN SELS et al.

Sac. 4636.

Supreme Court of California.
Aug. 8, 1933.

**Specific performance** ⟹109.

In suit for specific performance of covenants of trust deeds, appointment of receiver *held* within power of court, since suit was of equitable nature.

In Bank.

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

Action by the American Securities Company and another against Maurits Carel Constantyn Van Loben Sels and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

George M. Naus and Hubert Wyckoff, Jr., both of San Francisco, for appellants.

Brobeck, Phleger & Harrison, of San Francisco, and Downey, Brand & Seymour, of Sacramento, for respondents.

IRA F. THOMPSON, Justice.

This is an appeal from a final judgment in an action for the specific performance of the terms of trust deeds. The facts essential to an understanding of the contentions of appellants are as follows: On March 1, 1923, P. J. Van Loben Sels executed his promissory note for $600,000 to the Mercantile Trust Company of California, and to secure the same, and such additional advances as might be made, executed a trust deed covering 4,000 acres or more of land situated in the counties of Sacramento, Yolo, and Colusa. The name of the Mercantile Trust Company was subsequently changed to American Trust Company, and the American Securities Company was substituted as trustee. Advances were made until on February 14, 1928, the total sum secured by the deed of trust was $1,194,108.92. However, on March 3, 1927, P. J. Van Loben Sels died, and the real property mentioned, subject to the deed of trust, was distributed by a decree for that purpose to the appellant, Maurits Carel Constantyn Van Loben Sels, who, together with his wife, on February 14, 1928, executed a new note for the above-mentioned sum of $1,194,108.92 in favor of the American Trust Company, and secured it, and such further advances as might be made, by a trust deed in which the American Securities Company was named as trustee. This deed of trust expressly recognized the one executed in 1923, and recited that it was not in any wise to be considered as payment of the indebtedness secured thereby or as releasing the same. It further provided that the defendants and appellants should not be personally liable for the indebtedness. Further advances were made until the total sum amounted to $1,646,864.97. Both deeds of trust contained the following: "The trustee, its successors or assigns, may at any time, at its option, commence and maintain suit in any court of competent jurisdiction and obtain the aid and direction of said court in the execution by it of the trusts, or any of them herein expressed or contained, and may in such suit obtain orders or decrees, interlocutory or final, of said court directing the execution of said trusts." Both trust indentures contained provisions that in the event of default the trustee might either by itself or by a receiver appointed for the purpose take possession of the premises and perform such acts of repair or cultivation as might be necessary or proper to conserve the value thereof, and to collect and receive the income therefrom. In the second deed of trust there was also a provision authorizing the same to be foreclosed, at the option of the trustee, as a mortgage, and also empowering the trustee to "use, operate, manage and control said property and conduct the business thereon."

On February 10, 1931, this action was commenced, alleging the execution of the notes and deeds of trust, the accrued indebtedness, the default of the defendants, the provisions for taking possession by a receiver to cultivate and conserve the property and to collect and receive the income, the fact that defendants were released from personal liability; that the value of the property was less than $1,000,000; that the property was in immediate need of cultivation, such as the spraying of the pear trees, the plowing and preparation of the soil for annual crops, the care of an asparagus crop growing thereon, and attention to the drainage ditches; and that defendant Maurits Van Loben Sels had failed and refused and was without means to properly care for the same. Plaintiffs asked for decree for the specific performance of the provisions of the deeds of trust; that a receiver be appointed to conserve the property and the rents, issues, and profits thereof; and that defendants be restrained from interfering with any of the rights conferred upon plaintiff. Based upon this complaint and two affidavits which averred that the entire property was worth not more than $1,000,000, and that it was in immediate need of care and cultivation in order that it might produce the normal amount of crops, the court made its order ex parte appointing a receiver. Subsequently the defendants made a motion to vacate the last-named order, which motion was heard on May 4, 1931, and denied June 13, 1931. At the hearing the appellant Maurits Van Loben Sels testified that only about 150 or 175 acres were devoted to orchard, of which four-fifths or thereabouts was set to pears, all accessible from the county highway. Otherwise the motion was submitted upon the complaint, the two affidavits, and the argument of counsel. No appeal was taken from the order appointing the receiver nor was one attempted to be taken from the order declining to vacate the order appointing the receiver. Judgment was allowed to go by default and was entered July 28, 1931.

The appellants' attack upon the judgment really amounts to an assertion that the court was without jurisdiction to appoint a receiver, because the action is one at law, in ejectment, rather than one in equity. We might yield greater space to a discussion of the contention, but for the fact that recently we decided the case of Mines v. Superior Court, 216 Cal. 776, 16 P.(2d) 732, in which case we concluded that an action the same as the one now before us was equitable in character and that the appointment of a receiver was within the power of the court. The opinion therein concludes appellants' argument here.

The respondents contend that appellants are not entitled to have reviewed the order appointing the receiver or the order refusing to vacate the first-named order in this appeal from the judgment, because the first order is an appealable one under section 963 of the Code of Civil Procedure, and that the record discloses that appellants had notice of it immediately after it was made at the time when they surrendered possession of the property to the receiver in deference to the order. We must agree that there is much merit in respondents' position, but, inasmuch as the appeal is properly before us, we may dispose of it upon the ground already mentioned, without deciding the question raised by respondents, which is not entirely free from doubt.

Judgment affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

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218 Cal. 682

## JEFFERY v. STEVENS et al.

Sac. 4743.

Supreme Court of California.

Aug. 22, 1933.

**1. Waters and water courses** ⚿**152(8).**

In suit for injunction, evidence *held* not to show defendants acquired prescriptive right to have waters flow across plaintiff's land.

**2. Waters and water courses** ⚿**152(1).**

Where defendant allowed waste water from his lands to flow across plaintiff's lands, injunction was proper remedy to prevent defendant's gaining prescriptive right, even though no damage was shown.

In Bank.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Suit by Annie Jeffery against Warren Stevens and others. Defendants filed a cross-complaint. From a judgment for plaintiff, defendants appeal.

Affirmed.

Jerome D. Peters and Herbert Whitten, both of Chico, for appellants.

Bond & Deirup, of Chico, for respondent.

PER CURIAM.

This action was brought to enjoin defendants from permitting waste water from their lands to flow across the land of plaintiff. The essential facts are few. The Crouch ranch lies several miles northeasterly from the plaintiff's property. De Bock slough extends southwesterly through the Crouch property, then through several other lands until it reaches and goes through that of

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

plaintiff. In 1926, defendant Stevens purchased a portion of the Crouch ranch, and defendants Estes and California Lands, Inc., each purchased portions constituting the remainder. The court found that water used by defendants for watering stock was allowed by them to flow into De Bock slough, and thence across plaintiff's land, to her damage. Judgment was given as prayed, enjoining defendants from permitting any water to run over the lands of plaintiff. Defendants appeal.

The position of defendants, taken by them in their answer and cross-complaint, is that the unauthorized drawing of waters complained of has continued openly and under claim of right for over five years, and that consequently defendants have acquired a prescriptive right or easement to have the waters flow in this manner.

Only a brief discussion is necessary, for there is substantial conflict in the relevant testimony on this issue. Defendants produced a number of witnesses who testified that quantities of water habitually flowed from the Crouch ranch through De Bock slough, for many years prior to the action. On the other hand, plaintiff's witness Murphy testified that De Bock slough was not a genuine water course, or even a well-defined slough, but was a system of little lakes and depressions. Nor does the evidence satisfactorily establish that the flow of water during this period continuously reached the land of plaintiff, several miles distant from the Crouch property.

The case of defendants is further weakened by the uncertainty surrounding the essential element of claim of right for the prescriptive period. Plaintiff testified that she herself had no knowledge of any such claim nor any knowledge of the fact that the water was being drained onto her lands. There is no contradiction of her testimony. Defendants assert that she should have known of such claim, but this suggestion is not convincing, in view of the uncertainty as to the source of the water—which might have come, not only from the Crouch ranch, but from other lands lying between it and plaintiff's property. Defendants also rely upon the purported knowledge obtained by plaintiff's son, C. L. Schwein, who managed the farm for her. This knowledge is said to be indicated in a conversation had by Schwein with one Cartwright, who told him that he had gotten stuck with his truck in the slough. Assuming that the knowledge of her said agent should be imputed to plaintiff, the difficulty with the testimony is that it does not clearly appear that the water, if any, came from defendants' lands, and not from others which drained into the slough.

Finally, the evidence shows that in 1926, and again in 1931, just prior to this action, defendant Stevens approached the plaintiff and sought to purchase the drainage right from her. Such action, taken prior to the running of the statute of limitations, offers a strong indication that the use was not adverse to the owner. See Lovell v. Frost. 44 Cal. 471; Clarke v. Clarke, 133 Cal. 667, 66 P. 10; 19 C. J. 884, § 43.

[1] In short, the evidence introduced by defendants to establish the elements of adverse user was not sufficient to meet the burden which the law imposes upon an adverse claimant. See Grimmesey v. Kirtlan, 93 Cal. App. 658, 270 P. 243.

[2] Defendants suggest also that plaintiff has failed to show damage as a result of the drainage. The injunction, however, is proper to prevent the gaining of a prescriptive right or easement which in the future might hamper the use of or lessen the value of the land.

In the state of the record described above, we can see no reason for disturbing the conclusion reached by the trial court.

The judgment is affirmed.

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133 Cal.App. 578

## PENZINER v. WEST AMERICAN FINANCE CO. et al.

Civ. 8333.

District Court of Appeal, First District, Division 1, California.

Aug. 2, 1933.

Rehearing Denied Sept. 1, 1933.

Hearing Denied by Supreme Court Sept. 28, 1933.

1. **Appeal and error** 🔑854(3).

Order sustaining demurrer must be affirmed, irrespective of whether order states proper grounds therefor, provided demurrer is well taken as to any of grounds stated therein.

2. **Pleading** 🔑216(2).

Reference cannot be made on demurrer to superseded complaints to explain, vary, contradict, weaken, or strengthen allegations of last complaint (Code Civ. Proc. § 452).

3. **Pleading** 🔑53(1).

Inconsistencies between alternative counts in complaint cannot be attacked by demurrer.

4. **Appeal and error** 🔑917(1).

Reviewing court assumes on appeal from judgment sustaining demurrer to complaint that facts are as alleged therein.

5. **Appeal and error** 🔑917(1).

Reviewing court on appeal from judgment sustaining demurrer is not concerned with plaintiff's ability to prove allegations of complaint.

**6. Trusts 🔑371(2).**

Complaint by borrower against finance company, as holder of deed of trust, and directors thereof, *held* sufficient to state cause of action for enforcement of promise to bid in property for plaintiff's benefit and hold title subject to redemption, notwithstanding allegations as to loan, notice of default and sale, and plaintiff's failure to obtain bidders.

**7. Pleading 🔑18.**

Uncertainty or ambiguity in pleading matters of inducement does not make cause of action demurrable.

**8. Conspiracy 🔑13.**

Representations of one of conspirators made in pursuance of conspiracy are binding on others.

**9. Trusts 🔑63½.**

Loan company's purchase of property for finance company holding deed of trust, after finance company had agreed to acquire title thereto for borrower's benefit, created resulting trust, not within statute of frauds, and borrower could recover from finance company value of property, less debt, where property had been conveyed to innocent purchaser.

**10. Trusts 🔑361.**

Borrower suing to recover value of property held under resulting trust, and conveyed to innocent third party, was not required to make demand before suit.

**11. Trusts 🔑365(4).**

Action brought by borrower against holder of deed of trust to recover value of property less debt *held* not barred by laches, where brought within ten months after defendant's repudiation of agreement to bid in property and hold it subject to redemption.

**12. Usury 🔑142(2).**

Action by borrower to recover treble interest on ground of usury *held* timely, where brought within year from date of sale of property under deed of trust (Gen. Laws 1931, Act 3757, § 3).

**13. Usury 🔑137.**

Defendants not actually receiving usurious interest *held* not liable under count of complaint seeking recovery of treble amount of usurious interest paid (Gen. Laws 1931, Act 3757, § 3).

**14. Usury 🔑114.**

It is always permissible to show that transaction ostensibly lawful actually constituted usurious loan.

**15. Usury 🔑142(3).**

In suit to recover treble interest for usury, facts from which usury appears must be pleaded (Gen. Laws 1931, Act 3757, § 3).

**16. Usury 🔑56.**

Exaction of commission from borrower by lender's agent will render transaction usurious if known to and authorized or ratified by lender (Gen. Laws 1931, Act 3757, § 3).

**17. Usury 🔑56.**

Brokerage fees must be considered as part of charge for loan, in suit to recover treble interest for usury, where lender required borrower to procure application from broker and divided brokerage fee (Gen. Laws 1931, Act 3757, § 3).

**18. Usury 🔑42.**

In testing transaction for usury, interest must be computed on actual sum advanced from date of advancement.

**19. Usury 🔑42.**

Where loan was available to borrower only in progress installments, and sum was held subject to conditions, some of which were not under borrower's control, any interest in excess of legal rate on sum actually available constituted usury (Gen. Laws 1931, Act 3757, § 3).

**20. Usury 🔑137.**

To recover treble interest, agreement for loan must be usurious in its inception (Gen. Laws 1931, Act 3757, § 3).

**21. Usury 🔑42.**

Transaction is usurious where excessive interest on loan is caused by contingency not under control of borrower.

**22. Pleading 🔑12.**

Less particularity is required in allegations of complaint, where facts stated are such that defendant, from their nature and his relation to them, has full information.

**23. Usury 🔑142(3).**

Complaint by borrower for recovery of treble interest for usury *held* not deficient for failure specifically to state dates and amounts of advances, where plaintiff alleged such facts were unknown to him and called upon defendant for discovery.

**24. Usury 🔑42.**

To determine usury, interest should be considered only for period of loan, and not after maturity (Gen. Laws 1931, Act 3757, § 3).

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Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Suit by William L. Penziner against the West American Finance Company and others. Judgment for defendants, and plaintiff appeals.

Affirmed in part, and reversed in part, with instructions.

For prior opinion, see 14 P.(2d) 810.

Bronte M. Aikins, of San Francisco, for appellant.

Orrick, Palmer & Dahlquist, of San Francisco (Christopher M. Jenks, of San Francisco, of counsel), for respondent Pacific State Savings and Loan Co.

John A. Sinclair and A. Don Duncan, both of San Francisco, for respondents R. T. Harper, C. A. Gibson, J. E. Scully, and E. W. Milburn.

Courtney L. Moore, of San Francisco, for respondent West American Finance Co.

GRAY, Justice pro tem.

Three demurrers, special and general in form, were interposed to each of the four counts of the third amended complaint respectively by (1) West American Finance Company (hereinafter called the finance company), (2) Pacific States Savings & Loan Company (hereinafter called the loan company), and (3) R. T. Harper, C. A. Gibson, J. E. Scully, and E. W. Milburn jointly and separately. All demurrers were sustained by an order, general in form, which did not specify the ground of the ruling nor grant leave to amend. Two days later a judgment, reciting that the court found the complaint did not state a cause of action, was rendered in favor of defendants for their costs. Plaintiff appeals from the judgment, claiming that the demurrers were erroneously sustained.

[1-5] The following general rules govern our consideration of counsels' arguments. If a demurrer is well taken as to any of the grounds stated therein, the order sustaining it must be affirmed, irrespective of whether the order states no or an erroneous ground therefor. Haddad v. McDowell, 213 Cal. 690, 3 P.(2d) 550, Burke v. Maguire, 154 Cal. 456, 98 P. 21. Section 452 of the Code of Civil Procedure commands that a complaint be liberally construed when passing upon a demurrer thereto. Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474, 475. Reference cannot be made to superseded complaints to explain, vary, contradict, weaken, or strengthen the allegations of the last complaint. Johnson v. Powers, 65 Cal. 179, 3 P. 625; Dougall v. Schulenberg, 101 Cal. 154, 35 P. 635; Bray v. Lowery, 163 Cal. 256, 124 P. 1004; Maddux v. Mora, 99 Cal. App. 695, 279 P. 467. Inconsistencies between alternative counts cannot be attacked by demurrer, since each count stands on its own allegations, unaffected by those contained in other counts. Little v. Union Oil Co., 73 Cal. App. 612, 238 P. 1066. Since the effect of a demurrer is to admit all of the allegations of the complaint which are well pleaded, it must be assumed on appeal from the judgment that all of the facts are as alleged. Isert v. Riecks, 195 Cal. 569, 234 P. 371. Neither plaintiff's ability to prove the allegations of his complaint, nor seeming difficulty in making such proof, concerns the reviewing court. Mox, Incorporated, v. Woods, 202 Cal. 675, 262 P. 302.

The first two counts of the complaint charge all defendants except the loan company; the last two counts charge only the loan company, R. T. Harper and C. A. Gibson. Each count alleges the facts concisely narrated in this paragraph. The finance company and the loan company were corporations, the individual defendants being directors of the former, and R. T. Harper being its president. The finance company was engaged in the business of making construction loans to owners of real property for the improvement thereof under a plan whereby it advanced the amount of such loan in payment of labor and material as the work progressed, but exacted interest monthly in advance upon the whole amount to be advanced regardless of the amount then actually advanced. The First Mortgage Bond Company (hereinafter called the broker), occupying the same office, was engaged as agent for the finance company in soliciting applications for such loans, charging borrowers a fee therefor, and dividing such fee with the finance company. On August 15, 1927, plaintiff, desiring to erect on described land owned by him a nine-story class "A" apartment house, applied to the finance company for a construction loan of $150,000 to be used for such purpose, was requested by its president to procure from the broker a form of application, directed to the latter, but regularly used by the former, which application was signed and delivered to the finance company, which forthwith notified plaintiff of its approval. The application applied to the broker for a loan of $150,000 "for a term of one year at 7% interest per annum, payable monthly in advance from date of note and deed of trust, to be secured by a deed of trust on said lot," described the building to be erected, and provided that the loan was to be advanced, on plaintiff's order, in installments as the building progressed, at the times and in the amounts stipulated by the broker, in payment of labor and material, and that plaintiff was to pay a premium of 3 per cent. of the loan and to allow the broker to maintain fire insurance for the sum of $150,000. The next day plaintiff executed and delivered to the finance company his note for the principal and interest specified in the application, and to R. T. Harper and C. A. Gibson, as trustees, his deed of trust conveying his land upon the usual trusts as security for the loan. In the usual course of construction, one year was reasonably necessary for the erection of the apartment house, and therefore progress payments would be made at such times that interest on the full amount of the loan would exceed 12 per cent. on the actual sums advanced. The application was furnished for the purpose of enabling the finance company to obtain usurious interest, and at the making of the application and execution of the note and deed of trust plaintiff and defendants believed usurious interest would be paid, and the finance company intended to exact usurious interest. During the year ending August 16, 1928, the finance company advanced money in an amount which plaintiff is unable to state, but believes did not exceed $100,000. The finance company recorded, on August 17, 1928, notice of default, and caused the trustees to publish notice that they would sell the property on December 31, 1928.

The first cause of action alleges the following additional facts: Before the commencement of this action, the finance company, upon plaintiff's demand, rendered him an untrue account of its advances. On or about August 16, 1928, defendants combined and conspired to defraud and deprive plaintiff of his title to land and apartment house and of his interest in the proceeds of the sale. Pursuant to the conspiracy, the finance company recorded the above notice of default, caused the above publication of notice of sale, and purportedly assigned the note to the loan company for an unknown consideration, but with the understanding that the latter would bid in the property at the sale, obtain a deed therefor from the trustees, and thereafter convey the same to the former. Also, pursuant to the conspiracy, the trustees offered the property for sale as advertised, the loan company bid therefor $150,000, the trustees accepted this bid, and executed and delivered to the loan company a deed for the property which acknowledged receipt of the bid in gold coin. The loan company on or about March 13, 1929, conveyed to the finance company, and the latter conveyed to a third party for an unknown consideration and without first giving plaintiff an opportunity to redeem. Before the sale plaintiff received from a named person, who was ready, able, and willing so to do, an offer to advance the money necessary to pay the debt or to purchase the property at the sale for their joint account, and advised R. T. Harper of such offer. Thereupon, the latter, in pursuance of the conspiracy, informed him that it would be unwise to sacrifice his equity, and, without an intention of performance, represented that it would be unnecessary to carry out the offer, as the title would be bid in by the finance company, held for his protection, and reconveyed at any time upon payment of his debt. Relying upon these representations, plaintiff refused the offer, abandoned all attempts to raise the money to pay the debt or to bid, and permitted the sale without any bid on his behalf. In further pursuance of the conspiracy, R. T. Harper falsely represented to prospective bidders, who otherwise would have bid at the sale, that the property was to be bought in by the finance company for the benefit and protection of plaintiff. As part of the conspiracy, the finance company and the trustees agreed with the loan company that it would bid $150,000, and the latter so did. This was the only bid. When plaintiff, surprised at the sale to the loan company, reminded R. T. Harper of his representations, the latter, in furtherance of the conspiracy, stated the loan company took title for the finance company and he would still be permitted to redeem at any time upon payment of his debt. Daily, from January 2d to 11th, both inclusive, plaintiff offered R. T. Harper to pay his debt and to redeem his property, and inquired of him the amount of such debt and time of redemption, but R. T. Harper, in pursuance of the conspiracy, rejected the offer, failed to state either amount or time, and evaded questions, and on the last day informed plaintiff he could not redeem, and refused an accounting of the proceeds of the sale. The value of the property at the time of the sale was $450,000 without reference to the debt, and plaintiff has been damaged $350,000.

[6-8] The first count does not contain the elements, imperfectly and not separately stated, of several causes of action as defendants respectively contend, but sets forth but one cause, which seeks the enforcement of Harper's promise that the finance company purchase the property at the sale for plaintiff's benefit and hold title thereto subject to his redemption. The allegations as to the loan, the advancement thereof, the execution of the note and deed of trust, the notice of default and sale, the sale, and plaintiff's inability to get bidders, are matters of inducement necessary to a proper understanding of the wrong done plaintiff. The gist of this count is Harper's promise and its breach. Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 200 P. 601. Any uncertainty or ambiguity in matters of inducement does not make the cause of action demurrable in those respects. Kraner v. Halsey, 82 Cal. 209, 22 P. 1137. The formation and consummation of the conspiracy is adequately and properly alleged. Moropoulos v. C. H. & O. B. Fuller Co., supra; Mox, Incorporated, v. Woods, supra. The representations of Harper were, therefore, binding upon the other defendants, and each is liable for their breach. Mox, Incorporated, v. Woods, supra. Hence it is unnecessary to consider the scope of Harper's authority, as its president, to bind the finance company, or the liability of the personal defendants as its directors.

[9-11] The purchase of the property by the loan company on behalf of the finance company, after Harper had represented that the latter would acquire title for plaintiff's benefit and hold it subject to his redemption, constituted a loan by the finance company to plaintiff of the purchase price, secured by the title, and the re-

pudiation of this relation created a resulting trust which is not within the statute of frauds. Webb v. Vercoe, 201 Cal. 754, 258 P. 1099, 54 A. L. R. 1200; notes 42 A. L. R. 10, 78 and 54 A. L. R. 1198. Since the conveyance to an innocent third party rendered impossible the impressing of a trust upon the property, plaintiff was entitled to recover its value, less his debt. Price v. Reeves, 38 Cal. 457. The matter of usurious interest, which affects the amount of that debt, will be subsequently discussed. Since a demand before suit was unnecessary (Crozier v. Soquel, 101 Cal. App. 402, 281 P. 698), it will be needless to discuss the sufficiency of plaintiff's offer to pay his debt. An action to establish a resulting trust and to recover a money judgment instead of the trust property must be brought within four years of the repudiation of the trust. 16 Cal. Jur. 480; 25 Cal. Jur. 269, 271. The present action was brought within ten months after such repudiation. No fact is averred from which acquiescence can be inferred or which would render granting relief inequitable. The demurrer for laches therefore was not well taken. Stevenson v. Boyd, 153 Cal. 630, 96 P. 284, 19 L. R. A. (N. S.) 525, Varrois v. Gommet, 43 Cal. App. 756, 185 P. 1001.

The next three counts reiterate the facts common to all, as stated in paragraph 3 hereof. They fix the value of the property at $350,000, which would be the value of the equity under the first count, instead of $450,000, its value as given in the first count. They differ between themselves and the first count as to defendants, as above noted. They also differ among themselves as to the nature of the transaction by which the loan company acquired plaintiff's note, but otherwise in the main contain the same additional facts.

The second count alleges the following facts: On or about December 15, 1928, the finance company borrowed from the loan company $97,500, and, by way of security, pledged the plaintiff's note with the understanding that the loan company would purchase the property at the sale for the finance company, obtain a deed therefor from the trustees, hold the title in lieu of the note as security for the loan, and, upon repayment of such loan, would convey the property to the finance company. Pursuant to this understanding and under the direction of the finance company, the loan company, on behalf of the finance company, but in its own name, bid for the property the sum of $150,000, and the trustees accepted such bid, sold the property to the loan company, and executed and delivered to the loan company a deed conveying that property upon the understanding that the pledge was released, and that title, in lieu of the note, was to be held by the loan company for the finance company, subject to its lien for $97,500, together with interest. At the time of the sale, the finance company had not advanced in excess of $100,000, and, for the purpose of extorting interest in excess of 12 per cent. per annum, had charged as advances the following sums not in fact paid out: $10,500 for interest from August 16, 1927, to August 15, 1928; $4,500 for brokerage, $250 for inspection fee, $150 for appraisal fee, and $25 for drawing papers, totaling $15,425; also $3,937.50 for interest from August 15, 1928, to December 31, 1928. The finance company had also charged, as advances on principal, certain sums not in fact made which would bring the total advances to $150,000. These facts were known to all defendants, and the trustees, with the consent of all defendants, and under instructions of the two companies, neglected to collect the amount of the bid in cash from the loan company, but credited its amount upon the note in payment of both the actual and the fictitious advances. On information and belief, plaintiff alleges that interest on the amount advanced, computed at 12 per cent. per annum from date of actual advance to sale, did not exceed $8,600. Through the sale and conveyance to the loan company for the finance company, plaintiff paid the latter, and the latter extorted from him, for the loan, the sum of $19,362.50, which exceeds 12 per cent. per annum on $100,000, the amount actually advanced. The acts of the finance company were done with the advice, consent, and approval of all defendants.

The third count alleges that on or about December 15, 1928, the finance company sold and assigned to the loan company, for an unknown consideration, and with knowledge of the facts, plaintiff's note. The fourth count alleges that the loan company purchased the note, after maturity, with knowledge that it was to secure advances upon a construction loan, but failed to ascertain the actual amounts advanced.

[12, 13] In each of the last three counts, plaintiff seeks to recover, under section 3 of the Usury Law (Act 3757, Deering's Gen. Laws), treble the amount of interest paid. This section reads as follows: "Every person, * * * who for any loan * * * shall have paid * * * any greater sum * * * than is allowed to be received under the preceding sections, one and two, may * * * recover in an action at law against the person * * * or corporation *who shall have taken or received the same* * * treble the amount of the money so paid * * in violation of said sections, providing *such action shall be brought within one year after such* payment. * * *" (Italics ours.) The recipient of the interest alone is liable. See, also, 39 Cyc. 1035 and 1038. The interest was paid to and received by the finance company alone, by the application of the amount of the bid made by the loan company at the sale to the claimed debt due to the finance

company by the trustees. Obviously, since the loan company as bidder, and Harper and Gibson, as trustees, did not receive the interest, neither of the last two counts states a cause of action. Likewise, since none of the individual defendants received the interest, the second count does not as to them state a cause of action. Since the statute allows, for the commencement of an action, one year from date of payment (Taylor v. Budd (Cal. Sup.) 18 P.(2d) 333; Rice v. Dunlap, 205 Cal. 133, 270 P. 196; Ames v. Occidental Life Ins. Co., 210 Cal. 271, 291 P. 182), which in this case was the date of sale, to wit, December 31, 1928, the filing of the original complaint on November 1, 1929, was within time.

[14-17] Whether the second count states a cause of action against the finance company depends upon the sufficiency of its allegations to charge usury. The note provided for interest at 7 per cent. per annum monthly in advance upon the principal. The application provided that the amount of the loan was to be advanced on plaintiff's order in installments as the building progressed and in amounts stipulated by the broker, and that plaintiff was to pay a brokerage of 3 per cent. on the amount of the loan. On its face the transaction does not appear usurious. "* * * It is always permissible to show that a transaction, ostensibly lawful, actually constituted a usurious loan and was made with intent to evade the statute. Haines v. Commercial Mortgage Co., 200 Cal. 609, 616, 254 P. 956, 255 P. 805, 53 A. L. R. 725." Terry Trading Corp. v. Barsky, supra. It is not sufficient to allege the conclusion that the transaction is usurious, but the facts from which usury appears must be pleaded. Mortgage Guarantee Co. v. Patch, 116 Cal. App. 584, 3 P.(2d) 35, 39 Cyc. 1049. The exaction of a commission from the borrower by the lender's agent will render the transaction usurious if such exaction is known to and authorized or ratified by the lender. Niles v. Kavanagh, 179 Cal. 98, 175 P. 462, 1 A. L. R. 831; Rice v. Dunlap, supra; notes, 21 A. L. R. 797, 850, 53 A. L. R. 743, 755. Since the finance company as lender required plaintiff, as borrower, to procure the application from the broker, who was its agent and who divided with it the brokerage, the brokerage, amounting to $4,500, must be considered as part of the charge for the loan. Fees for inspection, appraisal, and drawing papers, totaling $425, charged for the purpose of extorting usurious interest, must also be included in the amount paid for the loan. Wallace v. Zinman, 200 Cal. 585, 254 P. 946, 62 A. L. R. 1341.

[18-21] In testing a transaction for usury, interest must be computed on actual sum advanced from date of advancement. Taylor v. Budd, supra. "While the mere fact that the whole sum loaned is not drawn promptly by the borrower does not render the loan usurious, provided the whole sum was held subject to the borrower's order, yet when such a result is in accordance with an agreement made at the time of the loan, the transaction is obviously usurious." 39 Cyc. 959. If the agreement contemplates that the entire loan shall be available to the borrower, mere delay in its payment to him, in the absence of intent to evade the Usury Law, does not make the loan usurious, but if, as a condition of the loan, the borrower is required to leave part with the lender, interest in excess of the legal rate on sum actually available is usurious. Note, 12 A. L. R. 1422. Here, as the application provided that the loan was only available in progress installments, and the entire sum was not held subject to plaintiff's order, and an intent to evade the law is alleged, the above rule is applicable. The agreement must, in its inception, be usurious, for it cannot become so by reason of the borrower's default. Sharp v. Mortgage Security Corp., 215 Cal. 287, 9 P.(2d) 819. Where the excessive interest is caused by a contingency under the lender's control, or not under the borrower's control, the transaction is usurious; otherwise when the contingency is under the borrower's control. 39 Cyc. 951 et seq. The application provided that the loan was payable in installments: (1) For labor and material as the building progressed, (2) upon plaintiff's order, and (3) in amounts stipulated by the broker. The time of payment was fixed by three factors, of which one only was controlled by the borrower.

[22, 23] The complaint alleges that a total of $100,000 only was advanced, but fails to specify the dates of the respective installments, which plaintiff states he does not know. Since the application provides for payment of installments on plaintiff's order, the finance company argues that he should know the date and amount of each installment, and that his failure to so state renders the complaint vulnerable to a general and special demurrer. Since the advances were made on plaintiff's order, he had the means of ascertaining the dates and amounts of such advances. However, the finance company has full knowledge of these facts. Less particularity is required in the allegations of the complaint where the facts in it stated are such that the defendant, from their nature and his relation to them, has full information concerning them. Goldstein v. Healy, 187 Cal. 206, 201 P. 462. Plaintiff was not bound to allege the amounts as stated in the account of the finance company. McDermont v. Anaheim Union Water Co., 124 Cal. 112, 56 P. 779. Ordinarily such a complaint should specifically state the dates and amounts of payments, but where, as here, plaintiff alleges that such facts are unknown to him and calls upon defendant for discov-

ery as to such matters, the complaint is sufficient. 39 Cyc. 1049.

[24] To determine usury, interest for the period of the loan and not interest after maturity should be considered. The aggregate of $10,500 for interest, $4,500 for brokerage, and $425 for inspection, appraisal, and drawing papers, totaling $15,425, is in excess of lawful interest at 12 per cent. on $100,000 for a year by the sum of $3,425. Obviously the excess would be greater, if legal interest could be figured on each installment from date of payment to maturity. On this basis it is alleged the interest amounted to $8,600. The second count therefore states a cause of action against the finance company.

From what has been said, it is apparent that the demurrers of the finance company to the first and second counts, and the demurrer of the individual defendants to the first count, were improperly sustained, and that the demurrers of the loan company to the third and fourth counts, and of the individual defendants to the last three counts, were correctly sustained. The judgment is affirmed as to the loan company and reversed as to the finance company and the individual defendants, with instructions to overrule the demurrer of the finance company as to the first two counts, and the demurrer of the individual defendants as to the first count, with leave to answer.

We concur: TYLER, P. J.; CASHIN, J.

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133 Cal.App. 740

## MANNIX et al. v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.

Civ. 4973.

District Court of Appeal, Third District, California.

Aug. 17, 1933.

**1. Certiorari 🔑5(1).**

Certiorari cannot be used as writ of error for correction of mistakes of law or fact.

**2. Certiorari 🔑5(1).**

Certiorari goes only to jurisdiction or power of court to act, and can never be substituted for appeal to review mere errors.

**3. Certiorari 🔑5(1).**

Ordinarily, where party has right of appeal, certiorari will not lie.

**4. Certiorari 🔑64(2).**

Review under certiorari may extend not only to record of court below, but even to evidence, where necessary to determine jurisdictional facts.

**5. Courts 🔑21.**

Court cannot by presuming to act invest itself with jurisdiction.

**6. Pleading 🔑80.**

Court will not be ousted of jurisdiction of entire matter by pleading a bar to single issue only.

**7. Contracts 🔑127(1).**

Court cannot be ousted of jurisdiction by private agreement of individuals made in advance of controversy; such contracts being void as against public policy.

**8. Contracts 🔑127(1).**

Jurisdiction cannot be conferred by contract nor taken away by that means.

**9. Contracts 🔑127(1).**

Justice's court *held* to have jurisdiction in buyer's action upon contract for conversion of automobile by seller, though contract provided for waiver of damages if seller repossessed automobile upon buyer's failure to make any payment.

Original application for certiorari by W. J. Mannix and others to review a judgment of the Superior Court, in and for the County of Sacramento and Martin I. Welsh, Judge.

Writ dismissed.

R. H. Schwab and Donald E. Wachhorst, both of Sacramento, for petitioners.

George E. McCutchen and Clifford A. Russell, both of Sacramento, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

An action upon contract was commenced in the justice's court, alleging the wrongful conversion of an automobile by defendant.

The answer was a general denial, and as a further defense the contract, by virtue of which plaintiff had come into possession of the automobile in question, was set forth wherein it was stipulated in effect if the purchaser failed to make any payment therein provided for, the seller could at his option, and without notice to the purchaser, declare all of purchaser's rights under the contract terminated, and immediately retake possession of the automobile. The contract also provided that the purchaser waived all claims for damages due to or connected with such taking. Judgment was rendered for plaintiff (the purchaser) in the justice's court, and, upon appeal to the superior court upon questions of both law and fact, judgment was again given in favor of plaintiff.

[1, 2] Petitioner now seeks by a writ of certiorari to review the judgment of the superior court, claiming the parties had by their contract stipulated that plaintiff had waived all claim to damages by reason of the

taking of the automobile, and therefore the court had no jurisdiction of the subject-matter, the parties by their contract having disposed of the question of damages. Petitioner also claims that the court committed error in ruling upon certain questions of law and evidence. As to that point we are not here concerned. The writ of certiorari cannot be used as a writ of error for the correction of mistakes either of law or fact. Certiorari goes only to the jurisdiction or the power of the court to act and can never be substituted for an appeal to review mere errors of a judicial tribunal.

[3-5] The first point suggested, however, that the parties had by their contract waived any right of action for damages for the alleged unlawful taking, merits some attention. Ordinarily where a party has a right of appeal certiorari will not lie, and it is equally true that once jurisdiction has been obtained over the parties and subject-matter of the action no error committed by the court can be corrected on certiorari. Where, however, it is claimed the justice's court was without jurisdiction an appellate court will examine into the question of jurisdiction to ascertain whether or not the lower court had the right to consider the subject (Denninger v. Recorders' Court, 145 Cal. 629, 79 P. 360), and, as was suggested in Schwarz v. Superior Court, 111 Cal. 112, 43 P. 580, and affirmed in McClatchy v. Superior Court, 119 Cal. 413, 51 P. 696, 39 L. R. A. 691, while the writ of certiorari is not a writ of error it is nevertheless a means by which the power of the court can be inquired into, and for that purpose the review may extend not only to the record of the court below, but even to the evidence itself when necessary to determine the jurisdictional facts. A court cannot, by presuming to act, invest itself with jurisdiction. Therefore it is proper to inquire into the record, but solely to determine that question.

The question here to be determined is: Did the justice's court, in view of the provision of the contract as to the waiver of damages, have jurisdiction of the subject-matter of the action? We are of the opinion it had such jurisdiction.

[6-9] Upon the filing of the complaint in the justice's court, being an action for conversion and within the statutory limit as to amount, and no question being raised as to service on defendant, that court acquired jurisdiction. "Where a court has jurisdiction of the parties and of the subject-matter of the action such jurisdiction carries with it necessarily the authority * * * to decide the question submitted to it, incorrectly as well as correctly. Accordingly, error in exercise of its jurisdiction, however gross, cannot be annulled on certiorari." 4 Cal. Jur. 1036. The defendant's answer was a general denial, and also specially pleaded the contract whereby the entire controversy was presented to the court for determination. A court will not be ousted of jurisdiction of the entire matter by pleading a bar to a single issue only. Furthermore, it is the rule in California, as well as the almost unanimous rule in the United States, that the jurisdiction of a court cannot be ousted by a private agreement of individuals made in advance of the controversy; such contracts being void as against public policy. 7 R. C. L., p. 1046, and cases there cited. As jurisdiction cannot be conferred by contract, neither can it be taken away by that means.

We are therefore of the opinion that the writ of certiorari will not lie for the reason that the justice's court had original jurisdiction of the persons and subject-matter, and errors, if any, were reviewable upon appeal by the superior court, whose determination in the matter was final.

The writ is dismissed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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133 Cal.App. 440

## PEOPLE v. MONKS.

Cr. 244.

District Court of Appeal, Fourth District, California.

July 26, 1933.

Hearing Denied by Supreme Court Aug. 24, 1933.

**1. False pretenses 🔑6.**

Defendant prosecuted for issuing checks without sufficient funds could not complain of lapse of time between issuance of checks and their protest, where delay was brought about by defendant (Pen. Code, § 476a; Civ. Code, §§ 3234–3237).

**2. False pretenses 🔑43(1).**

In prosecution for issuing checks without sufficient funds, time that elapsed from date check was issued until its protest merely goes to weight of evidence and not to its admissibility (Pen. Code, § 476a).

**3. Criminal law 🔑517(4).**

In prosecution for issuing checks without sufficient funds, check and protest thereof when considered with evidence of defendant's flight *held* sufficient proof of corpus delicti to make defendant's confessions admissible, though check and protest because of delay in protest made slight evidence of corpus delicti (Pen. Code, §§ 31, 476a, 1127c; Civ. Code, §§ 3234–3237).

**4. Criminal law 🔑369(12).**
In prosecution for issuing checks without sufficient funds, evidence showing offenses of similar character *held* admissible (Pen. Code, §§ 31, 476a).

**5. Criminal law 🔑371(1).**
Similar offenses to one at bar may be proved to show guilty intent of defendant.

**6. Criminal law 🔑62.**
Criminal guilt can be fixed when one secures another to perform criminal act, but agent performing act must be innocent (Pen. Code, § 31).

**7. False pretenses 🔑39.**
Where prosecution contended that codefendant issued checks without sufficient funds as principal by using defendant's insane husband as agent to write checks on bank in which there were no funds, prosecution was required to prove that defendant's husband was insane when checks were issued (Pen. Code, §§ 31, 476a).

**8. Witnesses 🔑77.**
Whether particular person is competent to become witness is to be determined upon voir dire examination by trial court, either in or out of jury's presence.

**9. False pretenses 🔑51.**
Presenting to jury, in prosecution for issuing checks without sufficient funds, fact that defendant's husband was insane, after court on voir dire examination had declared husband incompetent to testify, *held* not error, where husband's insanity was vital question in determining codefendant's guilt (Pen. Code, §§ 31, 476a).

**10. Criminal law 🔑1169(1).**
In prosecution for issuing checks without sufficient funds, admitting testimony in nature of eulogy of defendant's insane husband *held* harmless error (Pen. Code, §§ 31, 476a; Const. art. 6, § 4½).

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Mrs. Allan B. Monks was convicted of having issued checks without sufficient funds, and she appeals.

Affirmed.

Edgar G. Langford, of San Diego, for appellant.

U. S. Webb, Atty. Gen., Warner I. Praul, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and John T. Holt, Deputy Dist. Atty., both of San Diego, for the People.

CAMPBELL, Justice pro tem.

Appellant and one Wiley L. Watson were jointly tried upon an amended information filed by the district attorney of San Diego county charging them with having issued checks without sufficient funds in violation of section 476a of the Penal Code. The information contained four counts, and the appellant was convicted on counts two and three. This is an appeal from the judgment of conviction and from the order denying appellant's motion for a new trial. The grounds upon which appellant relies for a reversal of the judgment and order denying her motion for a new trial are as follows:

(1) That the evidence adduced at the trial is insufficient to sustain the appellant's conviction of the charge contained in count two of the amended information.

(2) That the evidence adduced at the trial is insufficient to sustain appellant's conviction of the charge contained in count three of the amended information.

(3) That the trial court committed prejudicial error in its rulings upon objections to the admission of evidence during the course of the trial.

(4) That the prosecuting attorney was guilty of prejudicial misconduct during the course of the trial.

It appears, in substance, from the evidence that the appellant at the time of the commission of the alleged offense was the wife of and living with one Allan B. Monks, the marriage ceremony having been performed December 19, 1930. Apparently Monks, at one time, had been a man of considerable attainments and education. However, at this time he had lost his reason to a degree bordering on idiocy, and he was under the influence of, and his person and acts were entirely controlled by, the appellant. Furthermore, the evidence showed that a trust fund had been established in Boston, Mass., for Mr. Monk's benefit, and from time to time moneys were deposited in that fund to his account in a Boston bank. The trustees of this fund ceased to make deposits, owing to uncertainty on their part as to whether Mr. Monks was still living. This case was prosecuted upon the theory that appellant procured Mr. Monks to draw the checks described in the information on the Boston bank and issue them knowing that there were no funds in the account. The check described in the second count of the information was evidently signed by Mrs. Allan B. Monks, while the check described in the third count of the information was signed "Allan B. Monks." The check which is the basis of the second count of the amended information, upon which the defendant was tried and convicted, was given by Mrs. Monks to one C. S. Dorman on or about February 16, 1932, and was in the sum of $400. The defendant received cash on this check in the amount of $223, and was credited on an old account she had with Mr. Dorman for the balance of the check. Dorman sent the check through the regular channels of business by cashing the same at his personal bank on the day of its receipt, and in due time the check came back to him unpaid by the bank upon which it was drawn. This check was introduced in evidence, together with a protest of said check; it being protested on the ground "account closed." Appellant concedes that the record shows that the protest was in proper form, being in full compliance with the statutes of California, Civil Code, §§ 3234, 3235, 3236, and 3237.

The check which was the basis of the third count of the amended information, upon which the defendant was tried and convicted, was given to Felix Morette, on or about April 1, 1932. It is for the sum of $875. This check likewise was sent through the regular channels of business and in due time the check came back to Morette unpaid by the bank upon which it was drawn. The check was introduced in evidence at the trial of this action, together with protest of said check. It was protested on the ground that there were "no funds." As with the Dorman check, it is likewise conceded that the protest was in proper form.

[1] Appellant complains because of the lapse of time between the issuance of the checks and their protest. The evidence shows that this condition was sought for and occasioned by the appellant's own acts at and shortly after the time the crime was committed in an attempt to hide the crime. The evidence further shows that the appellant also lulled her victim, Morette, by telling him to rest assured that the check had not been paid because of some mistake, and, this being so, she cannot be heard to complain of the condition which she deliberately created. The evidence shows that the defendant, after the check had been issued, fled to Long Beach, Calif., with her codefendant, Watson (who was acquitted by the jury) and a Japanese chauffeur, and her husband, and that the defendant there secured an apartment under a fictitious name. From this place in Long Beach, the defendant finally fled to San Francisco, and was apprehended there by police officers. She denied that her true name was Mrs. Monks, or that she had ever lived in San Diego.

Appellant's counsel cites numerous civil decisions regarding the presentment for protest of checks within reasonable time. In Ryckman v. Fox Film Corporation, 188 Cal. 271, 205 P. 431, 434, the court said: "The appellant makes the further contention that, the check in question having been made and delivered to Goldstein Company by the defendant on December 19, 1917, and not having been indorsed or delivered by its said payee to the plaintiff until March 7, 1918, the check was a stale check of which the respondent could not be held to be a holder in due course. In support of this contention the appellant cites us to sections 3134 and 3266b of the Civil Code, as re-enacted in St. 1917, pp. 1540, 1560, which require that instruments payable on demand should be negotiated within a reasonable time. No evidence was presented in this case by either party showing the cause of the delay in presentment of this check nor by the defendant offering any proof as to any loss occasioned to it by the delay."

The unpaid checks, with the said protests, were presumptive evidence of knowledge of the insufficiency of funds or credit with the bank upon which the checks were drawn. This rule of evidence is set forth in section 476a of the Penal Code as follows: "Where such check, draft or order is protested, on the ground of insufficiency of funds or credit, the notice of protest thereof shall be admissible as proof of presentation, nonpayment and protest and shall be presumptive evidence of knowledge of insufficiency of funds or credit with such bank or depositary, or person, or firm, or corporation."

The rule has been approved in the case of People v. Jay Bullock, alias Jay McCanless, 123 Cal. App. 299, 11 P.(2d) 441, 442. The defendant in that case was tried on four counts of issuing checks without sufficient funds, and two counts of forgery. The court says: "* * * The prosecution, in all instances, to support this necessary element of the charges, introduced in evidence 'Protests' of the several instruments. This method of proof of this fact in actions of a civil nature has been sanctioned from time immemorial. It is recognized in such cases by both common law and statutory enactment. In matters involving criminal charges, section 476a of the Penal Code, as amended in 1929 (St. 1929, p. 1940), made provision for this class of evidence. * * * Nor are we forced, in sustaining the legislation in the instant case, to go as far as courts may properly go, as was said in Yee Hem v. United States (268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904), supra: 'If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not resting upon statute.' [Citing cases.]"

[2, 3] The time that elapsed from the date of issuing the check until its protest merely goes to the weight of the evidence and not to its admissibility. While the check and the protest thereof may have made, because of the passage of time between the issuance and the protest thereof, but slight evidence of the corpus delicti, still when considered with the evidence of appellant's flight it was sufficient upon which to make the admissions

and confessions of the defendant admissible. Pen. Code, § 1127c. In the case of People v. Hayes, 72 Cal. App. 292, at page 301, 237 P. 390, 394, the court sets forth as follows: " 'It is sufficient,' as a basis for the offer of a defendant's confession or admissions, 'if there is some proof, or prima facie proof, or even slight proof of the corpus delicti.' 8 Cal. Jur. tit. Crim. Law, § 303."

The evidence shows that the appellant stated to a witness called by the people, that she knew before she passed the check in question set forth in the second count of the information that there was no money in the bank, and to the same witness appellant stated that she had passed bad checks on this bank after the commission of the offense for which she was tried.

[4, 5] Appellant complains, and assigns as error, the admission of evidence showing offenses of a similar character to the one that she was being tried for, i. e., issuing checks without sufficient funds; citing the case of People v. Schneider, 126 Cal. App. 749, 14 P.(2d) 1018, 15 P.(2d) 540. However, that case has no application here. The court does not hold that similar offenses of passing bad checks may not be proven upon a prosecution based on section 476a of the Penal Code. The general and prevailing rule is definite and certain that similar offenses to the one at bar may be proved to show guilty intent of the defendant. People v. Weir, 30 Cal. App. 766, 159 P. 442; People v. Hamby, 55 Cal. App. 37, 202 P. 907; People v. Bercovitz, 163 Cal. 636, 126 P. 479, 43 L. R. A. (N. S.) 667.

Appellant next complains and assigns as error that Allan B. Monks was called as a witness for the people. The record in this action shows that the appellant was not tried alone, but that Wiley L. Watson, no relative of Allan B. Monks, was a codefendant and tried with appellant. Watson was acquitted by the jury upon this trial. The testimony shows that Wiley L. Watson cashed a check for $180 with one Sam Loeffler. The check was signed by Allan B. Monks, dated March 8, 1932. Under the Penal Code, § 31, it is provided: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission * * * and all persons counseling, advising, or encouraging * * * lunatics or idiots, to commit any crime, * * * or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed."

It was the contention of the people in the case at bar that Wiley L. Watson perpetrated the crime he was charged with, by counseling, advising, and encouraging a lunatic or idiot to commit the crime of issuing a check without sufficient funds therefor, and that then, after obtaining the check from the idiot or lunatic, willfully and feloniously cashed the same as charged in the information. It became highly important then for the prosecution to use Allan B. Monks as a witness, if possible to do so, for the purpose of showing that he had signed the checks while in a mental condition that showed him to be a lunatic, or idiot or insane, and that he was thus an innocent agency for the commission of the crime while under the influence and control of Wiley L. Watson.

It was also the contention of the people in the case at bar that the defendant, Mrs. Monks, under count three of the information, based upon the check given to Morette, which check was signed by Allan B. Monks, was guilty as a principal because she committed the crime as charged, by using the innocent agent, Allan B. Monks, whom she knew to be then insane, by advising and encouraging and counseling said insane person to write said check, and that the defendant, Mrs. Monks, willfully and feloniously gave the said check to Felix Morette.

[6, 7] It need not be argued that criminal guilt can be fixed when one secures another to perform a criminal act. The agent must be innocent. The cases all turn on the question of innocent knowledge or guilty knowledge. To simplify procedure, to do away with the technicalities of the common law, the Legislature obliterated the distinction between principal and accessory before the fact, and declared them to be principals, but even at common law, one who procured an innocent person to commit an illegal act was a principal. Thus it is apparent that it was not only proper but necessary for the people to prove that Allan B. Monks was insane at the time of the issuing of the checks referred to. It became necessary to prove by Allan B. Monks, as against the defendant Wiley Watson, that the said Wiley Watson had taken advantage of him during the period of Monk's mental derangement. It is apparent from the record that Allan B. Monks was called as a witness against the defendant Wiley Watson.

The evidence was overwhelming as against both the defendants that at the time of the commission of the crimes alleged Allan B. Monks was insane and both defendants knew of the insanity, and therefore the said Allan B. Monks was an innocent agent in the hands of the defendants.

[8, 9] The question whether or not a particular person is competent to become a witness is a question to be determined upon voir dire examination by the trial court, either in or out of the presence of the jury. The trial court, in this case, after conducting the voir dire examination, declared the proffered witness, Allan B. Monks, was incompetent to testify. Appellant insists that Allan B.

Monks was and is insane, and that therefore the presentation of the fact to the jury was error. However, the question of Allan B. Monks' insanity was a vital and proper question of fact for the jury to consider in determining the guilt of the defendant Wiley L. Watson.

[10] Appellant next complains of the admission of the testimony of Dr. H. F. Andrews, over her objection, and assigns it as error. The testimony is in the nature of a eulogy of Allan B. Monks. There is no question but that the trial court committed error in admitting the testimony. It had no place in the trial of the case at bar. However, it cannot be said that the testimony in any way prejudiced the substantial rights of the appellant or resulted in a miscarriage of justice.

Appellant complains of misconduct of the district attorney, but an examination of the record fails to disclose any foundation for the claim.

After an examination of the entire record in this case, the evidence clearly points to the guilt of the defendant, and, even though there was error in the admission of evidence, the verdict of the jury cannot be disturbed upon appeal because it has not resulted in a miscarriage of justice. Section 4½, art. 6, Constitution.

It follows that the judgment and order appealed from must be affirmed.

So ordered.

MARKS, Justice (concurring).

Appellant made numerous declarations against interest, some of them amounting to confessions, which, if taken as true, amply established her guilt. The real question on this appeal is whether or not the corpus delicti of each crime of which she was convicted was sufficiently proved to permit the introduction of these confessions in evidence.

The check given to C. S. Dorman was dated February 16, 1932, made payable to Dorman's Auto Equipment, and was protested on April 20, 1932, the reason given for nonpayment was "Account Closed." The Felix Morette check was dated April 1, 1932, and was protested July 29, 1932, the reason for its nonpayment being given as "No Funds."

We do not think it necessary in this case to lay down as a general rule without exception that the protest of a check several months after it was passed is sufficient to establish the corpus delicti, especially when the protest states as a reason for nonpayment that the account upon which it was drawn had been closed.

The overwhelming evidence of the flight of appellant after passing each of the two checks, under circumstances showing a guilty knowledge on her part, should constitute sufficient evidence of the corpus delicti to permit the introduction of her confessions in evidence since the enactment of section 1127c of the Penal Code. "'"Full proof of the body of the crime, the corpus delicti, independently of the confession, is not required, says Nelson, C. J., in People v. Badgley, 16 Went. (N. Y.) 59, by any of the cases; and in many of them slight corroborating facts were held sufficient."' * * * When the case is submitted for their verdict, the jury may consider all the evidence in the case, including the extrajudicial statements, admissions, or confessions of the accused, in determining whether or not all the elements of the offense charged and the connection therewith of the accused have been established to a moral certainty and beyond a reasonable doubt. If this were not the correct rule, proof of the extrajudicial statements, admissions, or confessions of the accused would have no utility except to connect him with the crime charged." People v. Selby, 198 Cal. 426, 245 P. 426, 430.

The check to Morette was deposited in a San Diego bank on the day it was written and sent through the usual channels to the Boston bank upon which it was drawn, and in due time returned unpaid. Morette then took the check to appellant, who told him "the money is there and the check has got to be paid." He again deposited it with his bank for collection. Upon its second return unpaid he attempted to find appellant, but could not, as she had disappeared. The check was then sent to Boston and protested. It is evident that appellant by her representations to Morette and her flight was responsible for a large part of the delay in protesting this check. She should not be permitted to profit by her own fraud and artifice.

The account in the Boston bank upon which the checks were drawn was maintained solely by deposits by trustees of a trust fund. The evidence shows that in December, 1931, appellant knew that the deposits in the account had been stopped and shortly thereafter that the funds in the account had been exhausted. An attorney representing the trust estate informed appellant on February 8, 1932, that the trustees would make no further deposits in the Boston bank until Allan B. Monks was produced in his office in San Diego, as the trustees questioned the fact of his being alive. Mr. Monks was not produced at this office. This evidence, together with the checks drawn thereafter, and coupled with evidence of her flight, was ample to establish the corpus delicti in each case and permit the introduction of the confessions in evidence. With the confessions in evidence the proof of guilt is convincing.

I concur: BARNARD, P. J.

133 Cal.App. 479

## NOLAND v. PAYNE, County Auditor.

Civ. 9184.

District Court of Appeal, Second District,
Division 1, California.
July 28, 1933.

**Mandamus ⚷102(2).**

Official reporter pro tempore of superior court *held* entitled to writ of mandate requiring county auditor to draw warrant on treasurer in payment of claims for services rendered as such.

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Proceeding by Alfreda Noland for a writ of mandate to H. A. Payne, as Auditor of Los Angeles County.

Peremptory writ granted.

Daniel V. Noland, of Los Angeles, for petitioner.

HOUSER, Justice.

Petitioner seeks from this court its writ of mandate by which respondent, in the regular course of his official duty as county auditor of the county of Los Angeles, shall be required to draw his warrant in favor of petitioner on the treasurer of said county in payment of each of two designated claims which petitioner has presented to said respondent on account of official services rendered by petitioner as a court reporter pro tempore while performing official duties as such in the superior court of the county of Los Angeles.

From the verified petition herein it appears that respondent is the duly qualified and acting county auditor of the county of Los Angeles; that during all pertinent times in question petitioner was a duly qualified and acting official reporter pro tempore of the superior court of the state of California, in and for the county of Los Angeles; that on each of two specified occasions petitioner was duly assigned to perform, and, in pursuance thereof, did perform, services as such court reporter, which fact was certified by a judge of said superior court, who thereupon made his order by which respondent was directed to draw his warrant on the treasurer of the county of Los Angeles in payment of such services; that the correctness of said claim was also certified by a deputy clerk of the county clerk of said county; that thereupon petitioner presented to said respondent each of the aforesaid orders respectively, and demanded of said respondent that he issue a warrant in favor of petitioner on the said treasurer in accordance with said order; but that said respondent then refused, and still refuses, so to do.

Respondent has filed no answer to said petition; nor has he at any time seen fit to file any objection to the demand of petitioner, or to make any argument, or to present any authority in opposition thereto. On the other hand, petitioner's position in the matter seems to be amply supported, not only by rule of the superior court, but as well by statute and by judicial precedent. This court knows of no authority to the contrary.

In such circumstances, it is ordered that a peremptory writ of mandate issue as prayed.

We concur: CONREY, P. J.; YORK, J.

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133 Cal.App. 465

## PEOPLE v. LEE.

Cr. 1700.

District Court of Appeal, First District,
Division 1, California.
July 28, 1933.

**Forgery ⚷44(½).**

In prosecution for forgery, evidence *held* to sustain conviction.

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Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

William Lee was convicted of forgery, and he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

KNIGHT, Justice.

The defendant was found guilty by a jury of the crime of forgery, and upon denial of his application for probation was sentenced to imprisonment in the state prison. Thereupon his attorney gave oral notice of appeal and requested the preparation of a transcript, which was later prepared, certified, and filed, but since then he has done nothing in furtherance of the appeal. At the time it was called for hearing, oral argument was waived and time was granted to prepare a brief, but none has been presented or filed. We have, nevertheless, examined the record on appeal and are satisfied that no legal grounds exist for interference with the judgment of conviction.

The evidence shows that, while in the employ of a firm named Quong Sang Company, the defendant passed a forged check for $100 on one Moskowitz. The check was made payable to Wm. Quong and was signed, "Quong Sang Company, Lee Chew." The defendant claimed in his defense that the check was given to him by a friend who owed him money. The evidence further shows, however, that about the same time defendant passed another forged check purporting to have been signed by the same party, and also cashed two more checks made payable to his employer by forging the latter's indorsement thereon. His explanation for having indorsed and cashed these latter checks was that his employer owed him several hundred dollars for back wages.

It will be seen, therefore, that the most that can be said in support of the appeal is that the verdict of the jury is based on conflicting evidence; and, consequently, since nothing appears in the record indicating that the trial was not fairly conducted, or that the jury was not properly instructed, the judgment of conviction must be affirmed. It is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

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133 Cal.App. 439

## PEOPLE v. ESTRADA.

Cr. 1260.

District Court of Appeal, Third District, California.

July 26, 1933.

**Robbery ⟹24(1).**

Evidence *held* to support conviction of robbery of second degree.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Ricardo Estrada was convicted of robbery of the second degree, and he appeals.

Affirmed.

Archibald M. Mull, Jr., of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant was accused of the crime of robbery, and by a jury found guilty of robbery of the second degree. In due time this appeal was taken and the cause submitted.

The transcript of the evidence is brief. But three witnesses were called, the complaining witness, the arresting officer, and an eyewitness to the commission of the crime.

We find no errors, nor was any particular point of law presented or argued during the trial. An examination of the record discloses no error in the proceedings, nor does counsel indicate anything justifying a reversal.

The judgment and order appealed from are affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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133 Cal.App. 755

## PEOPLE v. MERCER.

Cr. 1728.

District Court of Appeal, First District, Division 2, California.

Aug. 18, 1933.

Rehearing Denied Sept. 2, 1933.

Hearing Denied by Supreme Court Sept. 15, 1933.

**Criminal law ⟹1182.**

Judgment and order denying new trial were affirmed, where no appearance was made for appellant when cause was called for hearing, other than request for additional time to file brief, and no brief had been filed when time granted therefor had expired (Pen. Code, § 1253).

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Rex Mercer was convicted of robbery in the first degree, and he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

PER CURIAM.

The defendant and appellant was convicted in the superior court in the city and county of San Francisco of a felony, to wit, robbery, and the jury fixed the crime as of the first degree.

Judgment on the verdict was entered March 7, 1933, and the transcript on appeal was filed in this court on March 14, 1933. The cause

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⟹For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

was regularly placed on the calendar for oral argument on June 12, 1933. No appearance was made for appellant at the time the cause was called for hearing other than a request for additional time to file a brief. No brief has been filed in his behalf, and the time granted for that purpose has long since expired.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order denying a new trial are affirmed.

133 Cal.App. 423

**DOUGLASS v. WALKER et al. (two cases).**

**Civ. 8572, 8573.**

District Court of Appeal, Second District, Division 1, California.

July 25, 1933.

Rehearing Denied Aug. 21, 1933.

Hearing Denied by Supreme Court Sept. 22, 1933.

**1. Action 🔑50(5).**

Alleged liabilities on separate and unrelated official bonds of building and loan commissioners and their deputies *held* not "liabilities arising out of same transaction or transactions connected with same subject of action" so as to permit such causes of action to be united in same complaint (Pol. Code, §§ 954, 958, 959, 960; Code Civ. Proc. § 427, subd. 8; Gen. Laws 1923, Act 982, § 4).

[Ed. Note.—For other definitions of "Same Transaction," see Words & Phrases.]

**2. Parties 🔑26.**

Joining as parties defendant in one complaint two building and loan commissioners, their deputies and sureties on respective bonds of such officers, *held* misjoinder of parties defendant (Code Civ. Proc. §§ 379a to 379c; Pol. Code, §§ 954, 958, 959, 960; Gen. Laws 1923, Act 982, § 4).

Appeals from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Separate actions by Mae Douglass against George Stuart Walker and others, and by W. H. Douglass against George Stuart Walker and others. From a judgment of dismissal in each case, plaintiffs appeal.

Affirmed.

W. H. Douglass, of Los Angeles, in pro. per.

Sullivan, Roche, Barry & Johnson, of San Francisco, and John J. Wilson and Paul S. Honberger, both of Los Angeles, for respondent liquidator of Southern Surety Co. of New York.

John J. Wilson and Paul S. Honberger, both of Los Angeles, for respondents George Stuart Walker and Clair C. Barnes.

Mills, Hunter & Dunn, of Los Angeles, for respondents Roy Dorothy and United States Fidelity & Guaranty Co.

Farnsworth, Burke & Maddox, of Visalia, for respondent Charles A. Whitmore.

CONREY, Presiding Justice.

In each of these actions the appeal is by the plaintiff, from a judgment of dismissal entered after the court had sustained the several demurrers to the amended complaint, and after the plaintiff had failed to further amend within the time allowed therefor. In each case there was filed an amendment to the amended complaint on the same day when the court ruled on the demurrers. Counsel have assumed, and we shall adopt that assumption, that the demurrers were presented and considered as upon the respective amended complaints as thus amended. The actions were brought to recover upon separate official bonds of the several officers named, to compensate for damages incurred by reason of the failure, neglect, and omission of each of the bonded officers to faithfully perform his official duties as required by law, all with resulting loss to the plaintiffs.

Defendant Walker held the office of state building and loan commissioner from January 6, 1927, to August 12, 1929; and defendant Whitmore occupied that office from August 12, 1929, to December 31, 1930. Defendant Dorothy was a duly appointed and qualified deputy state building and loan commissioner from October 1, 1927, to December 12, 1930: defendant Barnes, from June 28, 1927, duration of term not shown; defendant Stern from August 2, 1929, to December 12, 1930.

The said official bonds were the bonds required to be executed by and on behalf of such officers in accordance with the provisions of the Building and Loan Commission Act approved April 5, 1911 (St. 1911, p. 607), as amended, and especially section 4 thereof (St. 1921, p. 1573; Deering's Gen. Laws, 1923 Ed., Act 982, p. 358), which reads as follows: "Before entering upon their duties, the commissioner and his deputies shall each execute an official bond in the penal sum of five thousand dollars, each of which bonds must be guaranteed by a duly authorized surety or bonding company, the premium on which shall be paid from the allowance for office expenses. Any bond executed under this section must be approved by the governor and filed and reported in the office of the secretary of state, and such commissioner and deputies must take the oath of office as prescribed by the

Political Code for the state officers in general."

For a statement of the required condition of an official bond, and the breaches of condition whereby liability is incurred, we are referred to Political Code, §§ 954, 958, 959, 960. It is further provided (section 961) that an official bond is obligatory "for the use and benefit of all persons who may be injured or aggrieved by the wrongful act or default of such officer in his official capacity; and any person so injured or aggrieved may bring suit on such bond, in his own name, without an assignment thereof." As will be seen, we do not need to discuss the questions which have been argued, relating to these sections and the conditions to which they apply.

The Guaranty Building & Loan Association of Los Angeles was a corporation subject to the provisions of the Building and Loan Commission Act. Under the terms of that act, the building and loan commissioner is obligated to perform certain official acts of examination and supervision. Within a period of time stated in the complaint the said association became insolvent. The plaintiffs deposited money with the association after it became insolvent. As to each of said bonded officers it is alleged that, by reason of the failure and neglect of the officer to perform his official duties, the association was permitted to continue in business, at and after the time when the commissioner in the due performance of his official duty should have taken charge of the affairs and business of said corporation; and that, by reason of such failure and negligence, the plaintiffs were induced to deposit money with the association, with resultant loss to the plaintiffs. This is a statement, in general terms, of the facts relied upon by the plaintiffs as the source of their right to recover upon the said several official bonds.

[1] In the first action (Civ. No. 8572) the defendants are the Commissioner Walker and his surety, and the Deputy Commissioner Dorothy and his surety. In the second action (Civ. No. 8573), the defendants are the same as in the preceding action, together with Commissioner Whitmore and his surety, and the Deputy Commissioners Barnes and Stern and their sureties. The demurrers of the several defendants in each case were made upon several different statutory grounds of demurrer, including the claim that the complaint did not state a cause of action, and the claim that several causes of action were improperly joined, and that there was a misjoinder of parties defendant. For example, the defendant Walker demurs upon the ground that there is a misjoinder of parties defendant, in that defendant Walker, as principal, and his surety, upon a separate and distinct bond, are joined in the same action with other defendant principals and their sureties upon other and separate bonds. He also demurs upon the ground that several causes of action are improperly joined, in that the alleged causes of action against defendant Walker and his surety, upon a distinct and separate bond, are united with alleged causes of action arising upon other and distinct separate causes of action arising upon different, distinct and other bonds. In their argument in support of their proposition that there is no misjoinder of causes of action, appellants rely upon section 427, Code of Civil Procedure (subd. 8), under which a plaintiff may unite several causes of action in the same complaint where they all are "claims arising out of the same transaction, or transactions connected with the same subject of action. * * *" In their argument in support of their claim that there is no misjoinder of parties defendant, they refer particularly to sections 379a, 379b, and 379c, Code of Civil Procedure, which relate to certain stated circumstances under which persons may be joined as defendants in an action.

As to the misjoinder of the causes of action, we think that the demurrers were properly sustained. These being actions at law to recover upon separate and unrelated official bonds, it is clear that the alleged liabilities on these separate bonds are not liabilities arising out of the same transaction, or transactions connected with the same subject of action. We think that the decisions referred to by appellants in their briefs, on this point, are not applicable to this case.

[2] With respect to the misjoinder of parties defendant, we are further of the opinion that the provisions of the Code of Civil Procedure, and the decisions cited by defendants do not sustain the contention of appellants that the court erred in sustaining the demurrer as to misjoinder of parties defendant.

Being of the opinion that for the reasons above stated the demurrers were properly sustained, we find it unnecessary to discuss any of the other questions presented and argued on these appeals.

In each case the judgment is affirmed.

I concur: HOUSER, J.

Mr. Justice YORK, deeming himself disqualified, takes no part in this decision.

## PEOPLE v. SONOQUI et al.*

Cr. 2375.

District Court of Appeal, Second District, Division 2, California.

Aug. 3, 1933.

Rehearing Denied Aug. 18, 1933.

Hearing Granted by Supreme Court Sept. 1, 1933.

**1. Homicide 🔑253(1).**

Evidence supported conviction of first degree murder.

**2. Criminal law 🔑741(1).**

It is jury's function to determine weight of evidence in first instance.

**3. Criminal law 🔑1160.**

Before verdict approved by court can be set aside for insufficiency of evidence, it must clearly appear that on no hypothesis is there sufficient substantial evidence to support conclusion reached.

**4. Criminal law 🔑1180.**

Ruling granting new trial for insufficiency of evidence in murder case did not establish law of case on that question in second trial, even though evidence might be substantially the same.

**5. Criminal law 🔑1144(15).**

Reviewing court presumes jurors followed trial court's admonition and instruction respecting improper argument.

**6. Criminal law 🔑404(4).**

In murder prosecution, guns and bullets found in defendants' home *held* properly introduced in rebuttal of defendants' statement denying such possession, and as showing defendants had means to commit offense charged.

**7. Criminal law 🔑404(4).**

In murder prosecution, lantern carried by deceased and piece of lead found *held* admissible to show complete picture of physical surroundings of crime.

**8. Homicide 🔑166(8).**

In murder prosecution, love letter from defendant to decedent's wife under assumed name 19 months after crime, during which time defendant had been in jail, *held* admissible.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Remigio Sonoqui and another were convicted of murder, and they appeal.

Affirmed.

W. T. Kendrick, Jr., of Los Angeles (L. V. Peterman, of counsel), for appellants.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Defendants were jointly charged with the crime of murder, to which charge each pleaded not guilty. At the first trial defendants Sonoqui were apparently found guilty; the action having been dismissed as to their codefendant Martina Ruiz. Motions for a new trial were granted and the cause was again set for trial, before another judge, at the conclusion of which both were found guilty of murder in the first degree; the verdict fixing the punishment at life imprisonment. Defendants' motions for a new trial and in arrest of judgment were denied. Each has appealed from the order denying his motion for a new trial and from the judgment entered upon said verdict.

[1-3] Appellants contend: (1) That the evidence is insufficient to justify the verdict and judgment; (2) that the matter of the sufficiency of the evidence was adjudicated by the action of the judge presiding at the first trial in granting a new trial on the ground of insufficiency of the evidence to support the verdict; (3) that the district attorney conducted himself in a manner prejudicial to appellants; and (4) that the court erred in admitting certain exhibits in evidence.

(1) Vicente Ruiz, who at the time was living with his wife and daughter, was killed on September 15, 1928, in Azusa, Calif., as the result of a gunshot wound in his abdomen, caused by a .22 short bullet. His daughter, Mrs. Dorothy Sierra, testified that she had known defendants Sonoqui for two years before her father's death—that they lived about two blocks from the Ruiz home; that about a month before her father was shot he came home in the middle of the afternoon and found defendant Remigio Sonoqui at their home; that said defendant had been there all morning and afternoon, and when her father arrived her mother was in the dining room and Remigio was in the living room playing the phonograph. Evidence showing quite a different picture just preceding the arrival of Ruiz was excluded by the court. Ruiz asked Remigio what he was doing there, to which the latter replied, "Nothing, nothing, just playing the phonograph." Ruiz then said, "You had better stay away from this house, I don't want you here any more." About the same time, according to the testimony of the daughter, she heard a conversation between Remigio Sonoqui and her mother. Asked as to what was said, she testified: "Well, Remigio told my mother that he loved her and my mother said, 'I love you too.' He said, 'Shall we run away?' My mother says, 'If I run away I

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 35 P.2d 123.

will lost my property and my children both.' He said, 'I will fix that.'" Mrs. Sierra further testified that she retired on the evening of the murder at about 9:20 p. m. Later she heard a noise at her bedroom window and saw defendant, John Sonoqui outside, about four feet from the house; that shortly thereafter she heard her father go to the kitchen for some coffee; that he returned to his bed and immediately took a lantern and went outside. A few minutes later she heard two shots fired, and on running to the window she saw two men running across a vacant lot next to their home and recognized them as the defendants Sonoqui. Ruiz was taken to the hospital and the witness was taken to the Sonoqui home. Later, when Mrs. Ruiz returned from the hospital with John Sonoqui, she went to the Sonoqui home also. When defendant Remigio arrived, according to Mrs. Sierra, he was crying and pulling his hair, and Mrs. Ruiz said to him, "Don't cry, don't be a coward."

It will be seen from the foregoing that the daughter played a very important part in making plaintiff's case, and she was the only one who testified to seeing defendants, or either of them, at or near the scene of the murder at the time it occurred. It is true that certain investigating officers testified to tracing the tracks across the lot and to a point directly across the street from the Sonoqui home, in the direction of which they pointed, and that such tracks showed that the men ran from the scene of the murder. Defendants were taken by the officers over soft ground and the tracks so made compared in size to those made by the men fleeing from the scene of the crime. There was other evidence which tended to point to appellants as the perpetrators of the act. Their conflicting stories of their whereabouts on the evening in question, told to the officers, did not sound good. There is ample evidence to justify the verdict. The principal contention of appellants is that the testimony of the daughter is unworthy of belief. She testified at the inquest that she saw no one in the yard that night and had no idea who shot her father. She told no one that she saw appellants running from the scene of the murder, or that she saw John Sonoqui near her bedroom window, until she told her husband about it some two weeks before the preliminary hearing, which was held November 18, 1932. However, she had an explanation as to why the story was not told before, which was believed by the jury and which, with other facts in the case, would seem to make it sufficient as an explanation.

The matters above referred to go but to the weight of the evidence, which it is the function of the jury to determine in the first instance and the trial court on motion made after verdict; "and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal" upon the ground herein discussed, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389. Under the evidence in this case, even in the face of the contention of appellants as to the testimony of the daughter, we cannot so say.

[4] (2) Nor can we see any merit in appellants' claim that the ruling of the judge presiding at the first trial, in granting a new trial on the ground of insufficiency of the evidence, established the law of the case on that question in the second trial, even assuming that the evidence might be substantially the same. To so hold would mean that there could be no new trial. Instead of granting a motion on that ground the court should make some order finally disposing of the case, which of course it has no jurisdiction to do. In few cases is there any very substantial change in the evidence on the new trial. Such order was not a final judgment, and yet that is the effect appellants claim for it. The cases cited show that the phrase "law of the case" arises out of a final determination of a question of law on appeal. City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 P. 298. It is true the judge presiding on the first trial with brutal frankness, but without judicial poise, branded the daughter as a "liar"; but an equally honest man might come to an entirely different conclusion in that regard.

[5] (3) Appellants urge that the conduct of the district attorney in his opening statement in the trial in chief and in his argument to the jury was calculated to and did prejudice the rights of defendants and prevented them from having a fair trial. While we must admit that some of the things complained of could well be classified as examples of how a prosecutor should not conduct a trial, we are of the opinion that if any prejudice resulted at all it must have reacted in the minds of intelligent and fair jurors rather against the case of the people than in its favor. The record shows, however, that appellants either did not object, or if objection was made the court admonished both the district attorney and the jurors in such a way that we fail to see how prejudice could have resulted; and we must presume that the jurors followed such admonition and instruction, in the absence of an express showing to the contrary in the record before us.

[6, 7] (4) In the investigation of the case appellants were asked by the officers if they had any guns or shells of .22 caliber, to which they replied that they did not. This was after the officers had found some .22 short caliber shells at the scene of the homicide. Subsequently in the Sonoqui home the investiga-

tors found a rifle and revolver of .22 caliber, as well as some .22 short caliber shells. Asked as to why they said they had no guns in the house except two shotguns, they responded that it was because they "didn't want to get mixed up in this murder of Ruiz." The lantern being used by Ruiz when he was shot was found with a nick in the handle, as though made by a bullet, and an irregular piece of lead smaller than a bullet was found near by, which might have been a piece of the bullet cut off and deflected after striking the lantern handle. These were all introduced in evidence over appellants' objection that they were incompetent, irrelevant, and immaterial, and no proper foundation laid. The guns and bullets found in the home of appellants were properly introduced in connection with the evidence of their finding, in rebuttal of the statement made to the officers denying possession of any such articles. Being the same size and caliber as those used in perpetrating the crime, they were also competent evidence showing that appellants had the means at hand to commit the offense charged against them. People v. Mooney, 177 Cal. 642, 171 P. 690. The lantern and piece of lead found were necessary to show a complete picture of the physical surroundings of the crime as a part of the people's case and as furnishing a circumstance bearing upon the charge, "whether directly or remotely" being "for the jury to decide in view of all the other facts and circumstances." People v. Mar Gin Suie, 11 Cal. App. 42, 51, 103 P. 951, 956.

[8] A letter written by appellant Remigio Sonoqui to Martina Ruiz, wife of decedent, was admitted in evidence against said appellant and over his objection. The missive was dated at San Quentin, Calif., Wednesday, July 23, 1930, some nineteen months after the crime charged, and it might well be characterized as a fervent love letter. It was introduced in connection with a statement made by Remigio to Officer Morrell, in the course of which he was asked if he was ever in love with decedent's wife, to which he replied, "No, I was not." He was then asked if he ever wrote her any love letters, to which he answered, "Well, that one you had [referring to the letter in question] is the only one, because I didn't know who she was." The letter was addressed to "Miss Margaret Sonoqui." When first asked if he wrote to Mrs. Ruiz under the name of Sonoqui, Remigio denied it and said, "That is a forged letter." After admitting in the statement that he wrote the letter he stated that he did not know it was Mrs. Ruiz, but that it was in reply to a letter signed by the same name which he received and thought came from a cousin of his. It was stipulated that defendant Remigio Sonoqui was either in jail or prison from the day following the homicide up to the time of writing the letter in question, and that he did not visit Mrs. Ruiz during such time. The particular objection appellants' counsel seem to have to the letter is that it was dated at San Quentin. After the stipulation above referred to was made the court instructed the jury that the fact as to defendant Remigio Sonoqui being in custody was not for their consideration except to show his inability to have personal relationship with Mrs. Ruiz, and that they were not under any consideration whatsoever to allow the fact of some other offense having been committed to enter into their deliberations, which admonition was stated to be satisfactory by appellants' counsel. It would seem, however, that with the evidence already before the court as to the love existing between such appellant and the wife of decedent prior to the murder, the fact that it could endure in spite of bars from the day after the murder until the date of the ardent letter had a very material bearing on the depth of such affection and as to whether or not it was deep enough to motivate an act such as that here in question. Furthermore, the fact that the correspondence with Mrs. Ruiz was carried on under an assumed name might evidence a desire to keep the relationship secret, and to some degree at least point to a guilty conscience on Remigio's part.

Judgment and orders affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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133 Cal.App. 391

## NITZSCHE v. STEVENS.

Civ. 8757.

District Court of Appeal, Second District,
Division 1, California.
July 22, 1933.

**Appeal and error** ⚷1010(1).

Judgment must be affirmed where record and appellant's brief show sufficient evidence to sustain court's fact finding constituting sole ground of appeal.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Robert V. Nitzsche, by his guardian ad litem, Helmer E. Sanner, against C. D. Stevens. Judgment for plaintiff, and defendant appeals. On respondent's motion to dismiss the appeal or affirm the judgment.

Motion granted, and judgment affirmed.

George L. Greer, of Los Angeles, for appellant.

Charles W. Cradick and Clarence W. Hull, both of Los Angeles, for respondent.

PER CURIAM.

This matter has been submitted on motion of respondent for an order dismissing the appeal or affirming the judgment; the motion being made pursuant to section 3 of rule V.

The plaintiff's injuries were received by reason of an automobile collision caused by the negligence of defendant. The sole ground of appeal, as stated in the brief for appellant, is that under the evidence the plaintiff was guilty of contributory negligence as a matter of law. A brief inspection of the record, together with a reading of the few pages of testimony shown in the supplement to appellant's brief, is sufficient to show that there is evidence sufficient to sustain the finding of the trial court in favor of the plaintiff on said issue of contributory negligence.

The motion is granted, and the judgment is affirmed.

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133 Cal.App. 466

## PEOPLE v. QUINTAL.

Cr. 1703.

District Court of Appeal, First District, Division 1, California.

July 28, 1933.

**1. Criminal law** ⚷1182.

Appeal from judgment of conviction and order denying motion for new trial *held* abandoned, where oral argument was waived and no brief was filed by appellant.

**2. Burglary** ⚷45.

Guilt of defendant prosecuted for burglary *held* for jury.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Anthony Quintal was convicted of second degree burglary, and he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

KNIGHT, Justice.

[1] After having initiated and caused to be perfected the within appeal from a judgment of conviction of second degree burglary and from an order denying a motion for a new trial, counsel for appellant, to all intents and purposes, abandoned the same; oral argument having been waived and no brief having been filed.

[2] An examination of the record shows that the place burglarized was a so-called sandwich shop located at 199 Fremont street in San Francisco. The glass in the front door had been smashed so as to allow the bolt on the inside to be thrown. According to the testimony given by the police officers who detected the burglary and arrested appellant, two men were seen emerging from the place about midnight, each carrying a sack partly filled with something. When called upon to stop they started to run. A pistol shot was fired at one, and he fell to the street. A shot was then fired at the other, and he dropped the sack, but continued his flight, turning the corner and disappearing from the view of the pursuing officer. The officer then blew his whistle, and appellant was captured by another officer a few blocks from, and taken back to, the sandwich shop. In the meantime the other man, who had fallen in the street, had disappeared, abandoning the two sacks, which were found to contain cigars, cigarettes, etc., belonging to the sandwich shop. The officers further testified that as soon as appellant was brought back to the sandwich shop he was searched in the presence of several officers and certain documents stolen from the cash register were found on his person, and that in explanation of his connection with the burglary he stated to them that he had been hired by a man to help move the goods out of the sandwich shop and that not knowing the place had been burglariously entered he accepted the employment. At the trial, taking the witness stand in his own behalf, appellant denied ever having been in or near the sandwich shop, or of ever having made the statement attributed to him. He also denied that any stolen documents were found in his possession. He claimed that he had been visiting a barroom on Third street and was on his way to his room when arrested; and that after being taken back to the sandwich shop he saw the officers themselves remove the documents which they claimed to have found in his possession from the drawer of the cash register.

In view of the foregoing conflict in the testimony it was the exclusive province of the jury to determine the truth of the matter, and obviously the evidence adduced by the prosecution is legally sufficient to sustain its decision. Moreover, the record shows that appellant was given a fair trial, and that the jury was properly instructed.

On motion for new trial appellant produced a prisoner from the county jail under sentence to the penitentiary for first degree robbery, after having pleaded guilty thereto, and against whom other charges of robbery were pending, who claimed that he and a friend, not the appellant, committed the burglary. But on cross-examination circumstances were developed which fully warranted the trial court in disbelieving his testimony.

The judgment and order appealed from are therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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133 Cal.App. 437

### LARSON v. LAWSON.

**Civ. 7688.**

District Court of Appeal, Second District, Division 1, California.

July 26, 1933.

**1. Appeal and error 🔑616(2).**

Record *held* insufficient to justify reviewing court's consideration of notices of motion with affidavits, incorporated in appellant's brief, where certificate did not show that notices and affidavits were used in connection with proceeding before trial court, though they were all set out in reporter's transcript.

**2. Appeal and error 🔑184.**

Alleged error of granting to respondent jury trial could not be complained of, where appellant did not object to jury trial, either at trial or in connection with motion for new trial.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Joseph L. Larson against Howard B. Lawson. From the judgment, plaintiff appeals.

Affirmed.

Harry G. Sadicoff, of Los Angeles, for appellant.

Goudge, Robinson & Hughes, David A. Sondel, and Sanford Wilson, all of Los Angeles, for respondent.

YORK, Justice.

This is an appeal under the so-called alternative method from a judgment rendered in favor of defendant and respondent and against plaintiff and appellant.

[1] In connection with the first-stated ground of appeal there is incorporated in the brief of appellant a certain notice of motion with two affidavits of respective counsel, and a certain notice of motion to vacate the setting and set the action for trial before a jury, and certain other affidavits of counsel. However, although they are all set out in the reporter's transcript, the certificate does not show that they were used in connection with any proceeding before the trial court. The record is not sufficient to furnish a basis upon which this court properly may consider the same in reference to this appeal.

[2] The first ground of appeal is that "The court erred in granting the respondent a jury trial." But there is nothing in the record to show that there was any objection by the plaintiff to the jury trial, either at the time of trial or in connection with any motion for a new trial.

As to the second ground of appeal stated by plaintiff, an examination of the record itself discloses that there was a substantial and direct conflict in the evidence upon the issues relative to the principal questions urged by the appellant in support of this second ground of appeal. Appellant states his second ground of appeal as "Insufficiency and total absence of evidence to justify the verdict and the judgment rendered thereon." The record discloses sufficient evidence to justify the verdict.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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133 Cal.App. 559

### PEOPLE v. SANDOW.

**Cr. 89.**

District Court of Appeal, Fourth District, California.

July 31, 1933.

Hearing Denied by Supreme Court Aug. 28, 1933.

**1. Criminal law 🔑508(1).**

In burglary prosecution, it was proper to prove corpus delicti by accomplice.

**2. Criminal law 🔑511(2).**

In burglary prosecution, evidence sufficiently connected defendant with crime to corroborate story told by accomplice (Pen. Code, § 1111).

**3. Witnesses 🔑372(1).**

Where prosecution witness was asked whether she was friendly to defendant, refusal to strike answer showing illicit relations between defendant and witness' daughter *held* not reversible error.

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Motion was made to strike such matter as voluntary statement without issues of case, and on ground that it was incompetent, irrelevant, immaterial, and not called for by question.

**4. Witnesses 🔑372(1).**

When question is asked, answer to which naturally calls for state of mind, and purpose of which is to draw inferences of prejudice, generally evidence which may counteract or justify such inferences is admissible.

**5. Witnesses 🔑321.**

Defense attorney recalling prosecution witness to complete foundation for impeaching testimony did not make witness his witness so that he could not impeach her.

**6. Witnesses 🔑363(1).**

State of mind of witness as to bias or prejudice, interest involved, or attitude towards party are always proper matters for investigation.

**7. Witnesses 🔑266.**

Cross-examination of witness is matter of right.

**8. Criminal law 🔑1186(4).**

Ruling that defense counsel recalling prosecution witness to complete foundation for impeaching testimony made witness his witness so that he could not impeach her, though erroneous, *held* not prejudicial in burglary prosecution (Const. art. 6, § 4½).

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Appeal from Superior Court, Orange County; James L. Allen, Judge.

John Sandow was convicted of burglary, and he appeals.

Affirmed.

Hearing denied by Supreme Court; LANGDON, J., dissenting.

A. P. Nelson, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

TURRENTINE, Justice pro tem.

[1] Defendant was convicted of burglary, and the appeal is from the judgments of conviction and order denying a new trial. It appears from the evidence that defendant resided at the home of one Mrs. Briney, who was the mother of one James Lankford. The defendant and James Lankford occupied the same room in the Briney home. Lankford testified that he and the defendant entered four different garages after night and that each took from the garages certain personal property which they took to the room which he and the defendant were occupying. Among other things that the witness and defendant took were a hack saw and Stillson wrench. The defendant had a small sewing machine motor which he told Lankford he obtained from one garage, stating there were other tools there, and they went together to this garage and got the tools. At no time did they have permission to enter the garages or obtain the property. James Lankford is an admitted accomplice. It was proper to prove the corpus delicti by the accomplice. People v. Richardson, 161 Cal. 552, 563, 120 P. 20; People v. Frazer, 80 Cal. App. 464, 468, 252 P. 633. Defendant attacks the judgments on (a) errors in instructions to the jury; (b) insufficiency of the evidence to support the verdicts, which is a claim that the accomplice was not sufficiently corroborated; (c) errors in admission of evidence.

[2] In corroborating the story told by the accomplice, evidence was offered of the following facts: (a) A portion of the stolen property was found in the room occupied by defendant and the accomplice. (b) That he moved some of the property from his room to the home of his own mother, which was in another part of town. (c) That some of the property was placed in the basement of the house belonging to his mother. (d) That a certain hack saw was taken by the defendant from his room to his mother's place. (e) That when arrested and asked about this hack saw he said that it belonged to his sister. (f) When defendant was on the stand he stated that he never made such statement respecting the hack saw, and that his sister did not purchase nor own it. (g) That he had the sewing machine motor around the home of Mrs. Briney and offered to sell it to a person by the name of McIntyre. (h) That, when Mrs. Briney asked him where he got the motor, defendant said he got it down the street. After his arrest he made an escape from the officers and fled, and on the stand the defendant had denied having moved the tools to his mother's house, and denied telling Mrs. Briney that he took them to his mother's house, and denied that he had ever seen the sewing machine motor. We think that this evidence, independent of, and in no way dependent on, the testimony of the accomplice, sufficiently connects, or tends to connect, the defendant with the commission of the crime to satisfy the requirements of Penal Code, § 1111, and the rule of corroboration as laid down in the case of People v. Yeager, 194 Cal. 452, on page 473, 229 P. 40.

[3, 4] On cross-examination, defendant's counsel asked Mrs. Briney: "You are not particularly friendly to Mr. Sandow are you, Mrs. Briney?" To which she replied: "A. As far as being friendly I am friendly but then we never did get along very good—he has a couple of children by my daughter but was never married to her." Defendant's counsel moved to strike the last sentence as

a voluntary statement of the witness without the issues of the case and on the ground that it was incompetent, irrelevant, and immaterial and not called for by the question, which motion was denied. This he assigns as reversible error. We are of the opinion that, when a question is asked, the answer to which naturally calls for a state of mind, and the purpose of which is to draw inferences of bias, prejudice, or motive from the answer, generally, evidence which may counteract or justify such inferences is admissible. This principle which we announce seems to have support in People v. Johnson, 106 Cal. 289, 39 P. 622. In that case a police officer had testified for the prosecution that he had taken quite an active part in the defense. In rebuttal he was asked his reason for the interest, and stated that on investigation he believed the defendant innocent. The answer was on motion stricken out. On page 293 of 106 Cal., 39 P. 622, the court said: "The prosecution having proven that the witness had an interest in the result of the litigation, for the purpose of weakening the effect of his testimony, we see no valid reason why opposing counsel had not the right to show generally what that interest was for the purpose of counteracting the effect of the former evidence."

[5] Counsel for defendant asked Mrs. Briney, a witness for the prosecution, certain questions in laying a foundation for her impeachment, as follows:

"Mr. Nelson (To Witness): Are you acquainted with Genevieve Lan Franco? A. I am.

"Q. Do you remember some time the last part of February, 1932, of having a conversation with her, at your home in your bedroom, at which time you and she were present and no one else? A. We might have, she stayed at my place at that time, lived there.

"Q. And in which you stated in substance that you would like to see Jack Sandow back in prison, that he was always butting into your affairs, and you would do anything you could to send him back, or that in substance? A. I did not.

"Q. Never made such a statement? A. No."

It was established elsewhere in the evidence that the witness at the time of the crimes and trial was residing at 202 West Washington, and the term "at your home" may have referred thereto. Thereafter, in due course, defendant called Mrs. Lan Franco for the purpose of impeaching Mrs. Briney, and she was asked:

"Q. Now, did you, some time in the month of February, the latter part of February, in 1932, did you ever have a conversation with Mrs. Briney relative to the defendant, Jack Sandow? A. Yes. * * *

"Q. Where did that conversation take place? A. It took place at 801 North Ross, Santa Ana, at her home, in the bedroom. * * *

"Q. Now what was said by Mrs. Briney at that time, relative to the defendant, Jack Sandow?

"Mr. Kaufman: Just a moment, we object to that on the ground that it is too remote, no proper foundation having been laid for it.

"Mr. Nelson: The foundation has certainly been laid, because I asked the witness as to time, place, those present and if the conversation, which will be testified to, was in substance had. How can I lay any better foundation?

"Mr. Davis: If my memory is right, Mr. Nelson asked the witness Mrs. Briney if this conversation took place in her bedroom at 202 West Washington. This is the first witness that has mentioned 801 North Ross.

"The Court: "I don't think this is impeaching a conversation that you laid the foundation for, Mr. Nelson.

"Mr. Nelson: I would like to recall Mrs. Briney, if the Court please.

"The Court: Very well.

"Mr. Nelson: Maybe she can answer right from there.

"The Court: You may recall her to the stand.

"Mr. Kaufman: This is your witness now.

"The Court (To Mr. Nelson): She is your witness if you call her.

"Mr. Nelson: I just want to lay my impeaching foundation.

"The Court: Very well, you may call her to the stand, but you are making her your witness. Mrs. Margaret Louise Briney again resumes the stand, Mrs. Lan Franco being withdrawn by Mr. Nelson.

"Mr. Nelson (To Mrs. Briney): "Q. Mrs Briney, I asked you with reference to a conversation which you had with Mrs. Lan Franco, in which I am laying a foundation. I asked if you had such a converation at your home in 202 West Washington Street. Now, I will ask you the same question and ask you if you had such a conversation with her at 801, at your home at 801 North Ross Street? A. No, I did not.

"Mr. Nelson (To Witness): That's all.

"Mr. Nelson: Mrs. Lan Franco, you may resume the stand. (Mrs. Jennie V. Lan Franco thereupon resumes the stand for further direct examination by Mr. Nelson.)

"Mr. Nelson (To Witness): Q. Now, I will ask you to state the conversation.

"Mr. Kaufman: At this time, Your Honor, we object, no proper foundation laid on the ground that this conversation, if the conversation was had, was too remote; on the fur-the ground that counsel cannot impeach his own witness. This woman you put on the stand, Mr. Nelson, is now your witness.

"Mr. Nelson: She was recalled for the purpose of correcting my cross-examination. She is not my witness in any sense of the word.

"Mr. Kaufman: The Court advised you she was your witness.

"The Court: Yes, the Court said she testified as to a conversation on Washington Street, and you had a right to lay a foundation to anything she testified to, to impeach her which had been testified to on her direct examination. As to North Ross Street, a conversation, the Court said, 'if you put her on, you put her on as your own witness.'

"Mr. Nelson: I recalled her, if the Court please, simply for the purpose of correcting the location.

"The Court: I understand, but that wouldn't be cross-examination, there was nothing said to her about North Ross Street. Sustained.

"Mr. Nelson (To Witness): That's all."

While the impeaching question is not in proper form, this record discloses that the court ruled that he would not permit the impeachment of the witness regardless of the form of the question and it would have been useless, almost a contempt of court, for defendant's counsel to attempt to frame further questions along this line, in view of the ruling. We do not think that defendant made the witness, Mrs. Briney, his witness, when he recalled her for the purposes indicated, regardless of the comment of the court to that effect. People v. Lee Chuck, 74 Cal. 30, 15 P. 322. It is to be particularly noted that, in the question to Mrs. Briney, the conversation was laid at her home, and in the question to Mrs. Lan Franco it was at her home at 801 North Ross street. It is only to reference elsewhere in the record that we find that the home of Mrs. Briney was 202 West Washington. The probabilities are that she had moved from one address to the other, and the location of the conversation at her home in the bedroom is definite enough in itself to lay the proper foundation.

The evidence sought to be obtained was admissible.

[6] "'It is elementary law, supported by all authority, that the state of mind of a witness as to his bias or prejudice, his interests involved, his hostility or friendship towards the parties, are always proper matters for investigation, in order that truth may prevail and falsehood find its proper level. If the inner workings of a witness' mind are actuating his testimony, and the workings of that mind are brought forth to the light and held up in full view before the jury, results will be obtained much more in accord with truth and justice than though the witness' testimony is weighed and measured by his words alone. * * *'" People v. Pantages, 212 Cal. 237, 258, 297 P. 890, 899.

[7] The elementary rules of cross-examination have been recently stated by the United States Supreme Court in the case of Alford v. United States, 282 U. S. 687, 51 S. Ct. 218, 219, 75 L. Ed. 624, and among other rules lays down the following:

"Cross-examination of a witness is a matter of right. * * * Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. * * * In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony. * * *

"The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross examination. This was an abuse of discretion and prejudicial error."

While these and other rules in the Alford Case were applied to a different state of facts, the fundamental reasoning is the same in that the defendant was denied the right to put on evidence, which all the authorities hold he has a right to produce, and on the ground that he was impeaching his own witness, which we have indicated is in no sense tenable.

[8] It remains to determine whether or not this error has in the instant case resulted in the miscarriage of justice. To determine this matter we have given very careful consideration to the entire transcript of the evidence and have arrived at the conclusion that the proof of the guilt of the defendant is established beyond a reasonable doubt. His own testimony is so inherently improbable as to, in itself, make us feel that it was deliberately false. Having arrived at this conclusion, we feel that the judgments must be affirmed in accordance with the requirements of section 4½ of article 6 of the Constitution.

The judgments and order appealed from are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

133 Cal.App. 500

## TIPTON v. TIPTON et al. (two cases).

**Civ. 4888, 4889.**

District Court of Appeal, Third District, California.

July 28, 1933.

**1. Divorce 🔑287.**

When Supreme Court returned divorce case to lower court to retry issue of rights in community property, it became court's duty to determine what constituted community property and to divide it.

**2. Divorce 🔑287.**

Where Supreme Court returned divorce case to lower court to retry issue of property rights, it was not necessary to receive in evidence testimony taken at former trial.

The court had a right to examine and use the findings of fact, conclusions of law, and judgment in the former trial, bearing on question of extreme cruelty, which had become final.

**3. Appeal and error 🔑194(2).**

General rule is that where, notwithstanding fact that denials in answer are not as broad as allegations of complaint or are otherwise insufficient, answer is treated as putting material facts in issue, plaintiff cannot for first time on appeal object that such denials were insufficient.

**4. Husband and wife 🔑270(8).**

In trial to determine rights in community property, evidence supported finding that wife executed deed of property to husband, but husband failed to perform condition therein requiring payment to wife's father.

**5. Contracts 🔑75(2).**

Promise by one to fulfill his own contract with another is no consideration for promise by third party.

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Appeals from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Actions by Thompson Ramsey Tipton against Florence Katherine Tipton and others and by Florence Katherine Tipton against Thompson Ramsey Tipton, were consolidated. From adverse judgments, Thompson Ramsey Tipton appeals.

Affirmed.

Clarence L. Belt and William G. Randall, both of Los Angeles, for appellant.

Koenig & Brunton, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem., delivered the opinion of the court.

The above causes were consolidated for trial and also for the purposes of the appeals. We will first consider the appeal in the case of Florence Katherine Tipton v. Thompson Ramsey Tipton. This is an action for divorce. At the former trial the plaintiff was granted a decree of divorce from the defendant on grounds of desertion and extreme cruelty. The court allotted all of the community property of the parties, which consisted of real estate of the value of $2,500, and also an automobile, to the defendant husband, who was the offending party. Thereupon the plaintiff appealed on the judgment roll from that part of the interlocutory decree which awarded all of the community property to the defendant. The Supreme Court held that, where a decree of divorce was granted on the ground of desertion, there was no discretion vested in the trial court but to divide the community property equally between the spouses. Civ. Code, § 146, subd. 2. When such a decree was granted on the ground of extreme cruelty, the community property must be assigned "in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just." Civ. Code, § 146, subd. 1. From the section the Supreme Court also held that it was contemplated that the nonoffending party was entitled to a greater proportion of the community property than a moiety. It also appearing that all of the community property had been awarded to the defendant, who was the offending party, the judgment was reversed as to the disposition made of the community property. Tipton v. Tipton, 209 Cal. 443, 288 P. 65. The cause was again tried upon the issue as to the rights of the respective parties to the community property. At the conclusion of the trial, the court found that the real estate was the sole and separate property of the plaintiff, subject to a community interest of the parties to the extent of $800, and awarded that portion of the community property to the plaintiff. The court further found that a certain Essex automobile of the approximate value of $400 was also community property, and it was awarded to the defendant.

[1, 2] The first trial was held before Hon. J. Walter Hanby and the second trial before Hon. C. P. Vicini. The evidence taken at the first trial was not introduced upon the second trial, and no evidence of specific acts of cruelty were introduced at the last-named trial. It is said in appellant's opening brief that: "The jurisdiction of Judge Vicini upon the second trial of this case was plainly limited to the disposition of the 'sole question' which remained for determination as stated in the opinion, that is, the division of the community property." In this we quite agree with counsel. The court found that the real estate was the separate property of the plaintiff, subject to a community interest of $800, which was awarded to the plaintiff, who was the in-

jured party. The court also awarded a $400 community interest in one Essex automobile to the defendant, who was the offending party. We are of the opinion that, when the Supreme Court returned the cause to the lower court to retry the issue of the rights of the parties in the community property, it became the duty of the court to determine what constituted the community property of the parties, and to divide it. Reid v. Reid, 112 Cal. 274, 44 P. 564; Central Sav. Bank of Oakland v. Lake, 201 Cal. 438, 257 P. 521. We do not believe that it was necessary for the court to receive in evidence the testimony taken at the former trial. The court had a right to examine and use the findings of fact, conclusions of law, and judgment in the former trial, bearing on the question of extreme cruelty, which had become final. In addition, it was also found on the second trial "that the plaintiff is in a weak physical condition, and is unemployed and not in good health," which finding is not attacked. It was not necessary to retry the entire issue of cruelty. Chandler v. People's Savings Bank et al., 73 Cal. 317, 11 P. 791, 14 P. 864, 2 Am. St. Rep. 812; Duff v. Duff, 101 Cal. 1, 35 P. 437. Furthermore, had this appellant desired to have the testimony taken at the former trial before the court on the second trial, he had the privilege of offering it in evidence. Upon the subject the following colloquy took place between the parties:

Question by Mr. Belt, counsel for appellant: "Q. Now, then, Mrs. Tipton, according to your divorce complaint, almost immediately after you and Mr. Tipton entered marriage he treated you in a cruel and inhuman manner? A. He did.

"Q. And did that continue until the date of the separation? A. It did.

"Mr. Brunton [counsel for defendant]: You are not going into the marriage and divorce?

"Mr. Belt: No, far from it."

These questions and answers of themselves disclose cruelty.

We are of the opinion that there is no merit in the claim of appellant, and that this judgment should be affirmed.

Thompson R. Tipton v. Florence K. Tipton: This action was brought for the purpose of quieting plaintiff's title to the land which was determined in the divorce action to be the separate property of the defendant in this action, and also to establish the existence of a lost deed from the defendant through which plaintiff claims title to said land as his separate property. Judgment went for the defendant, and the plaintiff appeals therefrom.

[3] Appellant claims that certain material allegations of his complaint were not denied by the answer, and, as we construe his contention, the findings and conclusions of the court and the judgment based thereon are contrary to these admissions. Without analyzing the various points advanced in support of this contention, it is sufficient to say that the case was tried upon the theory that the material allegations of the complaint were denied; evidence for and against the various claims of the respective parties as though all of the allegations of the complaint were denied was received without any objection; findings and judgment were entered; and the insufficiency of the denials of the answer are now raised for the first time. The following rule, appearing in volume 2, California Jurisprudence 246, § 73, is applicable to such a situation: "It is a general rule that where, notwithstanding the fact that the denials in an answer are not as broad as the allegations of the complaint or are otherwise insufficient to put the allegations of the complaint in issue, the answer is treated as putting the material facts in issue, the plaintiff cannot for the first time on appeal object that such denials were insufficient for any purpose."

This rule has been followed in Schuh v. R. H. Herron Co., 177 Cal. 13, 18, 169 P. 682; Zimmer v. Kilborn, 165 Cal. 521, 132 P. 1025; Kuhn v. Dickey, 66 Cal. App. 227, 225 P. 867.

The point is without merit.

[4] It is also advanced as a ground for reversal that the court's finding numbered 2 is not sustained by the evidence. The criticized finding is to the effect that between February 1, 1927, and February 15, 1928, while the plaintiff and defendant were husband and wife, the defendant made, executed, and delivered a grant deed of the property which is the subject-matter of this litigation to the plaintiff. The court further found in this connection that the said deed contained a condition precedent wherein said deed was not to become effective and was to be null and void unless the sum of $200 was paid to the defendant's father on or before one year from the date thereof, which said sum was not paid within the time specified, and said deed thereby became of no force or effect, and the court further found that no consideration was ever paid the defendant for the execution of said deed.

It is claimed by the appellant that this finding is not sustained by the evidence. The evidence discloses that the deed itself had never been recorded and was lost. Oral evidence of its contents was admitted. In answer to a question propounded by her counsel, defendant testified that she had a condition put in the deed to plaintiff that a debt owed by the plaintiff and defendant to the latter's father, in the sum of $200, should be paid by plaintiff. She testified: "That this deed will be made null if the sum of $200 is not paid on or before February 1, 1929, to H. Meinker." She further testified that the $200 was never paid; further that she had never received any consideration from the plaintiff for the execution of the deed.

This evidence, if believed by the court, and apparently it was, is sufficient to support that portion of the finding attacked by plaintiff. The testimony of the witnesses relied upon by the plaintiff merely raised a conflict.

It is a further contention of the appellant that the court was in error in finding that the payment of $200 to defendant's father was a condition precedent to the taking effect of the deed because the language used by the defendant was that the deed "will be made null and void" if the money was not paid. Whether the condition annexed was precedent or subsequent is immaterial, for the reason that the money was never paid and the time for the payment has, under either condition, long since expired.

[5] Appellant admits that no consideration was paid respondent for the deed given him, but he contends that the fact that the property was the separate property of the respondent and she was a joint maker with him on the note which was given for the purchase price of the property furnished a sufficient consideration. However, a promise by one to fulfil his own contract with another is no consideration for a promise by a third party. 6 Cal. Jur. 179, § 122; Ellison v. Jackson Water Co., 12 Cal. 542; Parrino v. Rallis et al., 116 Cal. App. 364, 2 P.(2d) 515.

Appellant also says that the court's finding that the allegations of paragraph V of the plaintiff's complaint are true fixes the time of the delivery of the deed by the respondent as occurring during the month of February, 1927. The facts are that the allegation of the complaint, found by the court to be true, alleged that the deed was delivered between November, 1927, and February 15, 1928. During the progress of the trial, the plaintiff asked leave to amend this part of the pleading by alleging the delivery between February 1, 1927, and February 15, 1927, which amendment was allowed by the court, although it was never inserted in the complaint. The finding of the court is that the allegation of paragraph V of the complaint is true and not paragraph V as amended. However, we cannot see where this finding as to the exact date of delivery is material, in the face of the other findings of the unperformed condition of the deed and that it was given without consideration. Further, the defendant testified that the deed was delivered in February, 1928, and the time for the fulfillment of the condition was one year later, which was more favorable to plaintiff than a delivery thereof in 1927. It is clear from the record that only one deed was given.

The court's finding No. IV is attacked. This finding is to the effect that at all times since March 15, 1927, plaintiff was in the possession of the property and had paid all taxes and assessments against the property and all interest charges upon incumbrances against the same. But it was further found therein that such possession was with the consent of the defendant and the aforesaid payments were made in accordance with an agreement of the parties, which payments were to take the place of the value of the use and occupation of the premises.

Conceding that this finding is without support in the evidence, we cannot see, nor has it been pointed out, what effect it has upon the ownership of the property, which has been found by the court to be the separate property of the defendant. It is an immaterial finding.

The court further found that the defendant, in executing the deed to the property in dispute, did not intend to divest herself of the ownership of the property, but conveyed it to the plaintiff so that he could borrow money thereon for the purpose of making improvements on the house situated on the premises. This finding was amply sustained by the evidence, but it is claimed by appellant that the intent with which a deed is executed cannot be testified to. In Gilmour v. North Pasadena Land, etc., Co., 178 Cal. 6, 9, 171 P. 1066, 1067, where the dispute was whether or not certain land was conveyed to a husband and wife as community property or because of the insistent demand of the wife that she should have a separate interest in the property, the court says: "The intent accompanying the act is to be inferred by the court or jury from all the circumstances, and the party's own testimony that he did not intend to make a gift, while competent, is not conclusive."

But, irrespective of this point, we are again confronted with the fact that the plaintiff failed to keep the condition requiring the payment of the money to defendant's father, and, further, that the deed was given to plaintiff without consideration, and either one of these facts constituted a defense to the plaintiff's judgment quieting his title to the property.

So far as the restoration of the lost deed is concerned, under the state of the record, the property belongs to the defendant, and its restoration would be an idle act.

We believe that what has already been said disposes of the appeal in each case. Therefore each one of said judgments is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

133 Cal.App. 428

## PEOPLE v. KAFFALINOS et al.

Cr. 1259.

District Court of Appeal, Third District, California.

July 25, 1933.

**Criminal law** ⚷1182.

Conviction must be affirmed, where brief was not filed nor appearance entered at time case was called for hearing, although transcript was filed some four months earlier (Pen. Code, § 1253).

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Spiro Kaffalinos and Sam Kaffalinos were convicted of assault with a deadly weapon, and they appeal.

Affirmed.

A. F. Ross, of Redding, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellants were convicted in the superior court of Shasta county of a felony, to wit, assault with a deadly weapon.

The transcript on appeal was filed in this court March 22, 1933. No brief has been filed in behalf of appellants. The cause was regularly placed on the calendar for oral argument on July 25, 1933. No appearance was made for appellants at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgments and the order are affirmed.

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133 Cal.App. 508

## PEOPLE v. BAILLIE.

Cr. 250.

District Court of Appeal, Fourth District, California.

July 28, 1933.

Hearing Denied by Supreme Court Aug. 25, 1933.

1. **Criminal law** ⚷511(1).

Evidence corroborating testimony of accomplice *held* sufficient to connect accused with kidnapping, warranting conviction therefor (Pen. Code, § 1111).

2. **Criminal law** ⚷511(2).

To warrant conviction, evidence corroborating testimony of accomplice need be neither strong nor convincing, but is sufficient if, standing alone, it connects, or tends to connect, defendant with commission of crime (Pen. Code, § 1111).

3. **Criminal law** ⚷511(1).

To warrant conviction, evidence corroborating testimony of accomplice need not extend to all facts and details covered by statements of accomplice (Pen. Code, § 1111).

4. **Criminal law** ⚷183.

Refusal to allow plea of former jeopardy by accused with whose consent jury was discharged before it reached verdict *held* not error.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Joseph P. Baillie was convicted of kidnapping, and, from the judgment, and from an order denying his motion for a new trial, he appeals.

Affirmed.

Joseph L. Fainer and R. E. Parsons, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Arthur Veitch and William Brayton, Deputy Dist. Attys., all of Los Angeles, for the People.

TURRENTINE, Justice pro tem.

The defendant and a number of other persons, including Ralph Sheldon and Jimmie Doolen, were jointly charged by indictment with the crime of kidnapping for the purpose of extortion and robbery. Sheldon and others were convicted in an earlier trial. The charge against Doolen, an admitted accomplice, was dismissed so that he might testify on behalf of the prosecution. After trial, a verdict of guilty resulted, and this is an appeal from the judgment of conviction and from the order denying defendant's motion for a new trial.

Defendant concedes there was sufficient evidence to establish the fact that a Mr. Caress, his wife, and their Japanese servant had been kidnapped and held for ransom. He contends, however, that there was insufficient evidence, independent of the accomplice Doolen, to connect, or tend to connect. him with the offense charged.

It appears that on the night of December 20, 1930, Caress, his wife, and the Japanese servant were kidnapped and taken to a house, where they were kept prisoners, and a demand was made on Mr. Caress for $50,000 ransom. He drew four checks and handed them to one of the persons who held them captive. He then suggested one Les Breuneman as a person likely to assist the kidnappers in cashing the checks and talked to Breuneman over the phone, requesting him to try and cash the checks at one of the gambling ships off Long Beach, and arranged an appointment for Breuneman to meet some one or more of the kidnappers. This was late on the afternoon of December 21, 1930. Later that same day a Dodge sedan carrying four passengers came to a stop on a road near one of the docks in the vicinity of Long Beach. Two police officers in a patrol car, upon seeing the automobile parked at such a place, pulled up alongside and began questioning the occupants. During the course of the questioning some one started shooting, and a somewhat extended pistol duel between the occupants of the car and the officers ensued. Two of the occupants of the sedan, namely, Ralph Sheldon, who gave his name as Ralph Sherman, and Les Breuneman were captured, but the other two escaped. Upon being searched, it was found that Les Breuneman was in possession of the four checks before referred to. The witness Doolen gave a detailed account of the defendant's participation in the kidnapping.

[1] The question presented is what evidence, independent of the witness Doolen, connects, or tends to connect, the defendant with the kidnapping? Evidence of the following facts, independent of, and not dependent upon, the testimony of witness Doolen in any way, were before the jury: (a) The automobile in which the four persons were seated when the police officers started to question them in Long Beach was registered in the name of defendant Joseph P. Baillie. (b) The ignition key used in the sedan was attached to a key case, and one of the other keys in this case fitted the lock on the front door of the house in which Caress, his wife, and their Japanese servant were then being held prisoners. The lock was in evidence, and the key was actually used in court to lock and unlock it. (c) The automobile was taken to a garage in Long Beach, but was never claimed by the defendant. Near the end of July, 1931, the wife of defendant appeared and claimed the car, and it was delivered to her. (d) The address on the registration certificate of the sedan was the residence of defendant. On discovering this fact, the officers immediately rushed to the house, arriving about midnight, found defendant's wife home and that the defendant was not at home. (e) The defendant's wife testified on his behalf, stating he had been sick in bed with the flu and asthma for five days preceding December 20th; that he had stayed home all the night of the 20th and the morning of the 21st; that on Sunday, the 21st, he had gone out to get some air; that, when the officers arrived about midnight of the 21st and asked for her husband, she thought it was he who was seeking admittance. All that night and for several days thereafter police officers remained at the Baillie home continuously, but defendant did not put in an appearance. (f) During the latter part of December and in January, defendant was seen working on a ranch which belonged to Ralph Sheldon, one of the defendants. (g) When an investigation was made of the house in which Caress, his wife, and the Japanese servant had been held prisoners, there was discovered in the fireplace a piece of burned paper which consisted of a duplicate tag or receipt issued by a shoe company at its place of business in Hollywood, located about three or four blocks from the residence of defendant, and on which ticket was written the name "Bailey." (h) The defendant was apprehended in Balboa, Panama Canal Zone, and was extradited. On the trip back he stated to the police officers that he had traveled from Los Angeles to New Orleans by bus, had then gone to Belize, British Honduras, and after a stay there had gone to Panama City and then to Balboa.

[2, 3] We think this evidence, standing alone, and in no way dependent upon the testimony of the accomplice Doolen, is sufficient in itself to connect, or tend to connect, the defendant with the commission of the crime, and is squarely within the rule in California, which may be stated as follows: The corroborative evidence required by Penal Code, § 1111, need be neither strong nor convincing; it may be such that if it stood alone would be entitled to but little weight. It need not extend to all facts and details covered by the statements of the accomplice. It is sufficient if, standing alone, it connects or tends to connect, the defendant with the commission of the crime. The courts announced this rule in many cases, and have very clearly expressed it as follows: "It has been held that to corroborate an accomplice the evidence need not establish the actual commission of the offense, nor extend to every fact and detail covered by the statements of the accomplice, or to all the elements of the offense, nor prove that the accomplice has told the truth. The corroborative evidence must tend in some slight degree, at least, to implicate the defendant. While it need not be strong, more is required by way of corroboration than a mere suspicion. It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight. It is not necessary to corroborate the accomplice by direct evidence. If the connection of the accused with the alleged crime may be inferred from the corroborating evidence in the case, it is sufficient." People v. Yeager, 194 Cal. 452 on page 473, 229 P. 40, 49.

[4] The defendant urges that the trial court committed reversible error when it refused

to allow him to make a plea of once in jeopardy. The circumstances surrounding this contention are as follows: After a jury had been impaneled to try the case and the district attorney had made his opening statement, a juror stated that the statement of the district attorney had recalled certain matters to her mind which made her feel that she could not act as a fair and unbiased juror. When the juror made this statement, the following took place in the courtroom:

"The Court: Mr. Fainer (counsel for defendant), what is your pleasure in the matter?

"Mr. Fainer: Your Honor, at this time I make a motion that this trial be declared a mistrial because of the fact that one of the jurors has made the statement after she has been sworn as a juror and the opening statement has revived something she has heard and discussed, and she could not be a fair juror in the matter; so I move at this time that this matter be declared a mistrial.

"The Court: Mr. Baillie, * * *

"Q. You have heard the statement and motion made by your counsel, that the court declare this a mistrial? A. Yes, your Honor.

"Q. Is that entirely agreeable to you? A. Yes, sir.

"Q. And do you stipulate that the court do order a mistrial? A. Yes, your Honor.

"The Court: Mr. District Attorney, is there anything you have to state in the matter?

"Mr. Veitch: We join in the stipulation, and we suggest this: That the stipulation be broadened to the extent that it include this jury, under that order, shall be discharged, and that a new jury shall be impaneled to try the case.

"Mr. Fainer: So stipulated, your Honor.

"The Court: Is that your stipulation, Mr. Baillie?

"Defendant Baillie: Yes, your Honor.

"The Court: You agree to that?

"Defendant Baillie: Yes, your Honor.

"The Court: Very well. For the reasons stated by the juror, Mrs. Lucas, and because of the reasons set forth in the motion of counsel for the defendant, and upon the stipulation of the defendant himself made in open court; likewise upon stipulation of the District Attorney; and good cause appearing therefor to the Court, it is now ordered that a mistrial be had in this case."

The jury was then dismissed and the case reset for trial. When it was called several days later, one of the attorneys for the defense asked leave to interpose the additional plea of once in jeopardy. In asking for such permission, he stated that he wished to enter such plea because of the dismissal of the first jury sworn in the case without such jury having reached and rendered a verdict predicated on the proceedings as hereinbefore set forth. The court refused permission to defendant to interpose such plea. With this state of the record we do not see how defendant could claim that he had been once in jeopardy or how his rights were prejudiced by a refusal to permit such claim. It must be borne in mind that all of the facts on which he desired to predicate the plea were admitted and were before the court at the time it refused him the right to make the plea. In the case of People v. Curtis, 76 Cal. 57, 17 P. 941, the defendant moved for a new trial, which was granted, and asked at the new trial to be allowed to plead once in jeopardy and former acquittal. On appeal, the Supreme Court said on page 59 of 76 Cal., 17 P. 941, 942: "As the jury was discharged with the consent of the defendant, without rendering a verdict, it must be held that there was no jeopardy and no acquittal. * * * Therefore the court did not err in refusing to allow defendant to plead former jeopardy and former acquittal. * * *" People v. Kelly (Cal. App.) 22 P.(2d) 526, lays down the rule as follows: "It is equally well settled that where a defendant has consented to the discharge of a jury before a verdict is reached, the plea of once in jeopardy is not available to him." Whatever may be the mechanics employed in the trial court in disposing of such a matter, it certainly cannot be urged as reversible error to deny defendant the right to make a plea of once in jeopardy under the facts as presented by the record in this case.

The claims by defendant that the admission of certain evidence is prejudicial error we think are disposed of by the decision in the case of People v. Frank (Cal. App.) 22 P. (2d) 792, 795, which was decided on the same indictment as this case. While the evidence objected to was not identical, the following statement in that case disposes of appellant's contention in this case adversely to him:

"Rulings of the court assigned as error relate to: (a) The admission of testimony concerning the stolen auto; (b) the purchase and delivery of a radio; (c) pistols being carried in a car; (d) conversations between Doolen and Wagner; (e) the burning of stolen clothing and a house; (f) the testimony of Wagner; (g) the testimony of Slaughter, Schack, Coit, and Mittwer in connection with the Long Beach occurrence.

"While the objections to these different elements of the testimony do not rest upon identical grounds, running strongly through them is the common ground that they have no possible relation to the issues of this case and are introduced by the state to create an atmosphere of general criminality on the part of defendants of crimes unrelated in character to the crime here involved and must have influenced the jury prejudicially against the defendants. An examination of the record as to each and all of these assignments of error indicates that the evidence had a fair tendency in every instance to show the relation existing between the defendants, to corroborate the testimony of the accomplice Doolen, and to support the theory of a conspiracy."

The claim of prejudicial misconduct on the part of the district attorney is answered by our holding that the evidence complained of was properly admitted in evidence, for it was on this conduct of the district attorney, in eliciting competent evidence, that the defendant charges him with misconduct.

Judgment and order affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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133 Cal.App. 574

## PEOPLE v. REYES.

Cr. 88.

District Court of Appeal, Fourth District, California.

Aug. 1, 1933.

**1. Homicide ⚷250.**

Evidence *held* sufficient to sustain conviction of murder.

**2. Criminal law ⚷1144(13).**

All intendments favor upholding judgment of conviction, and evidence must be viewed in light most favorable to prosecution, on appeal.

**3. Criminal law ⚷696(2).**

Error, if any, in offering as exhibit for identification blood-stained shirt, later shown not to belong to defendant, in murder trial, was waived by defendant's failure to move to strike it out.

**4. Criminal law ⚷721(5).**

District attorney's statement in argument to jury that all facts shown by state stood uncontradicted, undenied, and unchallenged, and without explanation by sworn testimony, *held* not prejudicial error.

**5. Criminal law ⚷723(5).**

District attorney's remark in argument to jury on trial of Mexican for murder that average Mexican can face death unflinchingly, which perhaps is why they can take other lives calmly, *held* not prejudicial error.

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Benito Reyes was convicted of murder, and he appeals.

Affirmed.

P. E. Bingman and C. O. Thompson, both of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., Alberta Belford, Deputy Atty. Gen., and Stanley Mussell, Dist. Atty., and Albert E. Weller, Deputy Dist. Atty., both of San Bernardino, for the People.

TURRENTINE, Justice pro tem.

Defendant was charged by information with the crime of murder, tried before a jury, found guilty, with recommendation of life imprisonment, and judgment was pronounced. This appeal is from the judgment of conviction and from the order denying defendant's motion for new trial.

It appears from the evidence that the deceased, Antonio Celis, a young Mexican, had been living at North Cucamonga, at the home of defendant's father for a short time prior to his death, which occurred on December 5, 1932. Defendant likewise lived in this village, living a part of the time at his father's home and a part of the time at the home of a woman by the name of Mary Rodriquez. At about 5 o'clock on the morning of December 5, 1932, the defendant and the deceased went into the pool hall of Francisco Lopez, remained a few minutes, and bought a package of cigarettes, after which deceased and defendant walked out of the pool hall together. This is the last time the deceased was seen alive. On the afternoon of December 5th the body of deceased was found in a pepper grove about a mile from the pool hall, with his head crushed in. At about 7:30 or 8 o'clock on the morning of December 5th defendant was seen walking in the vicinity of and away from the place where the body was found. Between 8 and 8:30 o'clock of the same morning, he went to the home of Mary Rodriquez, changed his shoes, and left a shirt, on which was found human blood.

Mary Rodriquez testified that the defendant left her house about 2 o'clock on the morning of December 5, 1932, and returned about 8 or 8:30 on the same morning. He there changed his shoes, and, when she asked him why he changed his shoes, he stated that he was going to water the lawn. Investigating officers, on going to the spot where the body was found, located two pair of footprints leading into the pepper grove and one pair leading away, which were followed for a distance, and that some of the footprints contained the word "Light." The officers went to the house of Mary Rodriquez, found a pair of shoes which fit the defendant's feet, and on the rubber heels were the words "Light Wear" in raised letters. These were the same shoes identified by Mary Rodriquez as belonging to defendant.

An officer testified that he followed tracks leading out of the pepper grove from the place where the body of deceased was found to the home of Mary Rodriquez; that in a conversation with him defendant denied being at Lopez' pool hall with deceased, and denied that he had ever been with the deceased at all; that defendant denied ownership of the shoes and shirt which were found in the home of Mary Rodriquez, and declared that he had spent all night at the home of Mrs. Rodriquez, had gone to bed early on the night of December 4th, and did not get up the next day until about 9 o'clock. Other corroborating circumstances were in evidence. Defendant offered no evidence, and the verdict was based on the prosecution's case as presented.

[1, 2] While the evidence is naturally circumstantial, it is clear and convincing and clearly sufficient for the jury to determine beyond a reasonable doubt that defendant was guilty. All intendments favor upholding the judgment and the action of the trial court, and the evidence is to be viewed in the light most favorable to the prosecution. People v. Dukes, 90 Cal. App. 657, 266 P. 558.

[3] A green shirt which, when tested, disclosed human blood stains, was offered as people's exhibit for identification. It later developed that it did not belong to the defendant. It was not offered in evidence other than for identification, and no motion was made to strike it from the record. If it was error to so offer the shirt, it was waived by defendant's failure to move to strike it out. People v. Balmain, 16 Cal. App. 28, 32, 116 P. 303.

[4, 5] The district attorney made two statements as follows: "All of the circumstances that point unquestionably towards the guilt of this defendant. And, what is the other side of the picture? Well, the State's case stands absolutely unchallenged. * * * All of these facts stand before you uncontradicted and undenied and unchallenged. No explanation by any sworn testimony. There is no denial of any of the substantial facts in this case." And: "Mexicans are peculiar, they are a stoical race. They can face death unflinchingly, the average Mexican can, and perhaps that is why they can take other lives unflinchingly and quite calmly." Objection was made to this, and the making of said statements is claimed by defendant to be prejudicial error.

That the first statement is not prejudicial error is decided by the following cases: People v. Wademan, 38 Cal. App. 116, 133, 175 P. 791; People v. McLeod, 30 Cal. App. 435, 438, 158 P. 506.

That the last remark, relating to the nationality of the defendant, was not prejudicial error, is decided in the cases of People v. Frost, 37 Cal. App. 120, 174 P. 106, and People v. Piazza, 84 Cal. App. 58, at page 77, 257 P. 592.

A careful and full investigation of the record convinces us that there were no substantial errors in the admission of evidence, that the jury was fully and fairly instructed, and that defendant was convicted after a full, fair, and impartial trial.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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133 Cal.App. 475

## LLEWELLYN IRON WORKS v. SMITH et al.

Civ. 7618.

District Court of Appeal, Second District, Division 1, California.

July 28, 1933.

1. **Master and servant** ⚿389.

Evidence *held* to sustain court's finding that operator of crane, hired by contractor, was employed by owner, so as to render latter liable to contractor for compensation paid its employees for injuries sustained through operator's negligence (St. 1917, p. 854, § 26, as amended by St. 1927, p. 1213).

2. **Evidence** ⚿471(1).

Court properly refused to allow witness to state conclusion instead of facts on which based.

Appeal from Superior Court, Los Angeles County; Robert B. Lambert, Judge.

Action by the Llewellyn Iron Works, a corporation, against Lisle Smith, individually and doing business under the fictitious firm name of Smith Bros. Truck Company, and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Harry William Elliott, of Los Angeles, for appellants.

Loeb, Walker & Loeb, of Los Angeles, for respondent.

YORK, Justice.

The plaintiff and respondent Llewellyn Iron Works was engaged in erecting tanks for the Dominguez Chemical Company. Prior to the date of the accident which was the cause of the controversy, the respondent hired a crane belonging to defendant and appellant Smith to assist in this work, together with two of the employees of appellant, defendant A. Stratton, who was the operator of the crane, and defendant Norris Bakko, who was the driver of the truck. Norris Bakko, at the time of the trial of this case, was found free of negligence, and the case as to him was dismissed, with his costs. The respondent's cause of action is of the nature known as a derivative one, which arose by virtue of subrogation under the provisions of the Workmen's Compensation Act. An award was had under the Workmen's Compensation Act against the Llewellyn Iron Works; this action being brought under authority of section 26 of the Workmen's Compensation Act (St. 1917, p. 854, Amendment St. 1927, p. 1213). Under this section the respondent became obligated to pay workmen's compensation on account of injuries sustained by respondent's employees through the negligence of appellants, and became subrogated to the rights of these injured employees against appellants. The respondent's cause of action, therefore, was a derivative one; that is, the cause of action which the respondent's employees had against the appellants, and which, by virtue of said section 26, was by said section in effect assigned to the respondent.

The trial court found that at the time in question Stratton was in the sole employ of appellant Smith, a general employer, and that Smith's right of control and supervision over Stratton by virtue of such general employment had not been relinquished to respondent. (Findings I and VII, Clerk's Trans., pp. 18, 22; Supplement 1, fols. 33 and 45.) Although the principal question to be determined is as to the sufficiency of the evidence to support these findings, the appellants also claim that the evidence is insufficient to support the court's finding of negligence, and that the court erred in excluding certain testimony. There was some conflict in the evidence, but there was sufficient evidence to sustain the trial court's finding as to the employment of Stratton and as to Stratton's negligence.

[1] As to the findings as to the employment of Stratton, the evidence showed that the control of Stratton and his control of the crane and truck which caused the injury was somewhat similar to the control of the elephant and its trainer in the case of McComas v. Al. G. Barnes Shows Co., 215 Cal. 685, 12 P.(2d) 630. The plaintiff in that case was injured by reason of some defect in the fastening of a howdah, which turned and caused plaintiff to fall from the elephant rented to the Wm. Fox Studio by the Alliance Investment Company, whose trainer handled and was expected to control the elephant, which was brought there for the use of the Wm. Fox Studio in the taking of a certain motion picture. But the way in which the trainer was to prepare the elephant and its equipment for such use, including the way the howdah was placed on the elephant so as to carry the plaintiff, was left entirely to such trainer. The plaintiff was injured by reason of the slipping of the howdah and the lack of proper handling of the elephant by such trainer. This is similar in this, that in the instant case the crane, by reason of the careless handling of the same, and not by reason of the nature of the work directed to be done by the plaintiff, in fact contrary to its express orders, caused the injury. The way in which the instrument was handled, in the one case the crane and truck, and in the other the elephant, was left to the operator of the crane in the one case and the trainer of the elephant in the other. The operator was not told how far to swing his crane, or derrick, in picking up any steel, except the warning that there was a high-tension wire overhead. And in the McComas Case, supra, no instruction was given by the Fox Studio as to how the trainer was to make the elephant move over to where it was to work, and no instruction as to how the howdah was to be held in place on the elephant when it was doing the things expected of it by the Fox Studio. The operator of the crane or derrick "was employed by appellant on account of his peculiar skill and knowledge in the handling" (quoting from the McComas Case, supra) of the crane or derrick. In the McComas Case, supra, page 693 of 215 Cal., 12 P.(2d) 630, 633, the Supreme Court said: "In the case of Stewart v. California Improvement Company, 131 Cal. 125, 131, 52 L. R. A. 205, 63 P. 177, 179, 724, the city of Oakland had hired from the California Improvement Company a steam roller together with an engineer to operate the same. The steam roller was used by the city in rolling and leveling its streets. While the engineer was in charge of said steam roller, steam escaped from its engine through the safety valve in front of plaintiff's horse. The horse became frightened, 'wheeled short around and tilted over plaintiff's cart, and the plaintiff, without any fault on his part, was thrown out and dashed violently upon the ground.' In an action to recover for the injuries so sustained, the question arose as to whether the engineer at the time of the accident was in the employ of the city or of the defendant, California Investment Company. In deciding that question this court held as follows: 'The test in all these cases is, Who conducts and supervises the particular work, the doing of which, or the careless and negligent doing of which, causes the injury or damage? Here the city simply hired the use of the street roller outfit from the defendant company—to wit, the roller, engine, and the engineer to manage the same—for so much a day. The city's agent—foreman of the street superintendent—only directed or supervised how and where the street should be rolled. He did not have

the control or management of the engine; this was subject entirely to the judgment of the engineer, the servant of the owner, the defendant company, who had selected and employed him for that special purpose, paid him his wages, and had the sole right to discharge him. We think the conclusion of law deduced by the court below from the facts found that the defendants are liable, and not the city of Oakland, is correct.'"

[2] The objection as to the introduction of evidence is directed principally against the refusal of the trial court to allow a witness to give his conclusion instead of stating the facts upon which he based such conclusion. We find nothing in the record that justifies a reversal of the judgment.

The judgment appealed from is therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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## G. H. DEACON INV. CO. et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.*

Civ. 9026.

District Court of Appeal, Second District, Division 1, California.

July 25, 1933.

Hearing Granted by Supreme Court Sept. 21, 1933.

**1. Eminent domain** ⚷76.

Court ordering city in eminent domain proceedings to deposit in court money required as security to property owners had positive duty to enforce its order requiring deposit of sum court determined as value of property (Const. art. 1, § 14).

**2. Eminent domain** ⚷76.

City in eminent domain proceedings, availing itself of immediate possession, had absolute obligation to deposit in court amount of money determined as necessary to give property owners adequate security (Const. art. 1, § 14).

HOUSER, J., dissenting.

Petition by the G. H. Deacon Investment Company and others for a writ of mandamus to be directed to the Superior Court of Los Angeles County and others.

Writ granted.

Oliver O. Clark, Victor T. Watkins, and David Fulwider, all of Los Angeles, for petitioners.

Erwin P. Werner, City Atty., and Everett W. Mattoon, County Counsel, both of Los Angeles, for respondents.

CONREY, Presiding Justice.

Following the commencement of an action by the city of Los Angeles for the condemnation for public highway purposes of certain property of which the petitioners were the owners, the city deposited with the court the sum of $4,243.84 as security to the owners for the payment to them of just compensation, etc., for the property proposed to be taken. This was done pursuant to an order obtained upon ex parte application made by the plaintiff, in accordance with the permission given by section 14 of article 1 of the Constitution of California. That section contains the following provisions, pertinent to the questions now before us in this case: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner; * * * provided, that in an action in eminent domain brought by the state, or a county, or a municipal corporation, * * * the aforesaid state or political subdivision thereof or district may take immediate possession and use of any right of way required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, * * * as soon as the same can be ascertained according to law. The court may, upon motion of any party to said eminent domain proceedings, after such notice to the other parties as the court may prescribe, alter the amount of such security so required in such proceedings. * * *"

Thus having paid into court said sum of $4,243.84, the city immediately took possession of said property. Thereafter, and on the same day on which an interlocutory judgment was made and entered by which the value of the property and interest thereon was determined, the respondent court made its order by which the said city was directed to increase the amount of its deposit in said action in the additional sum of $75,750. Without complying with said order, the city filed its notice of appeal from the judgment. Thereupon, in pursuance of a hearing before

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 31 P.2d 372.

the respondent court on an order to show cause why the city of Los Angeles and certain of its officers should not be held in contempt of court for their failure to comply with the order of said court by which the said city of Los Angeles was so directed to increase the amount of its deposit in the action, the respondent court made the following order:

"In the above entitled cause defendants filed a petition and secured an order to show cause why plaintiff, its officers, agents and representatives should not be punished for contempt, for non-compliance with an order made by the Court herein on January 30th 1933. The order last above referred to required plaintiff to deposit with the County Clerk of Los Angeles County forthwith certain monies as an additional amount to secure the immediate payment to defendants as compensation for taking of their property. The plaintiff has not complied with the order. Upon making said deposit by plaintiff the defendants can immediately draw down said money, and there is no provision of law to recover same in the event a new trial is ordered on an appeal, and a lesser amount awarded. This practically prevents plaintiff from having an appeal from the awards made by the Court. It is not the intent or desire of the Court to prevent plaintiff proceeding with an appeal, and it appears to me unjustified to do so.

"Therefore, it is hereby ordered that plaintiff be, and hereby is, relieved of complying with the order of the court dated January 30th, 1933, requiring it to deposit certain monies with the Clerk of the Court, that it be purged of contempt and the petition dismissed."

Following the entry of this order, the defendants in the action procured from this court its alternative writ of mandate by which the respondent court was directed to enforce its former order by which the said city of Los Angeles was required to increase the amount of its deposit in the action as aforesaid; or that respondent court appear and show cause why it has not enforced its said order. The writ was directed to all of the respondents named in the petition, including the city and certain of its officers; but it will be sufficient for us to consider, as our principal subject, the duty of respondent court.

Respondents have replied both by demurrer to the petition and by answer. The facts alleged by petitioner are admitted, in all essential particulars. Therefore the case presents for decision the single question: On the facts as stated, does there rest upon respondent court a positive duty to enforce the order requiring that said money be deposited in court as security for the owner?

[1] Referring to the provisions of the state Constitution, quoted above, we find that the city is given the privilege to take possession of the defendants' property, in advance of actual payment therefor, only by first depositing in court such amount of money as the court has found to be "reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation," etc., as soon as the same can be ascertained according to law. The court, by its order altering the amount of such security, has fixed and determined the amount of the deposit to be made. The right of the defendants, thus determined, is derived directly from the Constitution, and not from any allowance thereof by the court. It is the court's duty to determine the amount to be deposited, and to make its order accordingly. But the court is not vested with any discretionary authority to grant or withhold the security to which the defendants are entitled.

[2] The provisions of the statute in relation to the right of the plaintiff, in a condemnation case, to abandon the proceeding, have no relation to the present matter. The plaintiff here has not abandoned the proceeding. On the contrary, plaintiff has taken the property and has actually made the proposed improvement and opened it to public use. Whatever right of election it had, with respect to availing itself of the "immediate possession" provisions of the Constitution, the plaintiff has exercised. There remains the absolute obligation, correlative with the owner's constitutional rights, to deposit in court the amount of money which has been determined to be the amount necessary to give adequate security.

It has been suggested, as justification for the failure of plaintiff to deposit said money, that, if it does make the deposit, the plaintiff will have a right to withdraw the money, and that then the appeal from the judgment will be dismissed on the ground that it has become a "moot case." Whether this consequence would follow, or whether such withdrawal of the funds while the appeal is pending could be controlled by the superior court, are questions which we think are not relevant to the matter now before us for decision. At all events, it is the present duty of the city of Los Angeles to deposit in court the amount of the required security, and it is the present duty of the respondent court to enforce its order in the premises.

Let the peremptory writ issue.

I concur: YORK, J.

I dissent: HOUSER, J.

133 Cal.App. 515

## CHRISTIANSON v. SOUTHERN PAC. CO. et al. (two cases).

Civ. 8623.

District Court of Appeal, First District, Division 1, California.

July 29, 1933.

Rehearing Denied Aug. 28, 1933.

Hearing Denied by Supreme Court Sept. 25, 1933.

**1. Railroads ⚷328(8).**

Evidence that deceased drove car on crossing after one train passed and another had whistled, when headlight of second train was visible through fog, and automatic signal was still operating, showed as matter of law that deceased was contributorily negligent.

**2. Railroads ⚷328(8).**

Traveler whose view is obstructed by dense fog at familiar railroad crossing should observe greater caution than if atmosphere is clear.

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Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Actions by A. V. Christianson and by A. V. Christianson, as administrator of the estate of Rose Mary Christianson, against the Southern Pacific Company and others. Judgments for defendants, and plaintiffs appeal. Affirmed.

H. J. Bischoff and Louis T. Fletcher, both of Los Angeles, for appellant.

Louis Oneal and A. G. Shoup, both of San Jose, for respondents.

KNIGHT, Justice.

Appellant's wife, Rose Mary Christianson, and his minor daughter, aged six, were killed instantly in a collision between a train operated by the respondent railroad company and an automobile driven by Mrs. Christianson, which occurred about 9 o'clock on the morning of December 3, 1930, in Palo Alto, at the Churchill avenue crossing; and by reason thereof appellant brought these two actions for damages. They were consolidated for trial, and at the conclusion of the evidence the trial court held as matter of law that negligence on the part of appellant's wife contributed proximately to the happening of the accident, and accordingly the jury was instructed to find for the respondents. Such verdicts were returned, and from the judgments entered thereon this appeal is being prosecuted.

There is no conflict as to the essential facts. The Christiansons lived in Palo Alto, on the west side of and approximately 200 feet from the main line double tracks of said company, where the accident occurred; and from their home they had a clear view of said tracks and knew of the operation of trains thereover. It was customary for Mrs. Christianson to drive her daughter to school every morning, and in order to reach the school it was necessary to cross the railroad tracks at the Churchill avenue crossing. At this crossing the railroad company maintained an automatic wigwag signal, which, besides swinging forward and back, rang a bell and displayed a red light as a warning of the approach of trains from either direction. The tracks on both sides of the crossing were straight and the view thereof unobstructed for a long distance. A south-bound passenger train (No. 78) and a north-bound passenger train (the Lark) passed each other every morning usually near the Churchill avenue crossing; and Mrs. Christianson was familiar with all these conditions. On the morning of the accident there was a heavy low fog, but, as will hereinafter appear, the approach of the north-bound train which collided with the automobile could be seen for a distance of at least 200 feet from the crossing. As Mrs. Christianson drove up to the crossing the wigwag signal was swinging, the bell operated thereby was ringing, and the red light was displayed, and she brought her automobile to a stop near the tracks, on the westerly side thereof. About the same time two other automobiles, one driven by Herbert E. Browning and the other by Professor Harris J. Ryan of Stanford University, approached the tracks from the opposite (easterly) direction and stopped on the easterly side thereof, diagonally across from Mrs. Christianson; and almost immediately the south-bound train, No. 78, passed by. As soon as it had cleared the crossing and while the automatic warning signal was still in full operation, Browning crossed the tracks, Mrs. Christianson attempted to do likewise, but as her automobile reached the easterly track it was struck and demolished by the on-coming north-bound train, and Mrs. Christianson and the child were killed.

The foregoing facts were established mainly by the testimony of Browning, Professor Ryan, and a Mr. Burke. In this regard, Browning testified that, as soon as the south-bound train passed he started across the tracks; that when his automobile reached the first rail he heard a train whistle, and looking to the south, he saw the headlight of the engine of the north-bound train as it emerged from the fog; that he continued on, and as he reached the other side of the right of way he passed Mrs. Christianson's machine which had not then started across the tracks; that almost immediately after passing her he heard a crash, and looking in the "rear-view" mirror on the windshield of his car he saw flames underneath the train; that he stopped at once and went back to the scene of the accident. Professor Ryan testified that he saw the automobile operated by Mrs. Christianson drive up to and stop on the opposite side of the crossing just as the south-bound train approached the crossing; and that about the same time the car operated by Browning drove up alongside of him and stopped; that, as soon as the south-bound train cleared the crossing, Browning started up and crossed the tracks; and that, although the crossing signal was still in full operation, Mrs. Christianson's car "was getting under way, with some hesitation" to cross the tracks; that at that moment he heard the whistle of the north-bound train, and looking to the south saw the headlight of the engine as it came out of the fog; that the engine was then about 200 feet south of the crossing; and that immediately following the crash occurred. Burke's testimony was substantially the same as that given by Professor Ryan. He was approaching the crossing in an automobile from the easterly side, on Churchill avenue, as the south-bound train passed. He saw the Browning car cross the tracks immediately after it had passed, and also saw Mrs. Christianson start across from the other side, after the whistle of the north-bound train had been sounded and the headlight of the engine appeared through the fog, and notwithstanding that the automatic warning signal at the crossing was in full operation. He further stated that when he first saw the headlight of the engine through the fog the train was just passing Colorado avenue, which was 400 feet from the Churchill avenue crossing.

There were two other witnesses to the accident, one of whom merely saw the impact from a window in a house some distance from the crossing. However, he saw and heard the operation of the automatic warning signal at the crossing after the south-bound train had passed, indicating the approach of the north-bound train. The other witness was a considerable distance from the crossing when the impact took place, his testimony as to the distance being uncertain. He was driving an automobile in a southerly direction toward the crossing along a street on the easterly side of and running parallel with the tracks. He stated that he heard the train whistle and saw the headlight of the engine as it came out of the fog, and he, too, fixed the location of the train at that time at some distance beyond the point fixed by Professor Ryan.

The speed of the train at the time of the accident was not definitely established. Its average running time between San Jose and Palo Alto was between forty and fifty miles an hour. However, the locomotive fireman, who was watching the track ahead from the left side of the cab, testified that when they were about 150 feet south of the crossing he saw the Christianson car start across the track in front of the train; that he instantly called to the engineer to "hold the train," meaning to shut off the steam and apply the emergency brakes; that this was done instantly, bringing the train to a stop as soon as possible. Both the fireman and the engineer corroborated the testimony of the other witnesses that on approaching the crossing the whistle was sounded, stating that two long blasts, one short, and one long, were given; furthermore, they stated that the locomotive bell was ringing constantly from the time the train left San Jose.

[1] In view of the foregoing undisputed facts, the trial court was fully justified, in our opinion, in holding, as matter of law, that the accident was proximately caused by the negligence of appellant's wife in failing to give heed to the obvious signals of danger there present. As shown by the positive uncontradicted testimony of Browning, Professor Ryan, and Burke, she started to cross the tracks after the engineer of the north-bound train had sounded the whistle more than an eighth of a mile south of the crossing, and after the headlight was plainly visible from the crossing. And even accepting the theory that she did not hear the whistle, or, if she did hear it, that she believed it was sounded by the south-bound train, it is evident that she did not take the precaution to look in that direction before attempting to cross the tracks, because manifestly, if she had so looked, she, like the witnesses mentioned, would have seen the headlight of the engine. Moreover, and aside from the warnings given by the train whistle and the headlight, the evidence shows positively that she attempted to cross the tracks in the face of the warning given by the full operation of the automatic crossing signal.

The legal rules by which the conduct of a traveler about to cross a railroad track are to be governed are well established by a long line of decisions in this state, and it seems wholly unnecessary to restate or discuss them here. Most of the cases upon the subject are reviewed at length in the recent case of Koster v. Southern Pacific Co., 207 Cal. 753, 279 P. 788; and a still later case involving a situation more closely resembling the present one in its facts is Vilhauer v. Pacific Electric R. Co., 118 Cal. App. 240, 4 P.(2d) 960; and when those rules are applied here it becomes manifest that the trial court did not err in holding as matter of law that the contributory negligence of appellant's wife bars recovery in both actions.

[2] Appellant emphasizes the point that the view of the approaching train was obscured by the heavy fog, all of which may be true; but it has been held, in substance, that, where, as here, a traveler is familiar with a railroad crossing and the operation of trains

thereover, and his view is obscured by a dense fog, he should observe even greater caution in crossing the tracks than he would if the atmosphere were clear; and that damages for injuries sustained may not be recovered, if, under such conditions, he attempts to cross without the exercise of due caution to look and listen for approaching trains. Hoffman v. Southern Pacific Co., 84 Cal. App. 337, 258 P. 397; Id., 101 Cal. App. 218, 281 P. 681.

The judgment in each action is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

134 Cal.App. 1

## FISCHER et ux. v. DAVIS STANDARD BREAD CO. et al.

Civ. 8948.

District Court of Appeal, Second District, Division 1, California.

Aug. 22, 1933.

Rehearing Denied Sept. 14, 1933.

Hearing Denied by Supreme Court Oct. 20, 1933.

1. **Negligence** ⚿122(1).

Defendant has burden of establishing plaintiff's contributory negligence.

2. **Automobiles** ⚿242(3).

To sustain burden of establishing plaintiff's contributory negligence because of inadequacy of brakes on plaintiff's automobile with which defendant's truck collided, defendant must establish plaintiff's inability to stop automobile within prescribed distance, and that surface of highway was dry asphalt or concrete pavement, and that grade did not exceed 1 per cent. (St. 1923, p. 545, § 94, as amended by St. 1931, p. 2115, § 27).

3. **Appeal and error** ⚿1010(1).

Trial court's findings based upon sufficient evidence are conclusive.

Appeal from Superior Court, Los Angeles County; J. O. Moncur, Judge.

Action by Robert A. Fischer and Ruth E. Fischer, husband and wife, against the Davis Standard Bread Company and another. From a judgment in favor of plaintiffs, defendants appeal, and plaintiffs file a motion to dismiss the appeal or to affirm the judgment.

Motion granted, and judgment affirmed.

W. I. Gilbert, of Los Angeles, for appellants.

Moote & Longcroft, of Los Angeles, for respondents.

HOUSER, Justice.

Under the provisions of rule V of the Supreme Court and the District Courts of Appeal, the respondent has presented to this court his motion to dismiss the appeal herein, or to affirm the judgment from which such appeal is taken.

The judgment was the outcome of an action for damages which resulted from a collision, alleged to have been occasioned by the negligence of the driver of a truck of which the defendant was the owner, with an automobile which at the time when the accident occurred belonged to and was being operated by plaintiff.

Each of several points presented in the opening brief of appellant for a reversal of the judgment is founded upon the alleged contributory negligence of plaintiff, and is predicated upon the claim that at the time when the accident occurred the brakes of plaintiff's automobile were not in the condition required by the terms of section 94 of the California Vehicle Act (as amended by St. 1931, p. 2115, § 27), which, among other things, provides that "it shall be unlawful for any person to operate on any public highway any motor vehicle * * * unless equipped with brakes adequate to bring such motor vehicle * * * to a complete stop when operated upon dry asphalt or concrete pavement surface where the grade does not exceed one per cent, and when operating at speeds set forth in the following table, within the distances set opposite such speeds: * * * 15 miles per hour, 20.8 feet; 20 miles per hour, 37 feet. * * *"

[1, 2] In that connection, in effect the specific contention by the appellant is that since by the undisputed evidence it appears that immediately preceding the time when, and at a distance of fifty feet from the point where the accident occurred, plaintiff was driving his automobile at a speed of between fifteen and twenty miles per hour, at which time and place he realized the imminence of danger, "slapped on his brakes and tried to stop the car in the shortest possible space," in consideration of the statutory provision to which reference just has been had, together with the fact that within the space of fifty feet he failed to stop his automobile, the deduction must be that, as required or defined by the terms of the statute, the brakes on said automobile were inadequate, and for that reason plaintiff was guilty of a violation of the law which contributed proximately to the happening of the accident. But it is well-established law that in an action for damages arising from the alleged negligence of the defendant therein, where for a defense thereto he relies upon the contributory negligence of the plaintiff, the burden is on the

defendant to establish that conclusion of law or fact. By reference to the statute controlling the instant situation, it will be noted that as conditions precedent to the establishment of the adequacy of the brakes of an automobile it should appear both that such automobile was "operated on dry asphalt or concrete pavement," and that "the grade does not exceed one per cent." And since appellant makes no pretense that either or any of such requirements was or were respectively complied with or established by evidence introduced on the trial of the action, it necessarily results that he has failed to sustain the burden which the law casts upon him. It is manifest that, notwithstanding the inability of plaintiff to stop his automobile within the prescribed distance, if the surface of the highway was neither "dry asphalt (n) or concrete pavement, or if the grade of the highway exceeded one per cent," in such circumstances the statutory inadequacy of the brakes on plaintiff's automobile was not established; nor as a consequence of such inability on the part of plaintiff could his contributory negligence legally be presumed. It follows that, as shown by appellant's brief, none of defendant's several points which are dependent upon the asserted contributory negligence of plaintiff can be sustained.

[3] Appellant's brief fails to disclose the existence of evidence which necessarily would lead to the conclusion that plaintiff's injuries were the result of his failure to exercise ordinary care. In that regard, the findings of fact by the trial court, based upon sufficient evidence, are conclusive.

With respect to the question of the sufficiency of the evidence to support the several findings of fact relating especially to the amount of the damage suffered by plaintiff, an examination of the statement of facts contained in the appellant's brief affords ample foundation upon which to rest the award by the trial court.

Although an inspection of the record reveals the fact that in summing up the several items of damage an error in addition thereof was made, with the result that judgment was ordered in favor of plaintiff for an amount greater than that to which he was entitled, nevertheless it also appears from the record that on the ruling on the motion for a new trial such error was corrected by order of the trial court, which correction was accepted and adopted by plaintiff.

Since it is apparent that "the questions on which the decision of the cause depends are so unsubstantial as not to need further argument" (rule V), it follows that the motion should be granted, and that the judgment should be affirmed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

133 Cal.App. 430

## CARTER v. BAKER, Tax Collector, et al.

**Civ. 832.**

District Court of Appeal, Fourth District, California.

July 25, 1933.

Rehearing Denied Aug. 21, 1933.

Hearing Denied by Supreme Court Sept. 22, 1933.

**1. Taxation 🔑788(9).**

Owner may defeat effect of apparently valid tax deed by proving that land was not properly assessed, that tax sale was not made at proper time or as required by law, or that notice thereof was not properly given.

**2. Taxation 🔑570(5).**

In action against tax collector and surety for giving of tax deed defective in form and refusal to give correction deed, plaintiff *held* required to show legality of proceedings forming basis of deed.

**3. Taxation 🔑769.**

If tax collector cannot execute tax deed correcting defects in form in prior tax deed unless he misstates facts, collector is not required to do so.

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Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by W. T. Carter against Ray W. Baker, as Tax Collector of Fresno County, and others. From a judgment in favor of defendants, plaintiff appeals.

Affirmed.

Strother P. Walton, of Fresno, for appellant.

J. P. Bernhard and Frank Kauke, both of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of the respondent tax collector of Fresno county and his surety in an action for damages resulting from the giving of a defective tax deed to appellant. The complaint contains two causes of action. The first alleges that the tax collector failed and refused to execute and deliver to appellant any deed after he had become the purchaser at a tax sale. The second alleges that the tax collector gave appellant a void deed which conveyed no title to him, and refused to give him a correction deed after the defects in the first deed were discovered.

Joseph L. Chevalier owned the property in question, and failed to pay the second instalment of taxes for the fiscal year 1921–1922. The tax collector sold the property to appellant in 1927 and gave him a deed to the property. Appellant then started suit to quiet title to the property, which resulted in a judgment in favor of Chevalier upon the payment of $42.70 into court for appellant, the amount of the taxes, penalties, costs, and interest. This judgment was affirmed on appeal September 16, 1929. Carter v. Chevalier, 100 Cal. App. 567, 280 P. 706. The court held the tax deed void. On November 22, 1929, appellant received the $42.70 from the county clerk, and on December 4, 1929, the further sum of $126.99 from the county of Fresno; this being the balance of the sum he had paid at the tax sale. About March 4, 1929, appellant made demand on the tax collector for the execution of a correction tax deed, which demand was refused. This action was commenced on November 27, 1929.

From the view we take of the case, it is not necessary for us to discuss the possibility of liability on the part of a tax collector to respond in damages for the execution of a tax deed so defective in form that it is void.

It is elemental that, to recover, the appellant must prove that he suffered damage as a result of the defective tax deed. Conversely, if the tax deed had been legal in form, he still would suffer no damage, unless it would vest in him some interest in the property it purported to convey. On this question the evidence shows he proved the execution of the void deed and the market value of the property and nothing more.

[1] An owner may defeat the effect of an apparently valid tax deed by proving that the land was not assessed as required by law (De Frieze v. Quint, 94 Cal. 653, 30 P. 1, 28 Am. St. Rep. 151); that the tax sale was not made at the proper time or as required by law (Bernhard v. Wall, 184 Cal. 612, 194 P. 1040); that notice thereof was not properly given (Smith v. Furlong, 160 Cal. 522, 117 P. 527). In Ramish v. Hartwell, 126 Cal. 443, 58 P. 920, 922, it was said: "It may be regarded as settled that the legislature may make a tax deed conclusive evidence of a compliance with all provisions of the statute which are merely directory of the mode in which the power of taxation may be exercised, but that it cannot make it conclusive evidence of those matters which are essential to the exercise of the power; that as to those steps which are jurisdictional in their nature, and without which the power of taxation cannot be called into exercise,—such as the listing or assessment of the property, a levy of the tax, some notice of its delinquency, and that the property will be sold therefor,—the legislature cannot deprive the owner of the right to show want of compliance. Mr. Cooley says (Const. Lim. p. 452): 'A statute which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property.' "

[2] This being an action for damages resulting from the giving of a void tax deed, and the deed having been held void by the courts of the state, appellant should have introduced evidence to establish the legality of the proceedings upon which the deed was based in order to support the conclusion that by the defects in the deed he lost the value of an interest in the property which it described.

[3] Appellant urges that the tax collector should have acceded to his demand of March 4, 1929, and have given him a correction deed, valid on its face. In 24 California Jurisprudence, 371, it is said: "When a tax deed does not conform in its recitals to the facts, the tax collector may, without special statutory authorization, execute a second and corrected deed, but he has no power to execute a deed which misstates the facts respecting proceedings prior to its execution." There is no evidence in the record which would justify the conclusion that the facts of the tax proceeding were such that the tax collector could have executed a valid correction deed without misstating these facts. This he is not required to do.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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133 Cal.App. 459

## DOOLEY v. JOHNSON, County Assessor.

## EDWARDS v. SAME.

Civ. 9036.

District Court of Appeal, First District, Division 1, California.

July 28, 1933.

1. **War** 🔑33.

"Armistice" effects merely a suspension of hostilities.

An armistice is defined as an agreement between belligerent forces for a temporary cessation of hostilities.

[Ed. Note.—For other definitions of "Armistice," see Words & Phrases.]

2. **Taxation** 🔑196.

Constitutional provision allowing $1,000 exemption from taxation to residents who served in Army, Navy, or Marine Service in "time of war" *held* to include persons in service up to date of declaration of peace (Const. art. 13, § 1¼).

3. **Constitutional law** 🔑229(2).
**Taxation** 🔑196.

Statute limiting period of service in war with Germany for tax exemption purposes to time preceding Armistice *held* void as arbitrary classification, under constitutional provision for exemption to persons serving "in time of war" (Pol. Code, § 3612, subd. 4u; Const. art. 13, § 1¼; Const. U. S. Amend. 14).

**4. Constitutional law ⚷211.**

State under equal protection clause may not grant right to one which under similar circumstances is denied to another (Const. U. S. Amend. 14).

**5. Constitutional law ⚷14.**

Generally words used in Constitution should be construed according to their natural and ordinary meaning.

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Appeals from Superior Court, San Diego County; C. N. Andrews, Judge.

Mandamus actions by Patrick T. Dooley and by Fred L. Edwards against James Hervey Johnson, Assessor of San Diego County. From an adverse judgment, plaintiffs appeal.

Reversed.

Fred A. Steiner, of San Diego, for appellants.

Thomas Whelan, Dist. Atty., and Frank T. Dunn, Chief Deputy, both of San Diego, for respondent.

PER CURIAM.

These two cases were consolidated for the purpose of trial. The plaintiffs each joined the United States Navy early in 1919 and continued to serve in the said Navy until 1923, when they were honorably discharged from said service. Each of them in the time required by law made application to the defendant, who was then the duly qualified and acting county assessor of the county of San Diego, Cal., for a veteran's tax exemption for the year 1932 as provided for by section 1¼ of article 13 of the Constitution of this state. The said assessor having denied to each of said plaintiffs the said exemption provided for by said section of the Constitution, they each filed a petition for an alternative writ of mandate praying that said assessor be directed to grant the said tax exemption to each of said plaintiffs. At the hearing of said petitions, the trial court entered a judgment denying each of them, and from this judgment plaintiffs have appealed.

Section 1¼ of article 13 of the Constitution of this state in part provides that the property to the amount of $1,000 of every resident of this state who has served in the Army, Navy, Marine Corps or Revenue Marine Service of the United States in time of war, and has received an honorable discharge therefrom, shall be exempt from taxation, with certain exceptions that have no application to the cases now under consideration.

Section 3612 of the Political Code as it stood in 1915 (St. 1915, p. 351) contained four subdivisions. Subdivision 1 provides for the procedure for tax exemptions of veterans. Subdivision 2 requires affidavits by the applicants for exemptions. Subdivision 3 provides that the assessor may require proof in addition to the affidavit of the applicant before granting the exemption, and subdivision 4 contains a list of the recognized wars within the meaning of the said constitutional provision. Subdivision 4 was amended in 1919 by adding thereto the words "War with Germany-Austria, April 6, 1917" (St. 1919, p. 305), and again amended in 1929 by adding the words "to and including November 11, 1918" (St. 1929, p. 441). An armistice was entered into on November 11, 1918, between the belligerent nations, and thereafter hostilities were not renewed. On July 2, 1921, peace between the United States and Germany and Austria was declared by joint resolution of congress.

The sole question presented for determination on this appeal is whether or not one who served in the United States Navy after the Armistice was in force and before peace was declared and who was honorably discharged is entitled to the exemption provided for in section 1¼ of article 13 of the Constitution.

Section 25 of article 4 of the Constitution prohibits the Legislature from passing local or special laws in certain enumerated cases, of which the following: Subdivision 19: "Granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity."

It is admitted that appellants possessed all the requirements entitling them to the said exemptions, provided they had served in time of the war that existed between the United States and Germany-Austria. Appellants contend that, although hostilities had ceased between the nations on November 11, 1918, by virtue of the Armistice, nevertheless a state of war continued to exist until peace was declared on July 2, 1921; that therefore that part of subdivision 4 (u) of section 3612 of the Political Code, which declares that the said war ended on November 11, 1918, is unconstitutional and void so far as it affects the rights of veterans who served in the Navy after the date of said armistice, but before peace was declared on July 2, 1921.

[1] Bouvier defines an armistice as being "an agreement between belligerent forces for a temporary cessation of hostilities. The condition of war between the parties continues in all other respects and produces its usual effects." 1 Bouvier's Law Dictionary, third revision, 238, 239.

"A truce or suspension of arms," says Kent, "does not terminate the war, but it is one of the commercia belli which suspends its operation. * * * At the expiration of the truce, hostilities may recommence without any fresh declaration of war." 1 Kent's Commentaries (14th Ed.) pp. 160, 161. An armistice effects nothing but a suspension of hostilities. Commercial Cable Co. v. Burleson (D. C.) 255 F. 99; Weisman v. United States (C. C. A.) 271 F. 944; Ex parte Sichofsky (D. C.) 273 F. 694.

The Supreme Court of the United States holds that a war does not end at the date of an armistice, but continues until peace is declared. Hijo v. United States, 194 U. S. 315, 24 S. Ct. 727, 48 L. Ed. 994; Hamilton v. Kentucky Distilleries Co., 251 U. S. 146–165, 40 S. Ct. 106, 64 L. Ed. 194. However, in Scott v. Commissioner of Civil Service, 272 Mass. 237, 172 N. E. 218, the court, in construing a statute (St. 1919, c. 150, § 1) defining the word "veteran" as used in said act, held that it meant any person who had served in the Army or Navy of the United States prior to the Armistice and had been honorably discharged. This statute provided that a veteran was one who had enlisted in the Army or Navy of the United States in time of war and had been honorably discharged. Petitioner had enlisted in the United States Navy on November 13, 1918, and had been honorably discharged. In the course of its decision, the court said that it was doubtless true, as claimed by petitioner, that, strictly speaking, the Armistice is not the end of the warfare, but is a temporary suspension of hostilities, but all warfare ceased when the Armistice was signed, and hostilities were not thereafter renewed; that it is common knowledge that upon the Signing of the Armistice the war was actually at an end, and was so regarded by everyone, and that therefore it cannot be rightfully held that it was still in existence after November 11, 1918.

[2, 3] We are of the opinion that the weight of authority upholds petitioners' contention that the said war did not terminate at the date of the Armistice, but continued until peace was declared on July 2, 1921, and that the words "in time of war" as used in section 1¼ of article 13 of the Constitution have reference to the date when peace was declared between the said belligerent nations. This being true the act of the Legislature fixing the date of the ending of said war as of November 11, 1918, is therefore in violation of the Constitution and void.

In Franchise Motor Freight Ass'n v. Seavey, 196 Cal. 77, 235 P. 1000, 1002, the court said: "It is well settled that the authority and duty to ascertain the facts which will justify classified legislation rests in the first instance with the Legislature. Every presumption is in favor of the validity of the legislative determination, and its decision as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary. Anastasion v. Superior Court, 194 Cal. 93, 227 P. 762; People v. Monterey Fish Products Co., 195 Cal. 548, 234 P. 398 [38 A. L. R. 1186]. It is equally well settled that a statute makes an improper and unlawful discrimination if it confers particular privileges upon a class arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted, and between whom and the persons not so favored no reasonable distinction or substantial difference can be found justifying the inclusion of the one and the exclusion of the other. 5 Cal. Jur. 825, and cases cited."

The tax exemptions granted by the Constitution to veterans applied to all who had served in time of war and not to a selected class. The attempt of the Legislature to limit the said exemptions to the veterans who served prior to the armistice was an arbitrary classification, not founded upon a reasonable distinction or a substantial difference justifying the exclusion of the veterans who served after the Armistice and prior to the declaration of peace.

[4] The Fourteenth Amendment to the Constitution of the United States provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. This equal protection clause makes but one demand upon the state, and gives the state but one right. It is that the state shall make and execute and interpret its laws without discrimination. It must not grant rights to one which under similar circumstances it denies to another. Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 183 P. 470; 5 Cal. Jur. 792.

Section 1¼ of article 13 of the Constitution has been amended several times; once in 1922 and again in 1926; but no change has ever been made in that part of it that refers to service in time of war.

[5] It is a general rule, in construing the provisions of the Constitution, that the natural and ordinary meaning of the words employed is to be accepted, unless they are technical or ambiguous, or except where the meaning has been established by statute or by judicial construction. San Francisco v. McGovern, 28 Cal. App. 491, 152 P. 980; City of Pasadena v. Railroad Commission, 183 Cal. 526, 192 P. 25, 10 A. L. R. 1425; San Pedro, etc., R. R. Co. v. Hamilton, 161 Cal. 610, 119 P. 1073, 37 L. R. A. (N. S.) 686; Miller v. Dunn, 72 Cal. 462, 14 P. 27, 1 Am. St. Rep. 67. The words "in time of war" are neither technical nor ambiguous. They have, in effect, received judicial construction by the highest court in this country. That construction we cannot do otherwise than follow.

The judgment is reversed.

133 Cal.App. 592

## WENDLER v. PICKWICK STAGES SYSTEM.

Civ. 4581.

District Court of Appeal, Third District, California.
Aug. 2, 1933.

**1. Trial 🔑139(1).**

Weight to be given to evidence, and where preponderance thereof lies, is question of fact.

**2. Carriers 🔑318(3).**

In action by passenger for injuries sustained on auto stage when defective rim caused blow-out, based on doctrine of res ipsa loquitur, evidence *held* not to sustain defendant's allegation that accident was caused by latent defect (Civ. Code, § 2100).

Evidence disclosed that defendant's employee inspected tires on day of accident, that the tire which blew out had no cut and was not worn very badly, and the rim seemed to be all right so far as he could observe with naked eye, that he looked rims over to see that lugs were on and that lock rings were on each of them, that it was impossible to observe condition of rim without removing tire, and he did not remove tires, that he did not sound out rims with hammer, and defective rim was not produced at trial.

**3. Carriers 🔑320(1).**

Whether operator of auto stage exercised due care to discover defect in wheel which caused accident and injury to passenger was question for court trying action without jury (Civ. Code, § 2100).

**4. Carriers 🔑318(3).**

Evidence warranted finding that examination of rims of wheels on auto stage was insufficient as respected liability for injuries to passenger when tire on stage blew out (Civ. Code, § 2100).

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Appeal from Superior Court, Humboldt County; T. H. Selvage, Judge.

Action by Mary H. Wendler against the Pickwick Stages System. Judgment for plaintiff, and defendant appeals.

Affirmed.

Nelson & Ricks, of Eureka, for appellant.

A. G. Bradford, of Eureka, for respondent.

BURROUGHS, Justice pro tem., delivered the opinion of the court.

This is an action for personal injuries sustained by the plaintiff while riding as a passenger on an auto stage owned and operated by the defendant who was a common carrier. The cause was tried by the court without a jury. Findings of fact were entered in favor of the plaintiff, and she was awarded a judgment in the sum of $4,362.45. From the judgment the defendant has appealed to this court.

Plaintiff's cause of action is based upon the doctrine of res ipsa loquitur. The answer alleges as a special defense: "That the tire-rim on one of the wheels of defendant's said automobile, which caused the tire to blow out on said automobile stage of defendant became broken and disconnected and was defective, thereby rendering further control of said automobile stage by the operator thereof impossible; that defendant used all reasonable precaution and diligence and the highest degree of care by way of inspecting the said automobile stage, and especially the wheels and tire-rims and tires on said automobile stage immediately prior to the accident referred to in plaintiff's said complaint, but that said defect, or defects, were latent and not susceptible to discovery and that said accident was wholly unavoidable on the part of this defendant."

The evidence discloses that the plaintiff was riding as a passenger in the defendant's auto stage from Eureka to Trinidad, in Humboldt county, Cal. At a point near McKinleyville, the stage suddenly plunged from the highway into a ditch where it turned partly over against an embankment. The plaintiff was thrown violently from her seat in the stage to the floor. Her knee and back were injured. She was taken from the auto stage through a window and hurried to a hospital in Eureka, Cal., where examinations disclosed a very severe sprain of the right knee. The knee was very much swollen and extremely painful. She remained in the hospital twenty-three days and was removed from there to her daughter's home in Eureka, where she was under treatment for her injuries for a long period of time. The trial of the action was held nearly two years after the accident, and the plaintiff was still under treatment and suffered very severe pain, and was unable to walk, except with the aid of a crutch or cane. She has also developed what is called "climatic arthritis" and she will always be an invalid. Plaintiff established that she had paid her stage fare in advance, and it was admitted that defendant was a common carrier of passengers for hire.

It is well settled that common carriers for hire are required to use the utmost precaution and diligence for the safety of their passengers. Section 2100, Civ. Code; Kline v. Santa Barbara, etc., Ry. Co., 150 Cal. 741, 745, 90 P. 125; Drury v. Los Angeles Ry. Corp., 102 Cal. App. 58, 63, 282 P. 525; Jianou v. Pickwick Stages System, 111 Cal. App. 754, 757, 296 P. 108.

[1, 2] It is contended by the defendant that, irrespective of the doctrine of res ipsa loqui-

tur and the inference deducible therefrom that the accident was caused by the negligence of the defendant, the latter having offered evidence to show how the accident happened, the effort made by it to keep its stages in good and safe operation, and to prove that the accident was not caused by any negligence on the part of the defendant or any of its employees, but was, in fact, due to the existence of a latent defect which the defendant knew nothing of and could not by the exercise of the utmost care and diligence have anticipated and, there being no rebuttal of such evidence offered by them, the evidence does not sustain the findings of negligence made by the court. In support of this theory, defendant has offered many citations of authorities to show that irrespective of proof sustaining the doctrine of res ipsa loquitur, the plaintiff is not relieved of the burden of proof, and defendant need only meet the plaintiff's case by evidence of equal weight. Scarborough v. Urgo, 191 Cal. 341, 346, 216 P. 584; Scellars v. Universal Service Everywhere, 68 Cal. App. 252, 228 P. 879; Valente v. Sierra Railway Co., 151 Cal. 534, 91 P. 481. While this is a correct statement of the law and sustained by the above authorities, we do not deem it applicable to the facts of this case. The weight to be given to the evidence, and where the preponderance thereof lies, is always a question of fact for the court or jury. The only evidence offered by the defendant as to the inspection of the wheel admitted by the defendant to be the cause of the accident, is that of one Shirley Callahan that it was his duty to "air up" the tires, inspect all the tires upon all the busses, make all changes of the tires off of the rims, remount the tires on the rims that go on the wheels, check the alignment of the front wheels, and keep a log of the tires that were running on the Pickwick Stages System; that he remembered the particular stage upon which the plaintiff was riding and examined the wheels thereon at about 1:30 in the afternoon of the day of the accident; that he found the tires to be all right. The tire that blew out had no cuts in it and it was not worn very badly, and the rim seemed to be all right so far as he could observe with the eye. He saw no crack or split in the rim. It did not appear to be rusted or defective. There was nothing to indicate that it was not safe to leave on the stage for further operation. He had been working in that particular line of work for three years, and on the day of the accident he checked all tires on the stage for air pressure. He had the front end of the car jacked up and checked the toe-in on that particular day. He looked the rims over to see that the lugs were on and the lock rings were on each of them. He looked over the front tires for cuts that might have been in them to cause a possible blow-out. He did not get underneath the car. He did not remove the tires from the rims. He further testified that it was not possible for him to observe the condition of a rim without removing the tire. All he could see from looking at it from the front was the condition of the edge of the tire rim. He knew of no other way of detecting any possible flaw or defect in the rims, without actually taking the tire casing off, other than the examination he had made. He covered the examination entirely by the eye. He did not sound out these rims with a hammer or anything like that to find their condition. It further appears that the defective rim was not produced at the trial.

Jianou v. Pickwick Stages System, 111 Cal. App. 754, 296 P. 108, was an action involving personal injuries to another passenger who was injured in the same accident. The following language taken from pages 758 and 759 of that opinion in 111 Cal. App., 296 P. 108, 110, applies with equal force to the facts of the case at bar, and we deem it decisive of this case:

[3, 4] "Having admitted that the accident was caused by a defective or broken rim of a wheel, the question as to whether the defendant exercised due care to discover and repair this defect, and thus avoid the accident, was a problem for the court to determine from the evidence adduced. By the rendering of the judgment against the defendant, its affirmative allegation that an adequate inspection of the wheel was made must be assumed to have been found against the defendant. * * *

"It is fair to assume from the foregoing testimony that Shirley Callahan was employed to examine the rubber tires and see that they contained the proper amount of air. All that he did to inspect the metal rims was to observe the portion which was visible as he turned the wheels around. He does not even pretend to have critically examined the rims. He was busily engaged in looking at the rubber tires for incisions or worn places. Absolutely nothing of real value was done to detect any flaws or defects in the metal rims. A little hammering with a mallet might have detected a crack or defect in the rim from the vibration or sound. The court was warranted in holding this superficial examination of the rims was insufficient to constitute adequate inspection thereof. If it be true, as the defendant alleges, that 'the tire-rim on one of the wheels * * * (was) broken and disconnected and defective' so as to cause the blowing out of the tire, it would seem that a casual inspection should have disclosed the defect. At least the evidence regarding the inspection of the wheels fails to furnish that degree of 'utmost care and diligence' required of a common carrier of passengers to insure their safety. The broken wheel was not even produced at the trial. Its production might have disclosed a crack in the rim which had existed for some time prior to the accident.

We are of the opinion the evidence is ample to support the findings."

We think the foregoing also disposes of the point raised by the appellant, that the defect in the rim was a latent defect.

No further question has been presented for our consideration. The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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## FIRST NAT. TRUST & SAVINGS BANK OF SAN DIEGO v. STALEY et al. *

Civ. 1070.

District Court of Appeal, Fourth District, California.

Aug. 17, 1933.

Hearing Granted by Supreme Court Oct. 16, 1933.

**1. Appeal and error 🔑616(1).**

Copies of unauthenticated documents incorporated in judgment roll cannot be considered on appeal (Code Civ. Proc. § 670).

**2. Mortgages 🔑548.**

Purchaser at sale following foreclosure of mortgage is entitled to rents of property sold (Code Civ. Proc. § 707).

**3. Injunction 🔑123.**

Allegation of answer that defendant acted solely as attorney constituted denial of allegations of complaint that he personally had prevented payment of rents to plaintiff, and presented issue which should have been determined before injunction was issued against him.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by the First National Trust & Savings Bank of San Diego, a corporation, as executor of the will of Frank R. Kingman, deceased, against W. S. Staley and Clara H. Nicoll, also known as Clara H. Staley. From judgments in favor of plaintiff, defendants appeal.

Judgment against first defendant reversed. Judgment against second defendant affirmed.

W. S. Staley, of San Diego, for appellants.

John A. Hewicker, of San Diego, for respondent.

MARKS, Acting Presiding Justice.

This is an appeal from judgments granting permanent injunctions restraining appellants from "collecting or attempting to collect any and all rents from the tenants and future tenants on the real property hereinafter described, and from interfering with the collection of said rents by plaintiff herein, its successors and assigns, and from going upon said premises, speaking to said tenants and/or from serving any papers of any kind on any of said tenants and future tenants, and from writing any letters to said tenants or future tenants, coercing, intimidating or in any manner molesting said tenants in their peaceful and quiet possession of said premises."

[1] The appeal is taken on the judgment roll, in which copies of affidavits and other documents which form no proper part of such a record are incorporated. Section 670, Code Civ. Proc. These are not authenticated as required by law, and cannot be considered on this appeal. Johnson v. Johnson (Cal. App.) 23 P.(2d) 780; Salinas v. Riverside Finance Co., 126 Cal. App. 675, 14 P.(2d) 1025.

On July 24, 1924, Grace Rood Rueda executed a promissory note, due five years after date, in the principal sum of $10,000, payable to F. R. Kingman, secured by a mortgage on real estate in the city of San Diego. The title to this property passed to Clara H. Nicoll, also known as Clara H. Staley, on April 2, 1932.

Kingman died testate on October 24, 1930, and respondent became the executor of his last will and testament. The note was not paid, and an action was instituted to foreclose the mortgage, with Clara H. Nicoll named as one of the defendants. Judgment was rendered for the plaintiff, and the property was sold by a commissioner to the heirs and devisees of the estate of Frank R. Kingman, deceased, for $12,406.99, the full amount of the principal, interest, and costs. A commissioner's certificate of sale was issued to the purchasers on October 29, 1932.

Respondent, as the representative of the purchasers, went into possession of the property, which was improved with several dwellings, and proceeded to collect the rents. It is alleged in the complaint that appellants represented to the tenants that they were the owners of the property and entitled to the rents; that Clara H. Nicoll caused a written notice to be served directing that the rents be paid to no one other than herself and declaring her intention of having the dwellings vacated on or before January 1, 1933; that the real estate was worth not more than $8,000; and that the maker of the note had been adjudged a bankrupt.

[2] It is the settled law in this state that the purchaser at a sale following the foreclosure of a mortgage is entitled to the rents of the property sold. Section 707, Code Civ. Proc.; Title Ins. & Trust Co. v. Pfenninghausen, 57 Cal. App. 655, 207 P. 927; Fowler v. Lane Mortgage Co., 58 Cal. App. 66, 207 P.

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 25 P.2d 982.

919; Fahrenbaker v. E. Clemens Horst Co., 209 Cal. 7, 284 P. 905. This would seem to dispose of the appeal of Clara H. Nicoll and require the affirmance of the judgment against her.

The appeal from the separate judgment against W. S. Staley presents a somewhat different situation. He filed a demurrer to the complaint, which was overruled, and then filed an answer, to which a general demurrer and motion to strike were interposed. On December 19, 1932, the court overruled the demurrer and denied the motion. These orders were vacated the next day and the matters set down for further hearing on December 22, 1932. On that day the demurrer was sustained without leave to amend, the motion to strike portions of the answer granted and judgment rendered against Staley. While the answer contained glaring defects, still two of its allegations require attention. Staley disclaimed any interest in the real estate, and alleged that in his connection with the transaction he had acted only as an attorney at law representing his client, Clara H. Nicoll.

The activities of Staley in question all took place prior to the filing of the complaint, which contains, as exhibits, copies of a notice which had been given the tenants, and another to the caretaker of respondent. The notice to the tenants was signed "Clara Nicoll, title holder, by W. S. Staley, her attorney," and the one to the caretaker "Clara Nicoll, title holder of said property, by W. S. Staley, her attorney."

[3] We are of the opinion that the allegation of the answer that Staley had acted in the matter solely as an attorney at law representing his client was a virtual denial of the allegations of the complaint that he, as an individual and personally, had interfered with the tenants and prevented the payment of rents to respondent. It presented an issue which should have been determined before the injunction was issued against him. He disclaimed any interest in the property. If his sole activities were confined to advising and acting for his client in good faith prior to the date of the restraining order against her, no matter how faulty the advice might be, we cannot conclude that such a situation would make him a party to the action or that an injunction should have been issued against him. Kircher v. Pederson, 117 Wis. 68, 93 N. W. 813; 32 C. J. 301, note 90 (a).

Respondent cites the case of Houser v. Superior Court, 121 Cal. App. 31, 8 P.(2d) 483, which holds that an attorney having knowledge of a restraining order may be punished for contempt of court if he advises his client to disobey its terms. This case announced a well-recognized principle of law, which gives respondent protection against any wrongful act of Staley taken after he had notice of the restraining order against his coappellant. There is nothing in the record even remotely hinting at any violation of any of the terms of this order by Staley.

The judgment against Clara H. Nicoll, also known as Clara H. Staley, is affirmed. The judgment against W. S. Staley is reversed.

I concur: **JENNINGS, J.**

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133 Cal.App. 618

## BAYLES et al. v. BROWNING.

**Civ. 4406.**

**District Court of Appeal, Third District, California.**

**Aug. 8, 1933.**

**Rehearing Denied Sept. 7, 1933.**

Hearing Denied by Supreme Court Oct. 6, 1933.

**1. Evidence 🔑458.**

In action against landlord for failure to furnish water, his oral declarations prior to execution of lease, interpreting clause that he was not liable for failure or shortage of water, and as to where water would be delivered, and testimony that landlord could have purchased water from creek from which canals carried it to land, *held* admissible.

**2. Evidence 🔑458.**

Circumstances under which contract was made, and understanding of parties, and their declarations during negotiations at and before time of execution of contract may be shown.

**3. Evidence 🔑417(7).**

In action for failure to deliver water under lease silent on point of delivery and source of supply, canal and point of delivery which parties had in mind when discussing lease could be identified.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by C. A. Bayles and Daniel Bayles, doing business under the firm name and style of C. A. & Daniel Bayles, against J. W. Browning. From a judgment in favor of plaintiffs, defendant appeals.

Affirmed.

Seth Millington, of Gridley, and Rutledge & Rutledge, of Colusa, for appellant.

Armfield & Eddy, of Woodland, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Respondents and the appellant entered into a lease and agreement whereby respondents rented from appellant two tracts of land, one containing approximately 400 acres and another 70 acres, for the growing of rice. The controversy here revolves around the obligation of the parties with respect to the delivery of water and the application thereof to the tracts in question.

Two sources of water are mentioned in the contract. One of these was Butte creek, which lies about 2 miles westerly from the leased lands. A system of canals carries the water from Butte creek to the 400-acre tract, one leading to the northwest corner thereof, another going to the northeast corner of the same tract. This latter system of canals had in more recent years been allowed to fall somewhat in disuse, and to have carried the water of Butte creek to the northeast corner of the tract during the year in question would have required some reconstruction and repair.

The other source of water referred to in the contract was Cherokee canal, from which water was diverted and conducted to the northeasterly corner of the larger tract and from there spread over the entire leased lands. Early in the season ample water was obtained from Cherokee canal, but, as the season advanced, the amount diminished until it became insufficient to supply the demand. An adequate supply continued to flow in Butte creek, but no use was made of any water from that source. A portion of the crop failed by reason of the lack of water, and plaintiffs brought this action against the defendant for the loss thereof. From the judgment in favor of plaintiffs awarding them damages therefor, defendant presents this appeal. Defendant, appellant herein, contends he was not required by his contract to deliver water from Butte creek to the land at the headgate in the northeast corner of the tract, but was obligated to and did deliver water from Butte creek at the northwesterly corner thereof and that respondents failed to construct the necessary laterals or ditches to take the water from that source and apply it over the land.

Those portions of the agreement pertinent to the questions here involved are as follows:

"The party of the second part (respondent) agrees to plow and level said land. * * * In due and proper season in 1926 he shall first properly prepare said land for rice, constructing the necessary laterals, ditches and checks so that the same may be properly irrigated and drained; * * * care for said crops while growing, attend to the proper irrigation of said land throughout the growing season and see that water is properly applied and retained in said land throughout said growing season; care for the drainage of the land and as soon as the rice is matured to properly drain the same, and cut, thrash and sack the same. * * *"

On the part of the appellant it is provided: "Party of the first part (appellant) will furnish the water for the proper irrigation of said land in the manner following, that is to say: party of the first part will deliver water in two main canals, one from Butte Creek and one from Cherokee Canal and the delivery of water to said land in said main canals shall be deemed a full performance of the obligation on the part of the first party to furnish water, it being understood that the party of the second part shall construct the necessary laterals and ditches to take said water from said canals and distribute it over said land for the proper irrigation of the same, * * * party of the first part shall have water in said main canals sufficient for the irrigation of said land by the 1st. day of April, 1926, and sufficient water will be maintained therein for the irrigation of said land during the irrigation period."

In addition to the foregoing, the contract further states: "It is understood and agreed, however, that the party of the first part shall not be liable in any way for failure or shortage of water, or that anything herein contained shall be deemed a guaranty on the part of the party of the first part as to the adequacy of the water supply, nor shall the party of the second part be held liable for loss of crops resulting from shortage of water not due to his failure to properly distribute the same upon the land."

It is apparent from the foregoing that appellant agreed to furnish water, but the dispute here is as to the point where respondent was to receive it. Respondent contends that the contract intended to and did specify that the water was to be delivered in two main canals, and that the delivery of the water to the land in said main canals was the duty of appellant, and that the responsibility of respondent was to see that it was properly applied to the leased lands.

[1] Appellant contends for reversal largely upon the receipt of testimony by the trial court of oral declarations made by appellant before the execution of the lease. It will be recalled that the paragraph previously quoted provides: "The party of the first part shall not be liable in any way for the failure or shortage of water. * * *" At or prior to the signing of the lease containing the foregoing, respondent asked appellant what was meant by the clause "failure or shortage of water," and appellant replied: "Of course you don't expect me to furnish water in case of a drouth, that is what that clause means," thereby inferring, so appellant claims, that he would be liable for any shortages of water except that by drouth.

Objection was also made by appellant to another conversation between one of respondents and appellant as to where the water would be delivered. We quote again from the transcript:

"Q. Now, at or about the time this lease was signed up, I understood you to say this morning that you had some conversation with Mr. Browning on the lease; is that correct? A. Yes.

"Q. Now you have testified that you went out all over the land, around the boundaries of the land? A. Yes, sir.

"Q. Did you at any time go to the place where water was to be supplied? A. Yes, * * * we went to a point here southwest of a large barn here.

"Q. And what is it marked, here on the map, 'Headgate'? A. Headgate.

"Q. You went there, and you and Mr. Browning alone? A. Yes.

"Q. All right; what if anything was said there between you and Mr. Browning at that time pertaining to this lease? * * * A. He told me they delivered the water right southwest of the barn at this weir in sufficient quantities to irrigate this whole section, or this whole 400-acre tract, and also this tract down here.

"Q. That is the seventy-acre tract? A. The seventy."

Appellant also told respondent, as they were viewing the premises prior to the execution of the lease, that water sufficient to irrigate the entire tract was delivered at the headgate near the northeast corner of the larger tract, and also said that point was the junction of the Cherokee canal lateral and the Butte Creek lateral.

Relying upon this testimony, respondent claims they made no preparation either by the construction of canals to distribute the water over the ground from the northwest corner of the tract nor made checks so water could be used from that point.

Objection was also made to testimony of an official of the Sutter Butte Canal Company that the canal company had water available which could have been purchased to irrigate the lands in question.

We believe all the foregoing testimony was properly admitted in order that the court and jury could get the situation of the parties and the surrounding circumstances.

[2] In Balfour v. Fresno C. & I. Co., 109 Cal. 221, 41 P. 876, 877, the law applicable to the present situation is thus stated: "For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made, but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between and declarations of the parties during the negotiations at and before the time of the execution of the contract may be shown."

Also in the case of Scott v. U. S., 12 Wall. 443, 444, 20 L. Ed. 438, the court said: "In cases like this it is the duty of the court to assume the standpoint occupied by the parties when the contract was made—to let in the light of the surrounding circumstances—to see as the parties saw, and to think as they must have thought, in assenting to the stipulations by which they are bound. This process is always effective. When the terms employed are doubtful or obscure there is no surer guide to their intent and meaning."

[3] Neither the point of delivery of the water nor the source of the water supply were mentioned in the contract. It merely provided that the water would be delivered in two main canals, and delivery in two main canals to the land would constitute full performance on the part of appellant. From long acquaintance with the land by respondent and from the tour of inspection with appellant prior to the execution of the contract showed him there was one canal from Cherokee canal to the northeast corner and from Butte creek canal a series of canals to various points, one of which, however, led to the northeast corner and to the site of the headgate referred to. It was therefore proper to identify the canal and point of delivery which the parties had in mind when discussing the agreement.

It appeared from the testimony of various witnesses and maps in evidence that the only established intake on the rented premises was at or near the headgate referred to in the testimony above, which was in the northeast corner of the tract. It also appeared that the fall of the land south of the irrigation canal leading from the headgate was southwesterly, and north of that canal the fall was westerly, all tending to support the finding of the jury as to the intention of the parties.

Appellant attempted to show the land could be irrigated from the northwesterly corner, but, in addition to that being lower than the surrounding area, there was also between the canal containing the water from Butte creek and the land itself, a borrow pit, a levee, and a canal or ditch. With such testimony of the physical condition existing upon the land, the jury were fully sustained in their conclusions.

It is not contended that respondents failed to properly distribute the waters reaching the land, but it is apparent that the loss of the crop was due to the failure of appellant to furnish the water as he agreed in his contract.

It is also urged by respondents that, after the water began to fail in Cherokee canal, appellant purchased water from the Sutter Butte Canal Company and delivered the same to the headgate. From that act it may be inferred that appellant interpreted the contract requiring him to deliver water at the headgate to the land. As was said in Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 150, 6 L. R. A. (N. S.) 275: "The law, however, recognizes the practical construction of a contract as the best evidence of what was intended by its provisions."

We believe the testimony offered by respondents was properly received as it illuminated the circumstances surrounding the parties and their negotiations, and that the verdict of the jury was amply sustained by the evidence.

Finding nothing to justify a reversal, the judgment is affirmed.

I concur: R. L. THOMPSON, J.

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133 Cal.App. 597

## ELLINWOOD v. McCOY.

Civ. 9171.

District Court of Appeal, Second District, Division 1, California.

Aug. 3, 1933.

**Appeal and error** ⚷391(1).

Where statutory period for justifying sureties on first supersedeas bond had expired before second bond was offered, but delay in filing new bond was excusable, *held*, appellate court, by order staying proceedings on judgment, should give appellant opportunity to file good bond.

Action by Herbert M. Ellinwood against Frank J. McCoy. From a judgment in favor of plaintiff, defendant appeals. On defendant's petition for a writ of supersedeas.

Proceedings on judgment stayed, such order to remain in force during pendency of appeal upon filing of supersedeas bond within time fixed by court.

Barry & Boehler, of Los Angeles, for appellant.

Edwards & Taylor, of Los Angeles, for respondent.

HOUSER, Justice.

From the several statements of fact contained in the record herein, it is assumed by this court that the pertinent and essential conditions which appertain to the application herein are substantially that in an action pending in the superior court between the parties hereto the plaintiff therein recovered judgment for a substantial amount; that thereupon the defendant gave notice of appeal and, in accordance with the provisions of the statute with reference thereto, for the purpose of staying execution of the judgment pending such appeal, filed an undertaking which was executed by a regularly authorized corporation that was engaged in the surety business; that upon exception being taken by the plaintiff to such undertaking, and following several stipulated continuances of the hearing on the proposed justification of said surety, the said surety failed to justify; that four days thereafter, in place of the original undertaking, the defendant offered to substitute another undertaking that was executed by two individual sureties; whereupon the plaintiff excepted to said sureties and objected to the giving of said undertaking on the ground "that there was no provision in law for filing a second undertaking in the superior court," and at the same time gave notice to defendant of a motion to issue execution on the judgment; that thereupon the hearing of said motion, the said exception, and the justification of the bondsmen on the proposed new undertaking was continued by order of the trial court to a date three days later. In the meantime, and following said last-mentioned order, the defendant obtained from this court an order appointing a time for hearing his application to it for a writ of supersedeas, and further directing a stay of all proceedings on the judgment until the further order of this court. From the record, it also appears that the plaintiff in the action is financially irresponsible; and, consequently, that, if execution were to be issued on the judgment and, in pursuance thereof, that the said judgment were satisfied, in the event of a reversal of the judgment on appeal, the defendant thereafter would be unable to reimburse himself in any action which he might be entitled to bring against the plaintiff.

In such circumstances, although it may be, as contended by the respondent herein, that, before the second bond was offered by the defendant as an undertaking on appeal, the statutory time within which the sureties thereon were entitled to justify had expired, nevertheless, judging from the detailed statement of facts which appears in the affidavits presented by the respective parties hereto, but deemed unnecessary to herein set forth, this court is of the opinion that at all times pertinent to this application counsel for defendant were acting in good faith in the matter, and that the seeming negligence of counsel for the defendant in permitting the statutory period for filing a new undertaking on appeal to lapse is entirely excusable; from which it follows that, within reason and the law, the defendant should receive the protection of this tribunal to the extent of permitting him to file a good and sufficient undertaking on appeal. Nonpareil

Mfg. Co. v. McCartney, 143 Cal. 1, 76 P. 653; Segarini v. Bargagliotti, 193 Cal. 538, 226 P. 2; Foster v. Fernandes, 200 Cal. 274, 252 P. 726.

In accordance with the order made in the first of such cited cases, it is ordered that the petitioner herein be allowed, within twenty days from and after the filing of this opinion, to file an undertaking in this court in due form in the statutory amount for a stay of proceedings during the appeal, upon the following conditions: Such undertaking and the sureties thereon shall be approved by the presiding judge of the superior court of Los Angeles county, and petitioner shall give to respondent at least three days' notice of the time when such undertaking shall be presented to said judge for his approval. Upon the filing of such undertaking in this court, approved by said judge, within the twenty days above mentioned, the order of this court hereinbefore made staying proceedings until the further order of this court shall be and remain in force during the pendency of the appeal; but, in the event that such undertaking be not filed here within said twenty days, the said former order of this court shall be considered as revoked and this proceeding discharged. It is further ordered that the demurrer of respondent to the petition herein be, and the same is, overruled.

We concur: CONREY, P. J.; YORK, J.

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133 Cal.App. 599

## DAVIS v. KITTLE MFG. CO.

Civ. 4741.

District Court of Appeal, Third District, California.

Aug. 3, 1933.

**Appeal and error** ⚿816.

Where two appeals between same parties were pending in Courts of Appeal of different districts, one court could not consolidate appeals.

> Appeals could not be consolidated since it appeared that one of the appeals was not ready for submission, no showing was made that evidence in each case was the same, the evidence in one case could not be used to support or impair the findings in the other, and the appeals were not pending in the same court.

Appeal from Superior Court, Los Angeles County.

Action by Mansell A. Davis against the Kittle Manufacturing Company. Judgment for plaintiff, and defendant appeals. On defendant's motion to set aside order of submission.

Motion denied.

Stick, Moerdyke & Gibson and Lyon & Lyon, all of Los Angeles, for appellant.

Roscoe R. Hess, of Los Angeles, for respondent.

PER CURIAM.

This is a motion to set aside an order of submission for the purpose of consolidating this appeal with that of another case which was subsequently tried between the same parties, and which was appealed to, and is now pending in, the District Court of Appeal of the Second District.

In January, 1930, judgment in this case for $16,295 was rendered in favor of plaintiff by the superior court of Los Angeles county in a suit to recover royalties pursuant to a contract for the manufacture and use of a patented bedstead. The appellant's opening brief was not filed until January, 1931. The record on appeal contains 2,000 pages of evidence. The cause was finally argued and submitted to this court for decision on May 10, 1933. On June 22, 1933, the appellant filed his notice of motion to set aside the order of submission in this case on the ground that another case between the same parties was subsequently decided by the superior court of Los Angeles county, and thereafter appealed to the District Court of Appeal of the Second District, in which last-mentioned case findings were adopted which are alleged to be in irreconcilable conflict with the findings of this case. It is urged that this cause should be consolidated with the other case so as to enable the appellate court to "reconcile said findings, and to avoid two decisions upon the same facts and under contrary and contradictory findings."

From the affidavits which were filed in support of the motion to set aside the submission in this case, it appears that the appeal which is pending in the District Court of Appeal of the Second District is not ready for submission. It does not appear when that appeal will be ready for submission. There is no satisfactory showing that the evidence upon which the two cases were decided is the same. The validity of the judgments in the respective cases must necessarily depend upon the records of each separate case as they are presented on appeal. The evidence which was adduced in one case may not be used to support or impair the findings which were adopted in the other case. Each must stand upon its own record. The second appeal is not pending in this court. This court has no authority to consolidate cases unless both appeals are pending in this court. There is no assurance the Supreme Court would consolidate these two cases on appeal if both cases were pending before that tribunal.

The unwarranted delay which would result from an order setting aside the submission in this case might amount to a denial of justice to the litigants. There is no assurance a consolidation of these two cases would subserve any good or equitable purpose.

The motion is denied.

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133 Cal.App. 452

## CROWTHER v. METALITE MFG. CO.

**Civ. 4725.**

District Court of Appeal, Third District, California.

July 27, 1933.

1. **Appeal and error 🔑907(3).**

On direct appeal on judgment roll alone, it will be assumed that all objections to evidence in support of findings were waived.

2. **Appeal and error 🔑907(3).**

Where findings were not strictly in accordance with issues, on appeal on judgment roll alone reviewing court must presume evidence was introduced without any objection which would support findings, and that facts were treated by all parties as issues properly before court.

3. **Damages 🔑120(2).**

Under contract for work and labor and not of sale, damages for breach are governed by statute relating to such matter (Civ. Code, §§ 3300, 3308, 3354).

In such case, damages are governed by Civ. Code, § 3300, rather than by sections 3308 and 3354.

4. **Damages 🔑45.**

Expenses necessarily incurred in good faith, in anticipation of performance or part performance of contract, may generally be recovered as part of damages for breach.

5. **Pleading 🔑400.**

Failure to allege breach of contract respecting manufacture of certain spouts, in addition to allegation of general failure to manufacture such amount as plaintiff might designate, *held* possibly ground for refusing to admit evidence covering specific amount to be manufactured, but did not prevent parties from consenting to have such issue tried and determined (Code Civ. Proc. § 580).

6. **Appeal and error 🔑907(3).**

Rule that on appeal on judgment roll alone reviewing court assumes, in support of judgment, that objections to evidence supporting findings were waived is subject to qualification that matter adjudicated properly belonged to subject of litigation.

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Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by H. M. Crowther against the Metalite Manufacturing Company for breach of contract to manufacture pouring spouts. From an adverse judgment, defendant appeals.

Affirmed.

Swanwick & Donnelly, of Los Angeles, for appellant.

Nathan M. Dicker and Abe Richman, both of Los Angeles, for respondent.

TUTTLE, Justice pro tem., delivered the opinion of the court.

In this action plaintiff recovered judgment in the sum of $456.92 upon a complaint based upon the breach of a contract to manufacture pouring spouts. The appeal is brought here and presented upon the judgment roll alone.

It is the contention of appellant that the judgment is outside the issues and void, under the authority of Baar v. Smith, 201 Cal. 87, 255 P. 827, and other cases.

The complaint alleged that plaintiff and defendant entered into a contract according to the terms of which the defendant agreed to manufacture for the plaintiff certain Tip Top pouring spouts at a stipulated price in such quantities as the plaintiff might require or designate; that relying upon the contract and upon the promise of the defendant to manufacture the said spouts at the price agreed upon the plaintiff incurred certain expenses especially enumerated in the complaint; that contrary to the terms of said contract the defendant failed, neglected, and refused to manufacture or sell to the plaintiff spouts except 5,000 thereof, although the plaintiff informed defendant that a great many more of said spouts were required; that in addition to the expenditures set forth in said complaint, plaintiff had been further damaged in the sum of $5,000 on account of loss of profits. Defendant denied the allegations of the complaint, and in its cross-complaint alleged that the contract was for 5,000 spouts instead of in such quantities as the plaintiff might require or designate, and further alleged a compliance on its part and a failure to comply on the plaintiff's part.

The court found that plaintiff was not entitled to any damages by reason of loss of profits, and limited the recovery to certain items of expenses which were incurred by plaintiff in anticipation of performance by defendant. These items were confined to the preparation of office facilities and advertising. The finding which is attacked as being beyond the issues is as follows: "That it is true that on or about the 9th day of August, 1928, at and in the county of Los Angeles, State of California, the plaintiff and cross-defendant, and the defendant and cross-complainant, all in connection with the transaction as alleged in plaintiff and cross-defendant's complaint on file herein, entered into a contract according to the terms of which defendant and cross-complainant agreed to manufacture for the plaintiff 5000 Tip-Top spouts at the price of five cents (5c) each, for which the plaintiff and cross-defendant agreed to pay said defendant and cross-complainant upon delivery of same; that it is not true that the defendant and cross-complainant manufactured said spouts pursuant to order of said plaintiff and cross-defendant and in the manner agreed upon by the said parties."

[1, 2] It is the rule in this state that upon a direct appeal from the judgment upon the judgment roll alone, it will be assumed, in support of the judgment, that all objections to evidence in support of the findings were waived. Poledori v. Newman, 116 Cal. 375, 48 P. 325, 326. The Supreme Court in that case goes on to state that: "If objection to the introduction of any evidence had been made upon the ground that the defect to which it related was not alleged in the complaint, the court would have permitted the plaintiffs to amend their complaint. Parties will not be permitted to lie by and keep silent when evidence is offered, and after the court has rendered its judgment, object thereto upon the ground that the evidence sustaining it was inadmissible under the issues presented by the pleadings."

In the instant case it is true that the findings are not strictly in accordance with the issues raised by the pleadings. The complaint seeks recovery of damages based upon the failure of defendant to manufacture spouts "in such quantities as plaintiff may require or designate," while the findings are to the effect that defendant manufactured 5,000 of such spouts, but that they did not conform to the agreement. This appeal being before us upon the judgment roll alone, we must presume that evidence was introduced which would support this finding, without any objection upon the part of defendant and appellant, and that the facts were treated by all parties as issues properly before the court at the trial. If the entire record were before this court, a different situation would be presented.

[3, 4] A similar contention is made by appellant with reference to the elements which were considered by the court in arriving at the measure of damages. We must presume that evidence of these elements was introduced by plaintiff without objection upon the part of defendant. We may add, however, that the contract in question appears to be for work and labor, and not a contract of sale. Accordingly, the damages are governed by section 3300 of the Civil Code, rather than by sections 3308 and 3354 as contended by appellant. The rule governing this feature of the case is clearly set forth by Mr. Justice Nourse in the case of United Iron Works v. Standard B. C. Co., 69 Cal. App. 384, 231 P. 567. Expenses necessarily incurred in good faith, in anticipation of performance or part performance of a contract, may generally be recovered as a part of the damages for its breach. 8 R. C. L. 495. The items which go to make up the total amount of damage here appear to fall within the latter authority.

The case of Baar v. Smith, 201 Cal. 87, 255 P. 827, 832, is not in conflict with the rule we have followed herein disposing of the attack made by appellant upon the ground that the judgment is outside the issues. In that case the entire record was before the court, including the evidence taken at the trial. The court there states that: "It is also true that the parties may voluntarily submit and try an issue without any specific pleadings and thus be estopped from complaining thereat after judgment. [Citing Poledori v. Newman, 116 Cal. 375, 48 P. 325, and other authorities.] But no such exceptions exist in this cause."

[5] Undoubtedly the record showed affirmatively that the parties did not voluntarily submit and try the questioned issues in that case. Here we have no record of the evidence, and we must assume, in support of the judgment, that all objections to evidence in support of the findings were waived. Poledori v. Newman, supra. Section 580 of the Code of Civil Procedure authorizes a court, when an answer has been filed to the complaint, to grant the plaintiff "any relief consistent with the case made by the complaint and embraced within the issue." The "case" made by the complaint herein, as well as the issue between the parties, was the right to recover damages for a breach of a contract to manufacture pouring spouts. The failure to allege a breach in respect to the manufacture of 5,000 of such spouts, in addition to an allegation of a general failure to manufacture such amount as plaintiff might designate, might have been a ground for refusing to admit evidence covering the specific amount to be manufactured, but it did not prevent the parties from consenting to have such issue tried and determined by the court. See Poledori v. Newman, supra.

The attack made upon the judgment in the Baar Case was a direct one. The portion of the judgment which was assailed clearly exceeded the issues as defined in the pleading, and the record of the trial failed to disclose that condition where it could be said that the parties voluntarily submitted and tried the issue in question, although there were no specific pleadings raising such issues. Under such conditions, the court held that a judgment based upon such issue was coram non judice and void.

In the case of Baar v. Smith, appellants applied for a supersedeas to restrain the enforcement of a judgment pending their appeal therefrom. The relief was sought upon the ground that so much of the judgment as formed the basis for a threatened execution was coram non judice and void. The action was brought to quiet title to personal property (corporate stock) under the provisions of section 738 of the Code of Civil Procedure. The trial court adjudged that plaintiff was the owner of the property, and decreed that the possession of said property should be given to plaintiff, and ordered defendants to indorse and deliver said property to plaintiff. In the event that defendants failed or refused to comply with the judgment, it was ordered that judgment be entered against them for the stipulated value of the stock, to wit, $408,316. It was held that that portion of such judgment which decreed that plaintiff should have possession of the property, and awarding damages for a failure to deliver the same, was void as without the issues. It appears, however, that not only was the judgment roll before the court, but the entire evidence in the case. The court goes on to state that: "It is also true that the parties may voluntarily submit and try an issue without any specific pleadings and thus be estopped from complaining thereat after judgment. [Citing Poledori v. Newman, 116 Cal. 375, 48 P. 325, and other authorities.] But no such exceptions exist in this cause."

[6] Undoubtedly the record in the Baar Case showed affirmatively that the parties did not submit voluntarily to try the questioned issues. Here we have only the judgment roll before us and no record of the evidence, and we are bound to assume, in support of the judgment, that all objections to evidence in support of the findings were waived. This rule is subject to the qualification that (as appears here) the matter adjudicated properly belonged to the subject of the litigation (see opinion by this court in Suisun Lumber Co. v. Fairfield School District, 19 Cal. App. 587, 127 P. 349), and where the relief granted was possible and inherent in the cause of action set up. Naugle v. Naugle, 89 Kan. 622, 132 P. 164. On the other hand, if an adjudication is attempted in connection with matters which are wholly unrelated to the subject-matter of the litigation, such as a judgment for the probate of a will where the action is one for the possession of real property, or a judgment ordering specific performance where the action is one for libel, such adjudication would be clearly void, as transcending the limits of the authority of the court. Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914. In California, where the ordinary action is brought to quiet title to real property under the provisions of section 738 of the Code of Civil Procedure, the plaintiff is entitled to a judgment for possession of the property, but jurisdiction to thus act is derived from section 380 of the Code of Civil Procedure. Polack v. Gurnee, 66 Cal. 266, 5 P. 229, 610. When section 738 of the Code of Civil Procedure was amended so as to place personal property in the same category with real property in the matter of quieting title, the Legislature apparently overlooked the amendment of section 380 of the Code of Civil Procedure so as to give the court the right to adjudge possession in respect to personal property in such an action. If the right to possession is expressly made an issue in an action to quiet title, of course the authority to adjudicate that issue would be unquestioned.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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133 Cal.App. 429

## PEOPLE v. GONZALES.

Cr. 1268.

District Court of Appeal, Third District, California.

July 25, 1933.

**Criminal law** ⚷1182.

Judgment and order appealed from were affirmed where transcript was filed, but no brief was filed for appellant, and no appearance made for him when case was called for hearing (Pen. Code, § 1253).

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Sino Gonzales, also known as Lino Gonzales, was convicted of petit theft with prior conviction of petit theft, and he appeals.

Affirmed.

Hugo McKinley, and Ralph M. Brown, both of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Stanislaus county of petit theft, a misdemeanor, with prior conviction of petit theft, a misdemeanor.

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

The transcript on appeal was filed in this court June 3, 1933. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on July 25, 1933. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

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133 Cal.App. 567

## ROBINSON v. EL CENTRO GRAIN CO. et al.

Civ. 960.

District Court of Appeal, Fourth District, California.

Aug. 1, 1933.

Rehearing Denied Aug. 30, 1933.

**1. Appeal and error** ⊂⇒1043(7).

Where court refused continuance until after decision of case involving similar issues, *held* that present case must be retried so that effect of now final judgment in such other case on issues in instant case may be determined.

> A continuance was asked for until after the decision of the other case on the ground that, when the judgment in that case became final, it would adjudicate the issues raised by special defenses in instant case.

**2. Trial** ⊂⇒368.

Agreed statement of facts takes place of, and has force and effect of, unattacked finding of facts made by court.

**3. Pleading** ⊂⇒291(2).

Where copies of instruments are set forth in answer, their genuineness and execution are admitted, unless adverse party makes denial in affidavit, but any new matter alleged in answer is deemed controverted (Code Civ. Proc. §§ 448, 462).

**4. Judgment** ⊂⇒580.

Trial court's judgment from which appeal is pending is not such final judgment that it becomes res judicata on issues.

**5. Pleading** ⊂⇒237(1).

Considerable latitude is given trial judges in permitting amendment of pleadings to conform to proof.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Action by J. B. Robinson against the El Centro Grain Company and others. From an adverse judgment, plaintiff appeals.

Reversed and remanded.

See, also, 125 Cal. App. 416, 13 P.(2d) 965.

Louis Ferrari, T. J. Bricca, and C. H. White, all of San Francisco, and Gray, Cary, Ames & Driscoll, of San Diego, for appellant.

Harry W. Horton, of El Centro, and Laurence H. Smith, of La Jolla, for respondents.

MARKS, Justice.

Appellant is the assignee for the purpose of collection of a promissory note in the principal sum of $16,000 and given by the El Centro Grain Company to the Southern Trust & Commerce Bank, a San Diego bank. This note was secured by a deed of trust on real property and a chattel mortgage, and bore on its face the signatures of S. T. Marshall and Harry W. Horton. It also bore a written guaranty of payment signed by Harry W. Horton, Arthur C. Rath, S. T. Marshall, C. W. Horton, J. M. Lathrop, and C. G. Wulff. Prior to the arising of the issues presented here, the Bank of Italy National Trust & Savings Association had succeeded to the interest of the Southern Trust and Commerce Bank.

The complaint in this action, after alleging the corporate existence of the two banks, the execution, indorsement, delivery, and assignments of the note, makes the further allegation that the security for the note had been exhausted and that its principal sum had been partially paid. Judgment was sought against the makers and indorsers for the deficiency remaining, together with interest and attorneys' fees.

The trial of this action was commenced on April 27, 1931. Findings of fact and conclusions of law and the judgment were filed July 1, 1931. The last trial day was May 14, 1931. The original answers of the defendants are not in the record. On May 5, 1931, over the strenuous objection of appellant, defendants were permitted to file amended answers. These set up what counsel admit were new defenses consisting of allegations of diversion of certain of the funds secured by the note from the purposes for which they were intended; a change in the due date of the note by substituting "Three Years" for "One Year" after date; and that the security had not been exhausted. When the amended answers were filed, counsel moved the court for a continuance of the trial until after the decision of the case of El Centro Grain Company et al. v. Bank of Italy National Trust & Savings Association, 123 Cal. App. 564, 11 P.(2d) 650, upon the ground that when the judgment in that case became final it would adjudicate the issues raised by the first two special defenses. This motion was denied, as was a motion to strike out these defenses, and the case proceeded to judgment. The trial court's findings sustained all of the special defenses set up in the amended answers and judgment for respondents followed.

[1] One principal question which is presented by this appeal appears to us to be controlling and worthy of very careful consideration, namely, Did the trial court abuse its discretion in refusing a continuance until after a decision of El Centro Grain Company v. Bank of Italy, supra, and the judgment in that case had become final? We have neither discovered a case from the courts of this state nor been cited to one directly deciding the question under facts similar to those before us.

In approaching this question, it is necessary that we summarize the issues of the case of El Centro Grain Company v. Bank of Italy, supra, in considerably greater detail than they are set forth in the published opinion. El Centro Grain Company, Harry W. Horton, Julia Horton, S. T. Marshall, Louise Marshall, A. C. Rath, C. G. Wulff, and J. M. Lathrop instituted their action in the superior court of Imperial county against Bank of Italy National Trust & Savings Association and others. The action as to the other defendants was later dismissed. It was alleged that the plaintiffs were the owners of real property in Imperial county; that the El Centro Grain Company executed to the Southern Trust & Commerce Bank its promissory note in the principal sum of $16,000, dated October 5, 1928 (an evident typographical error; it should have been 1922), due and payable November 14, 1925, with interest at 7 per cent. per annum; that the plaintiffs executed the chattel mortgage and deed of trust on the above-mentioned real property to secure the payment of the note; that certain facts were alleged which entitled plaintiffs to credits on the indebtedness, the exact amount being unknown to them; "that it is necessary that an accounting be had between the plaintiffs and said defendant banks in order to ascertain the true and exact amount that may be actually due, owing and unpaid from the plaintiffs to the said defendant banks; that the plaintiffs allege and state that the said defendants claim that there is due from the plaintiffs a sum which is in truth and fact from $2,500.00 to $3,500.00 in excess of the amounts actually due or owing or unpaid"; that on April 19, 1928, the defendant Bank of Italy National Trust & Savings Association caused the trustee named in the deed of trust to file a notice of default; that a notice of sale was published fixing the sale of the property for August 17, 1928, and that the sale would take place unless restrained by court; that the defendants claimed there would be due on the note $17,165.10 on the date of sale while there would not have been more than $14,750 actually then due; "that the plaintiffs herein are willing and desirous and able to pay the true amount that is due to the defendants or any of them upon said promissory note." An accounting was sought to determine the amount actually due on the note, and an order was issued temporarily restraining the sale.

The Bank of Italy answered, alleging execution of the deed of trust, chattel mortgage and note, and setting forth exact copies of the instruments, together with a copy of the written guaranty of the note. The copy of the note pleaded was due "three years after date." No plaintiff filed any affidavit denying the genuineness or due execution of any of the instruments.

The parties submitted an agreed statement of facts in which the following appears: "That on the 14th day of November, 1922, the plaintiffs, El Centro Grain Company, a corporation, Harry W. Horton, and S. T. Marshall, executed to the defendant Southern Trust and Commerce Bank, a corporation, its certain promissory note in writing in the words and figures following, to-wit: [Here follows a copy of the note as pleaded in the answer due 'three years after date'.]" "The payments of said note were, at the time of its execution, and delivery, guaranteed by the following named plaintiffs and persons, in the words and figures following, to-wit: 'We hereby guarantee payment of the within note, or any renewal, or extension thereof, and all expense of collection thereof, and waive demand, presentment for payment, protest and notice of protest, and consent that the time for payment may be extended without notice to Harry W. Horton, S. T. Marshall, J. M. Lathrop, Arthur C. Rath, C. W. Horton, C. G. Wulff.'" This agreed statement of facts concluded: "On November 14, 1925, the date of maturity of the note, all of said sum of $16,000.00, had been expended, except the sum of $223.95, for which plaintiff was entitled to credit on not later than said 14th day of November, 1925. That on November 24, 1925, a rebate was received by the Southern Trust and Commerce Bank, a corporation, for which plaintiffs are entitled to a credit of One Hundred Ninety-seven and 35/100 ($197.35.) Dollars, as of that date. That the only issue to be decided in this case is as to the amount due on said note of Sixteen Thousand ($16,000.00) Dollars, and advances made by the Southern Trust and Commerce Bank and Bank of Italy National Trust and Savings Association, together with interest and the relief the respective parties are entitled to, but the question of accounting is stated herein as to the respective amounts to be debited and credited to the respective parties. * * * It is further stipulated that the legal proposition as to the question of time and amount of interest shall be submitted to the court on briefs." A supplemental stipulation of facts was made which is not material here.

The judgment in this case contains the following: "That there is due and owing to the defendant Bank of Italy National Trust and Savings Association, a corporation, for principal and interest on the note secured by the trust deed, a copy of which said note and trust deed is attached to the answer of the defendant Bank of Italy National Trust and Savings Association, the sum of Seventeen Thousand Sixty-eight and 02/100 Dollars ($17,068.02)." It was further adjudged that the Bank of Italy National Trust & Savings Association had the right to proceed with the foreclosure, but it was restrained from doing so for thirty days to enable the plaintiffs to pay the amount due on the note. This judgment was affirmed by this court on May 19, 1932, and the remittitur issued July 19, 1932.

[2] In the first case the trial court made no findings of fact, but decided it on the agreed statement of facts. "Such an agreed statement of facts takes the place of, and has the force and effect of, an unattached finding of facts made by the court. Burnett v. Pacheco, 27 Cal. 408; Muller v. Rowell, 110 Cal. 318, 42 P. 804; McMenomy v. White, 115 Cal. 339, 47 P. 109; Conway v. Supreme Council Catholic Knights of America, 137 Cal. 384, 70 P. 223." Estate of Davidson, 21 Cal. App. 118, at page 120, 131 P. 67, 68. See, also, Faust v. City of San Diego, 115 Cal. App. 277, 1 P.(2d) 543, Wixom v. Davis, 198 Cal. 641, 246 P. 1041.

[3] Where copies of instruments are set forth in an answer, their genuineness and due execution are admitted, unless the adverse party denies such genuineness or due execution in an affidavit filed within ten days. Section 448, Code Civ. Proc. Any new matter alleged in an answer is deemed controverted by the adverse party. Section 462, Code Civ. Proc. The genuineness and due execution of the note as pleaded in the answer (due "three years after date"), and of the guaranty, became issuable facts in the case by their being set forth in the answer, and their genuineness and due execution became admitted when the opposite party failed to deny such issue under oath within the time allowed by law. The parties agreed in writing in the trial court, and the trial court found through the agreed statement of facts, that the note in the language pleaded was "executed" by El Centro Grain Company, Harry W. Horton, and S. T. Marshall, and that Harry W. Horton, S. T. Marshall, J. M. Lathrop, Arthur C. Rath, C. W. Horton, and C. G. Wulff guaranteed in writing the payment of the note at the time of its execution and delivery to the payee. C. W. Horton, one of the respondents here, was not a party to that action.

Appellant cites numerous California cases which he maintains support the doctrine that a final judgment is not only conclusive between the parties and their successors acquiring an interest subsequent to the judgment on "the subject-matter in controversy in the actions upon which it is based, but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case; the presumption being that all such issues were met and decided." Bingham v. Kearney, 136 Cal. 175, 68 P. 597; Quirk v. Rooney, 130 Cal. 505, 62 P. 825; Martin v. Holm, 197 Cal. 733, 242 P. 718; Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 258 P. 387; Elm et al. v. Sacramento, etc., Co. (Cal. Sup.) 17 P.(2d) 1003; Edmonds v. Glenn-Colusa Irr. Dist. (Cal. Sup.) 19 P.(2d) 502. This is but another way of stating the familiar rule recognized in many jurisdictions that a party may neither split his demand in more than one action nor reserve some of his defenses for a second action if he be unsuccessful in the first.

[4] It is admitted that a judgment of a trial court from which an appeal is pending is not such a final judgment that it becomes res adjudicata on the issues of the case. Brown v. Campbell, 100 Cal. 635, 35 P. 433, 38 Am. St. Rep. 314. The judgment in the case of El Centro Grain Co. et al. v. Bank of Italy, supra, had not become final at the time of the trial of the instant case in 1931. It became final on July 19, 1932, more than a year ago.

In cases presenting similar facts, it has been held that a party should ask a continuance of the second trial until the prior case is decided, and that such a request would be good ground for continuance, or that the trial judge could on his own motion continue the second trial. Brown v. Campbell, supra; Smith v. Smith, 134 Cal. 117, 66 P. 81; Houghton v. Superior Court, 187 Cal. 661, 203 P. 765; Pellissier v. Title, etc., Co., 208 Cal. 172, 280 P. 947; Lincoln v. Superior Court, 95 Cal. App. 35, 271 P. 1107. The converse of this situation is presented here. We must answer the question, Where the request is made and denied, is such denial an abuse of judicial discretion?

The Supreme Court was once placed in the unfortunate position of having to affirm two judgments, reaching opposite conclusions on the same state of facts, because no request for a continuance of the second case had been made in the trial court. Priest v. Brown, 100 Cal. 626, 35 P. 323, Brown v. Campbell, supra. We are not forced into any such position here because the request for a continuance of the trial was made and denied. We think the case must be retried so that the effect of the now final judgment in El Centro Grain Co. et al. v. Bank of Italy, supra, on the issues of the instant case may be determined.

[5] Appellant urges that the trial court abused its discretion in permitting respondents to file amended answers during the trial setting up the defense of diversion of part of the funds, of unauthorized alteration of the note, and that the security given for its payment had not been exhausted. Considerable latitude is given trial judges in permitting the amendment of pleadings to conform to the proof, and we cannot conclude that it was a breach of discretion to permit the filing of this pleading under the facts presented. The legal sufficiency of the first two special defenses will have to be determined on the retrial of the case, and, after the judgment in El Centro Grain Co. et al. v. Bank of Italy, supra, has become final. The third special defense presents a proper question for the determination of the trial court. Bank of Italy v. Bentley (Cal. Sup.) 20 P.(2d) 940; Brink v. Benton (Cal. App.) 21 P.(2d) 455.

Judgment reversed.

We concur: BARNARD, P. J.; TURRENTINE, Justice pro tem.

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133 Cal.App. 520

## LEWIS et al. v. HUNT.

Civ. 7645.

District Court of Appeal, Second District, Division 1, California.

July 29, 1933.

**1. Mortgages 🔑283(1).**

Purchaser who assumes payment of mortgage debt becomes as to mortgagor the principal debtor, and mortgagor a surety.

**2. Subrogation 🔑18.**

Mortgagors who voluntarily extinguished mortgage debt which their purchaser assumed became subrogated without formal assignment to benefit of security, which, as equitable assignees, they could enforce for money expended.

**3. Mortgages 🔑280(4).**

Statute providing for but one action to recover debt secured by mortgage was part of contract between mortgagors and purchaser, who assumed to pay mortgage debt, as though expressly incorporated therein (Code Civ. Proc. § 726).

**4. Mortgages 🔑292(3).**

Mortgagors who voluntarily paid mortgage debt could not, prior to foreclosure and determination of deficiency, have judgment for breach of contract against their purchaser, who assumed to pay mortgage debt (Code Civ. Proc. § 726).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Elizabeth T. Lewis and another against William M. Hunt. From a judgment in favor of plaintiffs, defendant appeals.

Reversed and remanded.

Meserve, Mumper, Hughes & Robertson and Baldwin Robertson, all of Los Angeles, for appellant.

Root, Bettin & Painter and Conant Wait, all of Los Angeles, for respondents.

HENDERSON, Justice pro tem.

The defendant, William M. Hunt, appeals from a judgment in favor of the plaintiffs Lewis, husband and wife, for breach of contract. The facts which we deem material for our decision are summarized as follows: The defendant entered into a contract on October 1, 1926, for the purchase from plaintiffs of a certain house and lot, which Mrs. Lewis claimed as her separate property, at a price of $15,000. As part of the purchase price the defendant "assumed and agreed to pay" when it became due on February 1, 1927, a certain note in the sum of $3,500 secured by a mortgage on the property held by the Bank of Italy. After the transfer of the premises, in further payment of the purchase price the defendant delivered to the plaintiffs his promissory note secured by a deed of trust constituting a second lien on the property. The defendant defaulted in the payment of this note when due, which default was followed by the purchase of the property subject to the mortgage at the foreclosure sale by Mrs. Lewis, who went into possession under the trustee's deed on February 15, 1930. The defendant having defaulted in the payment of the note secured by the mortgage, the plaintiffs voluntarily paid the same to the mortgagee bank at its suggestion in order to protect the property from foreclosure, and received from the bank what was termed a "release" on the 22d day of March, 1930. The plaintiffs sued, and the court rendered judgment, upon the contract of assumption alone. Irrespective of the many objections raised by defendant, they may be reduced for our consideration to his single claim that he cannot be legally bound upon a judgment for payment of money until plaintiffs have first foreclosed the mortgage, exhausted their security, and reduced the obligation to a fixed amount on a deficiency judgment, if any.

It is the position of the respondent, which receives the support of the great weight of authority, that the assumption of the mortgage debt by the grantee of the land subject thereto as part of the purchase price is a contract to pay rather than one of indemnity, and a cause of action accrues in favor of the original grantor for the entire sum secured thereby immediately upon the failure of the purchaser to pay the mortgage debt at maturity. 41 Corpus Jur. p. 741, § 802. The authorities announcing the majority view ordinarily declare that a recital in a deed stating, " 'which mortgage the grantee assumes, or assumes and agrees to pay' or the conveyance is made 'subject to the payment of an outstanding mortgage,' " makes the sum of money represented thereby a part of the purchase price, and imposes a personal obligation upon the grantee, which, in case of default, may be enforced by the mortgagee pursuant to the terms of the contract. Burbank v. Roots, 4 Colo. App. 197, 35 P. 275. See, also, Stichter v. Cox, 52 Neb. 532, 72 N. W. 848; Morlan v. Loch, 95 Kan. 716, 149 P. 431; Furnas v. Durgin, 119 Mass. 500, 20 Am. Rep. 341; Haas v. Dudley, 30 Or. 355, 48 P. 168.

The defendant urges, however, that, no matter how founded in reason the rule above announced may be, it arose in jurisdictions not restricted by a statutory requirement similar in nature to that of section 726 of the Code of Civil Procedure, providing for but one action to recover a debt secured by a mortgage. In this connection he further points to the fact that the California cases in their construction of this section have consistently held that a court cannot properly render a personal judgment in an independent action against the maker of a promissory note secured by a valid mortgage until the security is exhausted (Barbieri v. Ramelli, 84 Cal. 154, 23 P. 1086; Crim v. Kessing, 89 Cal. 478, 26 P. 1074, 23 Am. St. Rep. 491; Crescent Lumber Co. v. Larson, 166 Cal. 168, 135 P. 502); or, expressed in other words, the mortgaged land necessarily constitutes the primary fund out of which the mortgage debt must be paid (Woodward v. Brown, 119 Cal. 283, 51 P. 2, 542, 63 Am. St. Rep. 108; White v. Schader, 185 Cal. 606, 198 P. 19, 21 A. L. R. 499). Furthermore, the prevailing tendency of our appellate courts is to extend rather than limit the application of the provisions of said section 726 of the Code of Civil Procedure. See Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley (Cal. Sup.) 20 P.(2d) 940.

[1-3] Likewise in determining the position of plaintiffs we are bound to consider with the principles above announced the well-established rule that a purchaser or grantee who assumes the payment of the mortgage debt becomes as to the mortgagor the principal debtor, and the mortgagor a surety, and the dealings between the parties must be controlled by the doctrines governing suretyship. Tuohy v. Woods, 122 Cal. 665, 55 P. 683; Williams v. Naftzger, 103 Cal. 438, 37 P. 411; Hopkins v. Warner, 109 Cal. 133, 41 P. 868; Bogart v. George K. Porter Co., 193 Cal. 197, 223 P. 959, 31 A. L. R. 1045. Manifestly, in view of this rule, the plaintiffs by their voluntary extinguishment of the mortgage debt became subrogated without formal assignment to the benefit of the security, which as equitable assignees they could enforce for the money expended. Graham v. Durnbaugh, 44 Cal. App. 483, 186 P. 798; White v. Schader, supra. We are further convinced that the extent of respondents' right to recover cannot be determined solely by the strict language of the contract, but should be read in the light of said section 726 of the Code of Civil Procedure, which must necessarily enter into and form a part of the agreement as though expressly referred to and incorporated by its terms. 6 Cal. Jur. p. 310, § 186.

[4] It is evident that the payment of the note and mortgage by plaintiffs was not required to establish defendant's liability under the contract. This act on their part was apparently for no other purpose than to protect their newly acquired interest, purchased at the trustee's sale, from foreclosure under the prior mortgage. Moreover, the plaintiffs were presumed to know as a matter of law at the commencement of the action that defendant's liability was merely one of indemnity contingent upon the sale of the mortgaged property in a legal foreclosure proceeding and its failure to satisfy the debt and costs. See Biddel v. Brizzolara, 64 Cal. 354, 30 P. 609; Williams v. Naftzger, supra; 18 Cal. Jur. p. 42, § 364; Robson v. O'Toole, 45 Cal. App. 63, 187 P. 110. This being true, the plaintiffs have deprived themselves of a right of action under the contract by their failure to foreclose the mortgage and determine the deficiency, if any.

There is nothing said in the case of Turner v. Howze, 28 Cal. App. 167, 151 P. 751, cited and relied upon by respondents, contrary to the opinion we have reached. There the debt defendant agreed to pay was in substance his own, for which plaintiff's property had been given as security, and the plaintiff was clearly entitled to recover upon the contract.

For the foregoing reasons, the judgment is reversed, and the cause remanded for a new trial.

We concur: CONREY, P. J.; HOUSER, J

133 Cal.App. 418

### TOMLINSON v. KIRAMIDJIAN et al.

### Civ. 1260.

District Court of Appeal, Fourth District, California.

July 24, 1933.

Hearing Denied by Supreme Court Sept. 21, 1933.

**1. Automobiles 🔑245(35, 54).**

In action for death of automobile guest, whether driver was under influence of liquor, and whether this proximately caused accident, *held* for jury.

**2. Automobiles 🔑245(87).**

Whether deceased automobile guest knew or should have known that driver was under influence of liquor *held* for jury.

**3. Automobiles 🔑245(24).**

In action for death of automobile guest, whether driver turning to wave at passing automobile while traveling at excessive speed was guilty of gross negligence proximately causing accident *held* for jury.

**4. Automobiles 🔑244(31).**

Evidence that person has been drinking liquor, and thereafter drives automobile negligently, does not as matter of law show he was driving while under influence of liquor.

**5. Judgment 🔑199(3).**

Trial court may enter judgment notwithstanding verdict when it could and should have directed verdict, and court's right to direct verdict is same as right to grant nonsuit (Code Civ. Proc. § 629).

**6. Judgment 🔑199(3).**

Entering judgment for defendant notwithstanding verdict in action for death of automobile guest *held* error, where jury questions were presented.

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Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Mrs. J. Tomlinson, guardian ad litem of Betty Daslyne Brown, against Armen Kiramidjian and another. From judgment for defendants, notwithstanding the verdict, plaintiff appeals.

Reversed, with directions.

Harry A. Wishard, of Fresno, for appellant.

Conley, Conley & Conley, of Fresno, for respondents.

TURRENTINE, Justice pro tem.

Plaintiff, as guardian ad litem of Betty Daslyne Brown, a minor, brought suit against defendants for damages arising out of the death of the father of the minor, who was killed while riding in an automobile as the guest of the defendants. George Christian was operating the automobile with the consent of defendant Kiramidjian, the owner. The cause was tried before a jury, which rendered a verdict for the plaintiff. Prior to submitting the matter to the jury, defendants moved for a directed verdict. This motion was denied. After verdict, and before entry of the judgment, motion was made to vacate and set aside the verdict of the jury and enter a judgment for defendants notwithstanding the verdict. The motion for judgment notwithstanding the verdict was made in the alternative form asking therefor, and reserving, if that be denied, the right to apply for a new trial. On motion for new trial, judgment on the verdict was set aside, and judgment notwithstanding the verdict was made and entered for the defendants. Plaintiff appeals from such judgment.

The motion for a directed verdict and motion for judgment notwithstanding the verdict were made on the ground of the insufficiency of the evidence to justify the verdict, "because it appears from the whole evidence in the case that the negligence of the deceased, plaintiff's ancestor, proximately contributed to his death."

It appears from the evidence that at about 1 o'clock on the afternoon of August 25, 1930, the deceased met defendants and served them with beer; that the three of them drank a couple of bottles apiece between that time and 3 o'clock. At about 3 o'clock defendants left in an automobile and drove to a place about two miles distant. The deceased did not go with them. Upon arrival they drank more beer, returning about 4 o'clock, where they again joined deceased. It does not appear that deceased knew of their drinking at this other place. All three again drank beer, either a glass or a bottle apiece. They also had lunch. At about 5 o'clock they left for deceased's home, the defendant Christian driving, with all three sitting in the front seat. Christian drove some distance, and at the request of deceased stopped at a place, where he got two bottles of beer, putting them in the car. While there they each drank another glass. They re-entered the automobile with the same seating arrangement, Christian driving, and did not stop again until the accident occurred. On passing an automobile, Christian, while driving between fifty-five and sixty miles an hour, turned and waved his hand at the occupants of the other car. While he was so engaged the automobile he was driving swerved onto the left-hand side of the road, he glanced forward, turned it back to the right, it went off the highway and overturned, causing the death of deceased. The car was going about fifty-five miles an hour at the time of the accident.

The defendant Kiramidjian gave the following testimony:

"Q. Now, was Christian driving a little fast at any time prior to the accident? A. I don't know—at certain times.

"Q. Did Mr. Brown say anything to you or to Mr. Christian about his driving? A. He did once, he made a remark.

"Q. What did he say? A. Well, he told me—he asked me to take the wheel. He said if I didn't he thought Mr. Christian would kill us before we got home.

"Q. What was your answer to him? A. I told him, 'Our lives are not any better than his,' so we were feeling pretty good and we didn't care. We told Christian to slow up.

"Q. I will ask you if you said this to him after Mr. Brown told you to have him slow down, you said, 'What the hell?—your life is no better that his, sit where you are?' Is that what you said? * * * A. Yes, sir."

Whether this was before or after Brown got out of the automobile to get the two bottles of beer does not appear. When Kiramidjian was asked whether Christian's actions on the day of the accident were different than on any other day when he had not been drinking, he replied:

"Well, it has some effects on a fellow, he was feeling pretty good.

"Q. You had been with Mr. Christian on numerous occasions when he had not been drinking liquor? A. Yes.

"Q. Was there any difference in his actions this day than the days when you were with him when he had not been drinking? * * * A. No.

"What condition was Mr. Christian in just prior to getting in and driving the car relative to his stability? A. Well, he seemed all right to me.

"Q. He looked like he was able to drive your car did he? A. Yes.

"Q. Just state what you saw, what he did? A. He was feeling all right, he was feeling happy. He wasn't staggering or anything. He looked all right."

The defendant Christian, when called as a witness, gave substantially the same story as Kiramidjian, and, when asked whether he felt any different on the day of the accident than on other days, answered:

"Oh, yes, why sure, I felt better because I had been drinking beer. I felt happy and things like that. You are bound to feel different. I wasn't intoxicated, I had been drinking beer but not intoxicated."

Over plaintiff's objection, a traffic officer, who came on the scene shortly after the accident and saw the physical conditions surrounding the accident and smelled liquor, testified that he "thought it was a drunken party." He heard one of the defendants talk, did not know which one it was, but thought it was Christian. Some broken bottles were found at the scene of the accident. The three witnesses whose evidence we have reviewed were the only ones who testified as to what happened before or after the accident in respect to the drinking and condition of defendants and of the deceased.

[1-4] From these facts we feel that it was a question for the jury to determine, under proper instructions, (a) whether the defendant Christian was drunk or under the influence of intoxicating liquor as defined in People v. Ekstromer, 71 Cal. App. 239, 246, 235 P. 69, and whether, if drunk, or under the influence of intoxicating liquor, this was the proximate cause of the accident; (b) whether the deceased knew, or should have known, that defendant Christian was under the influence of intoxicating liquor when he last started to ride with him; and (c) whether the turning to wave at the passengers of the passing automobile while traveling at an excessive rate of speed was gross negligence, and whether such gross negligence, if so found, was the proximate cause of the accident. Krause v. Rarity, 210 Cal. 644–655, 293 P. 62, 77 A. L. R. 1327. From evidence that a person had been drinking intoxicating liquor and thereafter drives his car in a negligent manner, it does not follow as a matter of law that he was driving while under the influence of intoxicating liquor. There is no evidence in the record from which it can be said as a matter of law that deceased knew, or should have known, that Christian was under the influence of intoxicating liquor before he entered the automobile the last time, or that after discovering his intoxicated condition he had a clear chance to leave the automobile at a safe place. This clearly distinguishes the present case from Hirsch v. D'Autremont (Cal. App.) 23 P.(2d) 1066.

[5, 6] The trial court has power to enter a judgment notwithstanding the verdict when it could and should have in the first instance directed a verdict (Code Civ. Proc. § 629), and the court's right to direct a verdict is "absolutely the same as the right * * * to grant a nonsuit." Perera v. Panama-Pacific International Exposition Co., 179 Cal. 63, 175 P. 454, 455. Applying these rules to the facts and to the conclusions which we have drawn therefrom, we are of the opinion that the trial court did not have the right to determine from the whole evidence that a verdict for defendants should have been directed in the first instance, and therefore did not have a right to enter a judgment notwithstanding the verdict.

It is urged that a reversal of this case results in a final judgment for plaintiff. This is not the law. Upon a reversal of the case, and judgment on the verdict being entered, the defendants have a right to file a motion for new trial, if they so desire, and the trial court shall pass upon said motion as if made in the first instance, if made in the manner and within the time required by law, after notice of entry of the judgment as herein ordered.

The judgment is reversed. It is directed that judgment upon the verdict be entered.

We concur: BARNARD, P. J.; MARKS, J.

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133 Cal.App. 606

### PEOPLE v. NORRIS.

Cr. 1267.

District Court of Appeal, Third District, California.

Aug. 7, 1933.

**1. Robbery ⚷24(1).**

Evidence sustained conviction of first-degree robbery (Pen. Code, § 1111).

**2. Robbery ⚷23(1).**

Where there was no proof or offer of proof that accused left after robbery to visit wife in another state at her request, exclusion of question to wife touching request was proper.

**3. Criminal law ⚷829(10).**

Refusal of accused's instructions on weight to be given accomplice's testimony was harmless, where such matter and all others were fully covered in instructions given (Pen. Code, § 1111).

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Jack Norris was convicted of robbery in the first degree, and he appeals.

Affirmed.

Maxwell M. Willens, of Stockton, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant was convicted of the crime of robbery in the first degree, upon an information filed against him by the district attorney of San Joaquin county, charging that the defendant on or about the 28th day of February, 1933, willfully, feloniously, etc., held up and robbed the occupants of a certain roadhouse known as and called the "Five Mile House," situate in said county. The roadhouse in question is situate about five miles north of the city of Stockton.

The record discloses that the defendant and one George Hibbitt, a negro, participated in the robbery, and, at the trial of the appellant in this action, Hibbitt, who had previously pleaded guilty and been sentenced to Folsom, told the whole story of the transaction. This record discloses that the appellant and Hibbitt had been acquainted with each other for some years, had worked together in Stanislaus county at a place near Los Banos, and for the same employer. The record further shows that on Sunday evening, February 26, 1933, while the defendant, accompanied by two witnesses who testified in the cause, to wit, Art Fuller and H. W. Lambert, were walking along on one of the streets in the city of Stockton, the appellant recognized Hibbitt, who was sitting on a porch in front of a residence bordering the street where the three parties were walking, and at the time in question Hibbitt and the appellant had some conversation. This conversation was not overheard by either of the witnesses we have mentioned. Thereafter, the robbery occurred on the evening of February 28th.

The circumstances surrounding the robbery appear to be as follows: An automobile drove up in front of the roadhouse some time between 10 and 11 on the evening of February 28th; a colored man and white man immediately appeared at the door of the roadhouse, the colored man carrying a revolver, the white man having a handkerchief tied over his face to conceal his features; the occupants of the roadhouse were lined up, bound with wire, their pockets rifled, and the till of the roadhouse opened and the contents taken. The proceeds of the robbery aggregated about $175. The details of the robbery are fully set forth in the testimony of George Hibbitt; the fact of their being driven to the roadhouse in a Buick coupé belonging to Norris; the kind of gun which Norris gave to Hibbitt to use as he preceded the defendant in accomplishing the robbery. It also appears from the testimony of Hibbitt that the appellant and Hibbitt had been acquainted with each other from some time in the year 1926; that it was in the years 1926, 1927, and 1928 that the two were living near Los Banos. This witness, however, had not seen the appellant after 1928 until the meeting in Stockton which we have just mentioned. On the way out from Stockton for the purpose of the robbery, it appears that the appellant, who was driving the car, explained to Hibbitt the manner in which the holdup should be carried out, and that the two drove about for some little time until the hour which we have mentioned.

[1] Upon this appeal it is contended that the evidence is not sufficient to warrant con-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

viction, and that the court erred in its instructions to the jury, also in its rulings excluding the testimony offered by the appellant. The contention that the testimony is insufficient to support the verdict is based upon the provisions of section 1111 of the Penal Code, which specifies that a conviction cannot be had upon the testimony of an accomplice unless it is corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense, etc. If the record discloses any testimony tending to connect the defendant with the commission of the offense, the first contention of the appellant is unsound.

There is testimony in the record showing that the defendant, on or about the 1st day of October, 1932, went to work on a ranch known as the "Quinto" ranch, owned by a man by the name of Devaney. This ranch is located about two miles north of the Five Mile House, and, while there, had a conversation with a man by the name of Tinner, and during this conversation the appellant stated to Tinner that he had in mind the holding up of the Five Mile House. The record further shows that the employees of the Quinto ranch, including the appellant, were accustomed to have their pay checks cashed at the Five Mile House. The witness Hibbitt testified that the wire which was used in tying up the occupants of the Five Mile House on the night of the robbery was obtained from the Quinto ranch. It was found upon examination that the wire used in tying up the occupants of the Five Mile House was similar to wire found and left at the Quinto ranch. The wire used was baling wire.

The witness Hibbitt testified that the gun that was given to him by the appellant was a Colts 44 six-shooter, single action, side loader. One of the occupants of the roadhouse who was held up testified as to the revolver used on that occasion. Question and answer in relation to the revolver are as follows: "Q. Was there anything about it that you noticed particularly? A. It has got that side rod there, side loader, an old Colts. I could tell it, in fact I identified that gun before they ever picked it up, yes, I don't know if it is the same gun, but it is one like it if it is not the same."

The record shows that, when the defendant was arrested in Reno, to which place he had gone shortly after the robbery, a gun in the possession of the defendant was found precisely like the description of the gun given by the witness Hibbitt, and, also, one of the occupants of the roadhouse. The defendant admitted the ownership of the gun, and stated that he had owned it for about fifteen years. One of the occupants of the roadhouse testified that he noticed a peculiar wobbling gait of the white man who accompanied the negro, and that the wobbling gait of the white man was exactly similar to the walk of the defendant, which he had noticed after the defendant's arrest and during the course of the trial at Stockton. The appellant denied his acquaintanceship with the witness Hibbitt; denied that he ever knew him in Los Banos; denied the meeting in Stockton testified to by the witnesses Tinner and Lambert. The conversation testified to by Tinner with the appellant appears not to have been denied.

The record further shows that Hibbitt knew all about the automobile owned by the appellant; that he had had certain repairs made thereon; the cost thereof; had been compelled to have the shock absorbers taken off the machine, and other incidents in relation to the automobile, showing his familiarity with and acquaintance with the affairs of the appellant. The defendant simply denied his acquaintanceship with the negro.

The record shows, as we have stated, that the appellant left Stockton shortly after February 28th, to wit, on March 4th, and was arrested in Reno, Nev. The testimony and corroborating circumstances which we have detailed may be admitted as not sufficient, if standing alone, to support a verdict of conviction, but are certainly corroborating circumstances tending to support direct testimony given by the accomplice. As to the legal sufficiency of the corroborating testimony which we have set forth, an excerpt from the case of People v. McNett, 80 Cal. App. 81, 251 P. 688, 690, wherein this court, speaking through pro tempore Justice Needham, used the following language: "While, of course, it is axiomatic that corroborative evidence of that given by an accomplice need not be direct and positive, and while circumstantial evidence, which tends to connect the defendant with the commission of the crime charged, is sufficient to fulfill the requirements of the law, and while the corroborative evidence required by the provisions of section 1111 of the Penal Code need not be strong and is sufficient if it tends to connect the defendant with the commission of the crime, though if it stood alone it would be entitled to but little weight (People v. McLean, 84 Cal. 480, 24 P. 32; People v. Barker, 114 Cal. 617, 46 P. 601), and while such testimony need not extend to every fact in detail covered by the statement of the accomplice (People v. Cloonan, 50 Cal. 449; People v. Kunz, 73 Cal. 315, 14 P. 836), and while it has been held that sometimes a fact or circumstance which seems to be very slight carries the quality of sufficient corroborative proof, and while it may be claimed that the corroborative evidence in the instant case is sufficient under section 1111 of the Penal Code. yet we are constrained to hold to the opinion that such corroborative evidence in the instant case is not so clear and convincing as to render serious errors occurring at the trial harmless."

[2] Our attention has not been called to any serious errors, or, in fact, to any errors of the trial court occurring at the trial of the instant case. The appellant does urge that the court committed error in sustaining objections to questions propounded to Mrs. Norris, the wife of the appellant, as to whether she had or had not written to the appellant while he was living in Stockton and she living in Reno, asking the appellant to come to Reno, the contention being that this was in explanation of the defendant's leaving Stockton shortly after the robbery for which he was being tried.

An examination of the testimony given by the appellant discloses that he did not testify as to why he left Stockton and went to Reno, Nev., nor did he attempt to give any explanation of why he left Stockton shortly after the robbery. Unless it were shown that the appellant had left Stockton at the request of his wife, and gone to Reno, the fact that Mrs. Norris had written to the appellant was, of course, wholly immaterial. No such showing was made, nor was any offer to introduce such testimony presented to the court.

[3] The appellant requested from the trial court the giving of a number of instructions, most of which were refused. It is now urged that it was error on the part of the court not to give the instructions requested by the appellant, defining the weight that should be given to the testimony of an accomplice, and the fact that a defendant could not be convicted on the testimony alone of an accomplice.

Among the instructions given by the court we find the following: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. Corroborative evidence is additional evidence to the same point. To corroborate an accomplice the evidence need not extend to all the elements of the offense, nor prove that the accomplice has told the truth. The corroborative evidence must tend, to some degree at least, to incriminate the defendant. While it need not be strong, more is required by way of corroboration than mere suspicion." This fully covers all that was required on the subject of corroboration. In other instructions the court fully advised the jury that they could not convict the defendant unless they believed from the testimony, beyond a reasonable doubt, that the defendant was guilty. On the subject of flight, the jury was properly instructed that it was simply a circumstance which they might consider. The court correctly instructed the jury that they were the exclusive judges of the weight of any testimony that had been given.

A reading of the instructions given by the court shows that every element or question involved in the case was properly presented to the jury, and that, had the instruction requested by the defendant been also read, tedious repetition would have been disclosed, all of which was properly avoided.

The order and judgment of the trial court are affirmed.

I concur: PULLEN, P. J.

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133 Cal.App. 691

## SARRAT et al. v. WALTERS.

**Civ. 464.**

District Court of Appeal, Fourth District, California.

Aug. 14, 1933.

**1. Sales 🔑150(1).**

Contract to sell baled cotton which gave buyer option to purchase cotton in open market and charge seller with difference in market value, if seller failed to deliver, did not permit seller to deliver cotton only when raised during that season on lands owned or controlled by him.

**2. Contracts 🔑143.**

Unambiguous terms of contract must prevail in absence of pleading of fraud or grounds for reformation.

**3. Sales 🔑416(2).**

In buyer's action for breach of contract to sell cotton, testimony specifying amount of buyer's loss in purchasing cotton that seller failed to deliver *held* insufficient to sustain judgment for such amount, in absence of evidence that contract price was established, or as to market price at time of breach.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by P. L. Sarrat and others, copartners, doing business as Silvan Newburger & Son, against W. E. Walters. From a judgment for plaintiffs, defendant appeals.

Reversed.

Harry W. Horton, of El Centro, for appellant.

James W. Glassford, of El Centro, for respondents.

BARNARD, Presiding Justice.

Under a written contract dated April 29, 1926, the defendant agreed to sell to the plaintiffs 300 bales of cotton to be delivered on or before December 1, 1926, with the proviso that, if the same was not delivered, the plaintiffs should have the option to purchase cotton in the open market and charge the defendant "the difference in market value at such time." In this action to recover damages for failure to deliver any of the cotton, the plaintiffs recovered judgment, from which the defendant has appealed. No brief has been filed on behalf of the respondents.

[1, 2] A number of the points raised by the appellant are based upon the contention that under the terms of the contract he was under no obligation to deliver any cotton unless the same should be raised during that season upon lands owned or controlled by him. These contentions are without merit, as the terms of the contract are plain and must prevail in the absence of any pleading of fraud or grounds for reformation.

[3] A further contention that the judgment, with respect to the amount of the damages, is not sustained by either the findings or the evidence, must be sustained. The contract fails to fix a definite price for the cotton, but provides that the price shall be fixed "in open market" on or before November 15, 1926, and that, in the event the seller fails to fix the price on or before that date, the buyer may fix the same. While the court found that the appellant did not fix the price on or before November 15, 1926, there is neither a finding that the respondents ever fixed the price nor one as to what was the contract price. The court found that, "subsequent to" November 15, the respondents bought 300 bales of cotton in the open market at a price one hundred and twenty-five points above the December New York future market, but made no finding as to what was the December New York future market, what the respondents paid, or as to the weight of the cotton purchased. From these findings the conclusion is drawn that the difference between the contract price and the price paid by the respondents is $3,375.

Evidence was introduced by the respondents to the effect that the difference between the market price on December 1, 1926, and the contract price was "225 to 250 points." The witness was then asked: "What is the gross amount of difference at the time on December 1 and the contract price that you purchased for?" To which the answer was: "Cotton sold cheaper on December first at the time of the contract than it did on November 26 when we bought 340 bales." The record contains no other evidence as to quantity of cotton bought, and none to show that the price was fixed or what the market price was on December 1st. It cannot even be ascertained from the evidence what was the market price on November 26. It does appear that the respondents' gross figures, which were accepted by the court, were based upon the market price on November 26, although the respondents' own testimony shows that the market price on December 1st, which the contract provided should be used as a basis for fixing damages, was more favorable to the appellant. While there is evidence that the respondents bought cotton on several occasions in November, no purchase of 300 bales appears, and there is nothing to indicate that any purchase made was on account of the failure of the appellant to deliver the cotton here in question.

With no evidence that the contract price was ever established or as to its amount, and with none as to what was the market price at the time of the breach or any time thereafter, the respondents' witness was permitted to testify over the appellant's objection that the "loss" sustained on the purchase of 300 bales of cotton was $3,375, for which amount the court gave judgment. This statement was a pure conclusion, and the judgment is sustained neither by the findings nor by the evidence.

The judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

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133 Cal.App. 601

## PATTEE et al. v. KING et al.

Civ. 4829.

District Court of Appeal, Third District, California.

Aug. 7, 1933.

Rehearing Denied Sept. 6, 1933.

1. **Automobiles** ⟹244(14).

Evidence supported finding that driver was negligent in parking truck on paved portion of highway at night, and permitting it to remain there for several minutes without ascertaining whether rear lights were burning on trailer, into which another truck ran (St. 1923, p. 561, § 136).

2. **Automobiles** ⟹245(17).

Whether driver knew he had defective rear lights on trailer, and whether it was practicable for him to park truck off paved portion of highway at night, *held* for trial court (St. 1923, p. 561, § 136).

3. **Appeal and error** ⟹1010(1).

Trial court's findings, supported by substantial evidence, are conclusive.

**4. Automobiles 🔑245(83).**

Whether plaintiff's truck driver, who narrowly escaped collision with defendant's truck parked on paved portion of highway at night without rear lights on trailer, was contributorily negligent for failing to stop and warn driver of plaintiff's truck behind him, of danger from parked trailer with which second driver collided, *held* for trial court (St. 1923, p. 561, § 136).

**5. Damages 🔑139.**

Evidence supported $625 allowance for loss of use of damaged truck undergoing repairs for 33 days.

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Appeal from Superior Court, Madera County; H. S. Shaffer, Judge.

Suit by A. M. Pattee and another against George King and another. From a judgment in favor of plaintiffs, defendants appeal.

Affirmed.

Ray W. Hays, of Fresno, for appellants.

Laurence B. Myers, Ralph E. Norton, and Conley, Conley & Conley, all of Fresno, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendants have appealed from a judgment of $1,760 which was rendered against them for damages to a truck which occurred as a result of an automobile collision.

Shortly before midnight on July 7, 1931, the defendant Horn was engaged in driving a Moreland truck and trailer belonging to the defendant King northerly along the state highway at a point about four miles from Madera. Seated by his side was a coemployee by the name of Nevins. They were conveying a load of melons to the city of Oakland. The paved portion of the highway at that point is twenty feet wide. There is an eight-foot solid oiled shoulder on each side of the concrete highway at that place. Beyond the shoulder there is a gradual slope of solid land without the presence of a ditch. The defendant Horn had frequently driven a truck along this highway and was familiar with the condition of that roadway. He was driving at the rate of twenty-five miles an hour. Suddenly trouble developed with his carburetor or ignition system and the engine ceased to operate. Without applying the brakes, Horn guided his machine toward the outer edge of the concrete and the truck finally stopped with the inside wheels within two or three feet from the central white line of the concrete. Here the truck and trailer remained parked for three or four minutes until the collision occurred. Horn testified in that regard: "Q. How much time passed by from the time you came to a stop until the collision? A. Oh, I should say, three or four minutes."

Following the defendants' truck at some considerable distance were two other trucks belonging to the plaintiffs. They were traveling in the same direction. There was no other traffic on the highway at that time and place. The first one of plaintiffs' trucks was driven by an employee by the name of Earl Pattee. The second truck was driven by another employee by the name of Wipf. Both of these trucks were traveling on their proper side of the highway at a rate of twenty-five to twenty-eight miles an hour. The pavement was dry and the night was clear. When Pattee reached the parked truck he passed it by turning onto his left-hand side of the concrete. He said in that regard: "I had to swing out in order to miss him. I came pretty near hitting him myself." Pattee drove on without stopping. The undisputed evidence is that the plaintiffs' second truck was following the first one at a distance of from four to six city blocks, and at the rate of twenty-five miles an hour. Wipf failed to see the defendants' parked truck in time to avoid hitting it. The drivers of both of plaintiffs' trucks testified there were no tail or clearance lights on the parked trailer. The truck which was driven by Wipf ran into the rear end of the defendants' trailer. The plaintiffs' machine was damaged.

Suit for damages to the truck was commenced by the plaintiffs. It was asserted the defendants were guilty of negligence in parking their truck on the paved portion of the highway in violation of section 136 of the California Vehicle Act (St. 1923, p. 561), and in failing to keep the tail and clearance lamps on their trailer lighted. In their answer the defendants refuted the plaintiffs' allegations of negligence and affirmatively charged "that the carelessness and negligence of the plaintiffs and their agent and employee contributed directly and proximately to the collision." Upon appeal it is claimed the evidence fails to support the finding that the defendants were guilty of negligence and, upon the contrary, that Pattee, the driver of plaintiffs' first truck was guilty of contributory negligence in failing to stop his machine and warn Wipf of the danger of defendants' parked truck, and that this negligence is imputed to the plaintiffs so as to defeat their claim for damages.

The cause was tried without a jury. The court adopted findings to the effect that defendants were guilty of negligence which proximately caused the damages, and that plaintiffs were not guilty of contributory negligence. Judgment was thereupon rendered in favor of plaintiffs for actual damages sustained by their truck and for loss of the use thereof during a period of twenty-five days while it was undergoing repairs. From this judgment the defendants have appealed.

[1] There is ample evidence to support the finding that defendants were guilty of negligence in parking their truck on the paved portion of the highway in violation of section 136 of the California Vehicle Act, and permitting it to remain in that position for several minutes without ascertaining whether or not the tail and clearance lights on the trailer were burning when the driver knew they were flickering and likely to be extinguished. Mr. Wipf testified regarding the collision: "I did not see him in time to miss him. I turned to my left and applied my brakes at the same time, but I was too close to him when I saw him. There was no lights on the back end of his trailer, or no clearance lights; there was a dim light in front, I noticed afterwards, so I got out of the truck and took my shoe off my foot, my foot was hurt, and I did not know at that time that I had quite a severe cut on my wrist, and when I was out on the highway, Mr. Horn came back and asked me if his lights were on, and I told him that they were not, and he said that he knew that he had had trouble with them, that they had been flickering, but he did not know they was clear out."

[2, 3] The defendant Horn admitted sitting in his machine three or four minutes after it stopped on the highway before the collision occurred. He made no effort to ascertain the condition of his rear lights. Moreover, there was ample momentum of his truck and sufficient opportunity to guide the machine off the concrete portion of the highway after the driver discovered the trouble with his engine and knew that the machine was likely to stop running. He was traveling twenty-five miles an hour when the engine trouble occurred. It was a question of fact for the court to determine whether the driver of defendants' truck knew he had defective rear lights, and whether it was practicable for him to park the truck off the paved portion of the highway. Since the court's conclusions with relation to these questions of fact are supported by substantial evidence, its findings may not be disturbed by this court on appeal.

[4] There is also sufficient evidence to support the court's finding that the plaintiffs were not guilty of contributory negligence for failure on the part of the driver of their foremost truck to stop and warn the driver of the second truck of the danger from the defendants' parked machine. Assuming, without so deciding, that under certain circumstances the failure of one employee to warn another employee who is engaged in driving a separate machine, of threatened danger, would be imputed to the master and constitute negligence so as to defeat his claim for damages, still, under the circumstances of this case, it became a question of fact for the court to determine whether the driver of the first truck as a reasonable person would anticipate serious danger and be required to stop his machine to convey his fear to the driver of the truck which was following, and, if so, whether he believed that he had time to stop and warn him. Even though Pattee did narrowly escape a collision with the parked trailer, it may not be said as a matter of law, that he should necessarily assume the driver of the following truck would also fail to see the parked vehicle in time to avoid a collision. Moreover, the undisputed evidence is that Wipf's truck was following plaintiffs' first car at a distance of from four to six city blocks, which would be from 1,200 to 1,800 feet distant, and that it was traveling twenty-five miles an hour. It follows that the intervening space to the point of the parked truck would be traversed in from one-half to three-quarters of a minute. When Pattee first discovered the parked truck his machine was traveling twenty-five miles an hour. It would have been physically impossible for him to stop his truck, park it on the side of the highway and return to the defendants' truck in time to warn Wipf of the danger. We must assume Pattee knew that it was impossible for him to stop his machine so as to warn Wipf in time to avoid the collision, even though he anticipated it might occur. Under the circumstances of this case it may therefore not be held, as a matter of law, that the plaintiffs were guilty of contributory neglience. Contributory neglience of the plaintiffs became a question of fact to be determined by the court. With its conclusion in that regard this court may not interfere, since there is substantial evidence to support the finding favorable to plaintiffs. 19 Cal. Jur. 735, § 141; Elsey v. Domecq, 114 Cal. App. 42, 299 P. 794.

The evidence is adequate to support the amount of damages which the court found was suffered by plaintiffs.

[5] The court found that the truck was damaged in the sum of $1,135. This amount is not seriously disputed. The court further found damages for loss of the use of the machine for a period of twenty-five days at a rate of $25 a day. This is supported by the evidence. The bill for repairs, which was introduced in evidence contains an item charging for 265 hours of labor. Allowing eight working hours per day, this indicates that the machine was actually undergoing repairs in the hands of the mechanic for thirty-three days. The plaintiff W. M. Pattee testified that he figured the reasonable rental value of a truck to be "at least twenty-five dollars" a day. This evidence adequately supports the allowance of $625 for loss of use of the machine.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

133 Cal.App. 525

## FAIAS v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY.

Civ. 9092.

District Court of Appeal, First District, Division 1, California.
July 31, 1933.

**1. Executors and administrators** 🔑**234, 236.**

Where right to recover is not barred by statute, further consideration by estate's representative of valid claim not acted upon, or its subsequent allowance by representative and court, is not barred.

**2. Executors and administrators** 🔑**234, 236.**

Any act in writing by estate's representative or by judge sufficiently indicating intention to reject or approve claim has same effect upon estate as indorsement upon claim (Probate Code, §§ 711, 712).

**3. Executors and administrators** 🔑**213.**

Statute prohibiting approval of claim which is barred by limitation, *held* not applicable to claim, portion of which was not barred by limitation (Probate Code, § 708).

**4. Courts** 🔑**201.**

When superior court sitting in probate has jurisdiction of subject-matter, it has power to determine all questions of law and fact, determination of which is ancillary to proper judgment.

**5. Executors and administrators** 🔑**236.**

Superior court sitting in probate has jurisdiction to decide upon allowance of claim, and such jurisdiction is not limited to rendition of correct decision (Probate Code, §§ 708, 711, 712).

**6. Executors and administrators** 🔑**241.**

Allowance of claim against estate is not equivalent to "final judgment" and is not conclusive upon heirs (Probate Code, § 713).

[Ed. Note.—For other definitions of Final Decree or Judgment," see Words & Phrases.]

**7. Executors and administrators** 🔑**239.**

Order directing payment of claim by estate is appealable (Probate Code, § 1240).

**8. Certiorari** 🔑**29.**

Certiorari is not available to correct errors in exercise of jurisdiction, but only where court exceeded its jurisdiction (Code Civ. Proc. § 1068).

**9. Execution** 🔑**75.**

Mere lapse of time after entry of judgment does not deprive trial court of power to order issuance of execution (Code Civ. Proc. § 685).

**10. Executors and administrators** 🔑**213.**

Where judgment debtor died and statute of limitations ran against judgment, court may grant judgment creditor leave to enforce judgment by presentation of claim against estate, and by bringing action thereon if claim is rejected (Code Civ. Proc. § 685).

**11. Judgment** 🔑**855(1).**

Procedure contemplated by statute providing for enforcement of judgment after lapse of five years is subsequent step in action already commenced and not separate proceeding (Code Civ. Proc. § 685).

**12. Executors and administrators** 🔑**236.**

Superior court sitting in probate could not permit claimant to enforce dormant judgment, against estate, since whether execution can be issued on dormant judgment cannot be determined in separate proceeding (Code Civ. Proc. § 685).

**13. Judgment** 🔑**855(1).**

Whether dormant judgment shall be enforced is within discretion of trial court (Code Civ. Proc. § 685).

**14. Courts** 🔑**198.**

Probate jurisdiction of superior court is separate from its jurisdiction in ordinary civil matters, and while considering case belonging to one class, it cannot determine what is essentially case of another class.

**15. Executors and administrators** 🔑**238.**

Order permitting claimant to enforce dormant judgment may be vacated on motion, where order was in excess of court's probate jurisdiction, and was made without notice (Code Civ. Proc. § 685).

**16. Appeal and error** 🔑**82(1).**

Order permitting claimant to enforce dormant judgment against estate is appealable as order made after judgment, though order was void (Code Civ. Proc. § 685)

**17. Appeal and error** 🔑**141.**

Representative of estate must generally seek review of judgment against estate in personal action.

**18. Appeal and error** 🔑**147.**

Heir may prosecute appeal from judgment against estate, where representative refuses to do so.

**19. Certiorari** 🔑**33(2).**

Certiorari to review judgment or order of superior court can be granted only to parties to record and not to strangers.

**20. Certiorari** 🔑**33(2).**

Heir and his guardian stood in position of strangers to whom certiorari could not be granted to review order of superior court permitting claimant to enforce dormant judgment against estate (Code Civ. Proc. § 685).

**21. Appeal and error** 🔑**143.**

Heir and his guardian can make themselves parties to record by motion to set aside order complained of, and if order denying motion be appealable, they may have proceeding reviewed on appeal, not only for excess of jurisdiction, but for error.

22. Certiorari ⚷6.

That right to appeal was lost by lapse of time did not change rule that certiorari will not lie where remedy by appeal exists, except in unusual cases, such as want of notice (Code Civ. Proc. § 1068).

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Original application for certiorari by Frank Faias, as guardian of the person and estate of Christina Faias, an incompetent person, against the Superior Court of the State of California in and for the County of Alameda.

Order granting relief discharged, and order approving claim affirmed.

Edward J. Silver, of Oakland, for petitioner.

Robert P. Cahen, of San Francisco, for respondent.

PER CURIAM.

Certiorari to review certain orders made by respondent Superior Court.

Francisco Gomes De Sousa, who died on July 25, 1932, was during his lifetime married to Josephine Sousa. At the time of the marriage decedent had one daughter, Christina, an incompetent, of whose person and estate petitioner since August 12, 1932, has been and now is the duly appointed and qualified guardian. In 1913 said Josephine Sousa obtained an interlocutory decree of divorce from decedent, which provided for the payment by the latter of the sum of $25 each month for the support of the two minor children of the marriage, namely, Manuel and Madeline, who were aged three and four years, respectively. The same order was continued in the final decree. Decedent died testate, and said Madeline De Sousa was duly appointed and qualified as the administratrix with the will annexed of his estate. Said Josephine Sousa filed a claim against the estate, alleging that sums aggregating $4,700 with interest remained unpaid on said judgment. The administratrix took no action thereon; and after the lapse of thirty days the claimant filed in respondent court in the matter of decedent's estate her affidavit, setting forth the above facts, and, based thereon, the court entered its order, granting leave to enforce the judgment against the estate "as provided by law." The court also made therein a finding of the amount unpaid. Following this the claimant commenced suit on the claim in the Superior Court of Alameda county.

On February 23, 1933, the administratrix filed in the matter of the estate her petition, praying the order of the court permitting her to compromise said claim for the sum of $3,000. The petition was set down for hearing on March 1, 1933. Petitioner herein as guardian of the incompetent filed objections to the making of the order prayed for on the ground that the claim was barred by the statute of limitations. Following a hearing the court made its order as prayed for.

Petitioner contends that respondent court sitting in probate was without jurisdiction to make the order permitting the claimant to enforce the judgment; further, that there was a want of jurisdiction to make the second order mentioned.

[1] The last order was in effect no more than an approval of the claim for the reduced amount as agreed upon by the claimant and the administratrix. As stated, the claim was presented to the administratrix, who took no action thereon, and the court had not previously passed upon its validity. There is nothing in the law which forbids further consideration by the estate's representative of a valid claim, or its subsequent allowance by the representative and the court, if the right to recover thereon be not barred by statute. 11 Cal. Jur., Executors and Administrators, § 379, p. 661.

Respondents urge that a compromise in cases of this character is authorized by section 578 of the Probate Code. In view of the foregoing, however, the question whether that section applies to claims against an estate need not be considered.

[2] Section 711 of the Probate Code provides that the fact of the approval or rejection of a claim must be indorsed thereon. However, such an indorsement is but a manifestation of intention, and does not go to the essence of the thing done. See section 712, Probate Code. This provision, in our opinion, was adopted with a view to convenience rather than substance; and any act in writing by the estate's representative or by the judge sufficiently indicating an intention to reject or approve should, in so far as concerns the estate, be held to have the same effect as an indorsement upon the claim.

[3-5] The statute provides that no claim which is barred by the statute shall be allowed or approved (Probate Code, § 708); but it is not contended here that the whole claim was barred, as a portion at least had accrued within five years immediately preceding decedent's death; and when the Superior Court sitting in matters of probate has jurisdiction of the subject-matter of a case it has the power to hear and determine in the mode provided by law all questions of law and fact the determination of which is ancillary to a proper judgment (Burris v. Kennedy, 108 Cal. 331, 41 P. 458); and although the allowance of a claim may be erroneous

(Estate of Aldersley, 174 Cal. 366, 163 P. 206), the question is one which the court is empowered to decide, and its jurisdiction is not limited to the rendition of a correct decision (Kohn v. Rupley, 54 Cal. App. 565, 202 P. 163).

**[6-8]** It has been held that the allowance of a claim is not equivalent to a final judgment (Haub v. Leggett, 160 Cal. 491, 117 P. 556), and is not conclusive upon an heir (11 Cal. Jur., Executors and Administrators, sec. 448, p. 755). Section 713 of the Probate Code provides that any person interested in an estate may contest the allowance of any claim not passed upon in the settlement of any former account. Moreover, an order directing payment is appealable (12 Cal. Jur., Executors and Administrators, § 866, p. 106); or, if the one in question be considered as equivalent to such an order, an appeal therefrom lies under section 1240 of the Probate Code. However, the question of the right to appeal from the order last considered, or whether the heirs on whose behalf petitioner asks relief here, would, in view of the facts stated, be bound by the order, is not material, as certiorari is not available to correct errors in the exercise of the jurisdiction of a judicial tribunal (4 Cal. Jur., Certiorari, § 14, p. 1036), but only where it has exceeded its jurisdiction (Code Civ. Proc. § 1068), which, as respects this order, was not the case.

**[9-14]** The first order, however, presents a different question. There the claimant sought relief under section 685 of the Code of Civil Procedure, which provides that "in all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings. * * *" Under this section mere lapse of time after the entry of a judgment does not deprive the trial court of the power to order the issuance of an execution (Welk v. Conner, 102 Cal. App. 286, 282 P. 963); and when the judgment debtor has died and the statute of limitations has run against the judgment the court may under this section grant the judgment creditor leave to enforce the judgment by the presentation of a claim against the estate and by the bringing of an action thereon if the claim is rejected (Saunders v. Simms, 183 Cal. 167, 190 P. 806). However, it has been held that the procedure contemplated by the section is a subsequent step in the action already commenced and not a separate proceeding (Doehla v. Phillips, 151 Cal. 488, 91 P. 330; Murphy v. Davids, 55 Cal. App. 416, 203 P. 802). The question whether an execution shall issue not being one which can be determined in a separate proceeding, it is clear, we think, that respondent court sitting in probate was without jurisdiction to grant relief under the section. Whether a dormant judgment shall be enforced is a matter within the sound discretion of the trial court (11 Cal. Jur., Executions, § 12, p. 51), which may, as was done in Saunders v. Simms, supra, grant the judgment creditor leave to present a claim against the estate of a deceased debtor, and, in case of its rejection, to bring an action to establish its validity. The probate jurisdiction of the Superior Court is separate and distinct from its jurisdiction in ordinary civil matters; and while engaged in the consideration of a case belonging to one of those classes it cannot in the same matter hear and determine what is essentially a case of another class (7 Cal. Jur., Courts, § 81, p. 698).

**[15, 16]** While it is our conclusion that the order was in excess of the court's probate jurisdiction, such an order, if made without notice, as appears to have been the case here, may be vacated on motion; and, being an order which affects the judgment by way of enforcing it (Lake v. Harris, 198 Cal. 85, 243 P. 417), is appealable as an order made after judgment (Harrier v. Bassford, 145 Cal. 529, 78 P. 1038; Doehla v. Phillips, supra; Creditors' Adjustment Co. v. Newman, 185 Cal. 509, 197 P. 334); and this is true although the order was void, it being otherwise appealable (Merced Bank v. Rosenthal, 99 Cal. 39, 31 P. 849, 33 P. 732; Stearns Ranchos Co. v. McDowell, 134 Cal. 562, 66 P. 724; Ewing v. Richvale Land Co., 176 Cal. 152, 167 P. 876; Bacigalupi v. Bacigalupi, 72 Cal. App. 654, 238 P. 93).

**[17-22]** As urged by petitioner, the representative of an estate must as a general rule seek a review of a judgment against the estate in a personal action (Bancroft, Code Practice and Remedies, § 6371); nevertheless, where it appears that the representative refuses to prosecute an appeal an heir may do so (Holland v. McCarthy, 177 Cal. 507, 171 P. 421). Here it was apparent from the conduct of the administratrix that she did not intend to move to vacate the order or appeal therefrom, and no action was taken by the petitioner or the heir. Moreover, it has been held that the writ of certiorari to review any judgment or order of the Superior Court can only be granted to parties to the record and not to strangers. The petitioner and his ward stand here in the latter position. However, such persons can make themselves parties to the record by a motion to set aside an order complained of; and if an order denying the motion be appealable they may have the proceeding reviewed on appeal not only for excess of jurisdiction, but for error. Elliott v. Superior Court, 144 Cal. 501, 77 P. 1109, 103 Am. St. Rep. 102; Howe v. Superior Court, 96 Cal. App. 769, 274 P. 992; Tingley v. Superior Court, 8 Cal. App. 47, 96 P. 20; 4 Cal. Jur., Certiorari, § 51, p. 1087. Where the remedy by appeal exists certiorari will not lie (Code Civ. Proc. § 1068), and the fact that the right may have been lost by lapse of time does not change the rule except in unusual cases, such as a want of notice, which is not alleged to have been the fact here (4 Cal. Jur., Certiorari, § 27, p. 1055). In view of the foregoing we are satisfied that as to this order the writ should be discharged.

It is accordingly ordered that the writ be discharged as to the order purporting to grant relief under section 685 of the Code of Civil Procedure; and it appearing that the order approving the claim in question was not in excess of the jurisdiction of respondent court the same is affirmed.

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## BOOMER v. MUIR et al.

## SAME v. FIDELITY & DEPOSIT CO. OF MARYLAND et al. (R. C. STORRIE & CO., Interveners).

## SAME v. FIDELITY & DEPOSIT CO. OF MARYLAND et al.

## R. C. STORRIE & CO. v. ÆTNA CASUALTY & SURETY CO. et al.

Civ. 8207.

District Court of Appeal, First District, Division 2, California.

Aug. 3, 1933.

**Hearing Granted by Supreme Court Oct. 2, 1933.**

**1. Contracts 🔑319(1).**

Contractor prevented from performing contract by other party's failure to furnish materials as agreed may treat contract as rescinded and recover on quantum meruit, keep contract alive, offer complete performance, and sue for damages, or treat repudiation as terminating contract and sue for lost profits.

**2. Contracts 🔑303(4).**

Subcontractor's mere knowledge that general contractor intended to complete only part of work during year did not modify latter's contractual obligation to furnish subcontractor materials for completion of job in that year.

**3. Contracts 🔑323(1).**

Whether subcontractor, to whom general contractor agreed to furnish materials, intended to proceed after exhaustion thereof, if additional materials were furnished, *held* for jury.

**4. Contracts 🔑322(3).**

Evidence *held* to support jury's implied finding that subcontractor, to whom general contractor agreed to furnish materials, intended to proceed after exhaustion thereof if additional materials were furnished.

**5. Contracts 🔑323(1).**

Whether subcontractor was prepared to proceed further after exhaustion of materials furnished by general contractor and sufficient materials were reasonably available to proceed *held* for jury on substantially conflicting evidence.

**6. Appeal and error 🔑1002.**

Jury's verdict is conclusive on appeal as to question on which evidence was conflicting.

**7. Damages 🔑124(2).**

Whether contractor, prevented from performing contract, may recover more than contract price as reasonable value of work done, depends on whether it is equitable to permit him to do so.

**8. Contracts 🔑274.**

Rescinded contract ceases to exist for all purposes, including breach thereof (Civ. Code, § 1688).

**9. Damages 🔑124(2).**

Party terminating contract by preventing performance by other party cannot limit latter's recovery on quantum meruit to contract price.

**10. Contracts 🔑236.**

Parties' agreement to shift contractual obligation from one to other may be expressed or implied from their conduct (Civ. Code, § 1621).

**11. Contracts 🔑247.**

Evidence *held* to justify jury's finding that hydroelectric project contractor, letting subcontract for construction of dam, impliedly agreed to assume subcontractor's contractual obligation to excavate cut-off trench and operate air compressors.

**12. Appeal and error 🔑930(1).**

Appellate court must assume in support of verdict, including in damages awarded subcontractor increased cost due to general contractor's delay in performing work required of subcontractor by original contract, that jury found that general contractor assumed such obligations, where evidence justified such finding.

**13. Election of remedies 🔑1.**

Doctrine of "election of remedies" is based on plaintiff's estoppel to pursue one remedy after adopting another, if defendant is prejudiced thereby.

[Ed. Note.—For other definitions of "Election," see Words & Phrases.]

**14. Estoppel 🔑68(2).**

Subcontractor, quitting work on general contractor's failure to supply materials as agreed, *held* not estopped by filing of mechanic's lien suit to treat contract as rescinded and sue general contractor on quantum meruit.

**15. Trial** ⚷349(2).

Submission of special interrogatories to jury is within discretion of trial court.

**16. Work and labor** ⚷27(1).

Testimony as to yardage in drainage trench in excess of engineer's estimate *held* admissible in action on quantum meruit by subcontractor rescinding contract; engineer's estimate being no longer conclusive.

**17. Pleading** ⚷237(6).

Amendment of subcontractor's complaint in suit to foreclose mechanic's lien and recover money judgment against general contractor to conform to proof of rescission of contract *held* proper; general contractor not being prejudiced by allegations of amendment without evidentiary support.

**18. Damages** ⚷124(2).

Subcontractor rescinding contract because of general contractor's failure to furnish materials as agreed *held* entitled to recover reasonable value of work done, not merely agreed price, from sureties on contractor's bond (Code Civ. Proc. § 1183).

**19. Mechanics' liens** ⚷163.

Rescinded contract cannot be made basis for proving agreed price under statute limiting amount of mechanic's lien to reasonable value of labor or materials or agreed price (Code Civ. Proc. § 1183).

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Appeals from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Consolidated actions by H. H. Boomer against Robert B. Muir and another, the Fidelity & Deposit Company of Maryland and others, in which R. C. Storrie & Co. intervened, and the Fidelity & Deposit Company of Maryland and others, and by R. C. Storrie & Co. against the Ætna Casualty & Surety Company and another. From an order granting defendants Fidelity & Deposit Company of Maryland and others a new trial after a verdict against them, plaintiff Boomer appeals, and, from a judgment for defendants Boomer and the Ætna & Casualty Insurance Company, a judgment for plaintiff Boomer, and an order allowing him to amend his complaint in the first action, R. C. Storrie & Co. and defendants Fidelity & Deposit Company of Maryland and others appeal.

Affirmed in part, and reversed in part.

Humphrey, Searls, Doyle & MacMillan and Robert M. Searls, all of San Francisco, for appellants Robert B. Muir and R. C. Storrie & Co.

Sloss & Turner and Thomas E. Davis, all of San Francisco, for appellants-respondents Fidelity & Deposit Co. of Maryland et al.

Roland J. White, of San Francisco, H. B. Wolfe, of Quincy, and Keyes & Erskine, of San Francisco, for appellant H. H. Boomer.

A. B. Weiler, of San Francisco, for respondent Ætna Casualty & Surety Co.

Keyes & Erskine and Roland J. White, all of San Francisco, and H. B. Wolfe, of Quincy, for respondent H. H. Boomer.

DOOLING, Justice pro tem.

R. C. Storrie & Co., a copartnership composed of Robert B. Muir and Robert C. Storrie, had a general contract with the Feather River Power Company to build a hydroelectric project in the high mountains on certain tributaries of the north fork of the Feather river. The project was one of great magnitude, and under their contract Storrie & Co. were to receive a flat price of $7,691,889. In connection with this contract Storrie & Co. furnished a labor and materialmen's bond in the sum of $3,850,000 with Fidelity & Deposit Company of Maryland, Globe Indemnity Company, Hartford Accident & Indemnity Company, Maryland Casualty Company, and United States Fidelity & Guaranty Company as sureties on such bond. Hereafter these companies will be referred to as Storrie's sureties.

The project involved, as one item, the construction of a storage dam in Buck's Valley to impound the waters of Buck's creek. Under the specifications this dam was to be a rock fill dam with a gravity concrete section in its central part immediately over the bed of Buck's creek. The upstream toe of the dam was to be buttressed against a concrete cut-off wall extending below the surface to a depth to be prescribed by the engineers of the Feather River Power Company and the upstream face of the dam was to be covered by a series of concrete slabs resting at the bottom upon the cut-off wall as a base.

On May 28, 1926, Storrie & Co. entered into a subcontract with H. H. Boomer for the construction by him of the Buck's creek dam, the work to be done in accordance with the plans and specifications of the Feather River Power Company and to the satisfaction of that company's engineer. Under this subcontract Storrie & Co. were to deliver at the dam site to Boomer all cement, gravel, sand, steel and other metal work which was to be a permanent part of the dam. Boomer was to furnish all other materials and labor and equipment. Certain air compressors then being installed were to be delivered to Boomer and operated at his expense. Boomer was to pay for the electric power used by him at actual cost as metered by Storrie & Co. Boomer agreed to purchase certain equipment from Storrie & Co. and to assume all the benefits and obligations of Storrie & Co. under a contract which Storrie & Co. had with one Anderson to operate cook houses, commissaries, and camp buildings.

It was further agreed that work was to commence immediately and be completed on or before December 1, 1927. Boomer was to be paid for his work according to an agreed schedule of unit prices for quantities which were to be estimated by the engineers of the Feather River Power Company, such estimates to be made monthly for work completed during the previous month. On the basis of such estimates Storrie & Co. were to pay Boomer monthly 90 per cent. of the estimate, the remaining 10 per cent. to be paid upon the completion of the contract. Storrie & Co. were to complete the excavation for the concrete gravity section of the dam, but Boomer was to make the excavation for the cut-off wall.

Boomer furnished a performance bond in the sum of $333,334 upon which the Ætna Casualty & Surety Company was the surety.

When Boomer commenced performance of his subcontract, almost immediately friction developed between Boomer and Storrie & Co., and such friction and disputes continued as long as Boomer remained on the job. A discussion of the nature and character of these disputes will be deferred to a later portion of this opinion. Suffice it to say here that, when Boomer shut down for the winter at the end of 1926, a much smaller portion of the work had been done by him than the parties had anticipated at the inception of their contract. In a mutual effort to speed up the work in 1927, Boomer and Storrie & Co. entered into a supplemental agreement on March 4, 1927, whereby the original contract between them was considerably modified. By this supplemental agreement it was provided that Boomer should open up the work not later than April 1, 1927, and that commencing with May, 1927, Boomer should place not less than 40,000 cubic yards of material each month until the completion of the dam. Storrie & Co. agreed to pay Boomer all of the 10 per cent. estimates previously retained under their original contract with Boomer. The unit prices for loose rock fill were materially increased; it being recited that such increase should be construed as covering any cost Boomer had theretofore or might thereafter incur for stripping quarries, transportation of rock, and developing new quarries. Storrie & Co. waived their right to retain 10 per cent. of the monthly estimates, but after May 1, 1927, if during any month 40,000 cubic yards of loose rock should not be placed in the dam, the 10 per cent. for such month was to be retained by Storrie & Co. until completion. Except as modified by the supplemental agreement, it was agreed that the original agreement should remain in full force and effect. Other provisions of the supplemental agreement will be mentioned in connection with the discussion of specific points urged on the appeals herein.

Boomer proceeded with the work on the dam in 1927, and the disputes between Boomer and Storrie & Co. continued much as before, culminating with Boomer's leaving the job uncompleted in December, 1927.

Boomer originally commenced an action in Plumas county to foreclose a lien against the owners of the property (who have since ceased to be parties) and for a money judgment against the partners composing Storrie & Co. Later he commenced an action against Storrie's sureties upon their bond in which Storrie & Co. intervened. Storrie & Co. also commenced an action against Boomer and Boomer's surety, Ætna Casualty & Surety Company. These suits were ultimately combined for trial and tried before a jury in San Francisco. Boomer's actions contained inconsistent counts; one of them being upon a quantum meruit for the reasonable value of the work done less the payments received. This count proceeded upon the theory of rescission of the contract on the ground that performance had been prevented by Storrie & Co.'s failure to deliver materials as required by the contract. During the course of the trial, upon motion of Storrie & Co. and Storrie's sureties, the court compelled Boomer to elect the theory upon which he should proceed. Boomer elected to proceed upon the theory of rescission for prevention of performance. The jury brought in a verdict against Storrie & Co., and Storrie's sureties for $257,965.06. The court denied Storrie & Co. a new trial, but granted a new trial to Storrie's sureties. Boomer has appealed from the order granting Storrie's sureties a new trial. Storrie & Co. have appealed from the judgment in favor of Boomer and Boomer's surety, Ætna Casualty & Surety Company, in the action brought by Storrie & Co. against them. Storrie & Co. and Storrie's sureties have appealed from the judgment against them and in Boomer's favor for $257,965.06. Storrie & Co. have likewise appealed from an order of the court made after judgment was entered allowing Boomer to amend his complaint against them in the action which was originally commenced to foreclose a mechanic's lien.

In a consideration of the appeal of Storrie & Co., and Storrie's sureties from the money judgment against them, it will be necessary to state in considerable detail the facts which were developed upon the trial. We have said that the disputes between Boomer and Storrie & Co. were practically continuous throughout the time Boomer was on the job. These disputes fell into four principal classes: (1) Disputes concerning compressed air; (2) disputes concerning the cut-off trench; (3) disputes concerning material deliveries by Storrie & Co.; and (4) disputes concerning roads and quarries.

Concerning the compressed air, Boomer testified that, when the original contract was entered into, he had not seen the air compressors which were to be installed, and that he had never attempted to operate steam shovels with compressed air, but that Muir assured him that the compressors would be adequate to operate his steam shovels. The compressors did not furnish sufficient air to operate the shovels, and Boomer was compelled to operate them with steam. Although the contract provided that Boomer should take over the operation of the compressors, he never did so, and at all times they were operated by Storrie & Co. During the greater part of the time that Boomer was on the job, Storrie & Co. were diverting some air to other parts of the work. In June, 1927, both compressors were destroyed by fire. Storrie & Co. installed a smaller compressor and removed the burned compressors to San Francisco and had them repaired. The burned compressors were not both returned for something like sixty days. During this time Boomer repeatedly complained to Storrie & Co. about the delay in restoring the compressors, and upon the trial he testified that by reason of the lack of air in July and August his operations were slowed up approximately one-half.

The contract required Boomer to excavate for the cut-off trench. Storrie & Co., however, actually did all of this excavating, and Boomer at no time took it over. Boomer testified that, when he went on the job, he wished to take over this excavation, but Storrie & Co. would not allow it. During the entire course of his operations Boomer was making demands upon Storrie & Co. to proceed more expeditiously with these excavations, claiming that he was being retarded in his other work by Storrie & Co.'s failure to make the excavations for the cut-off trench rapidly enough. Upon the trial there was substantial evidence that delays in excavation for the cut-off trench both delayed Boomer's operations and made them more expensive.

When Boomer entered into his contract, one quarry was stripped. This later proved inadequate, and Boomer was compelled to open other quarries and build roads to them. Boomer claimed extra compensation for this work, and the supplemental agreement purported to settle this claim, at least so far as the quarries were concerned, by increasing certain of the unit prices.

While he was on the job, Boomer repeatedly complained to Storrie & Co. about delays in furnishing materials and for several months before December, 1927, he informed them that if the materials were not supplied as needed, he would quit the job and hold Storrie & Co. responsible. There is testimony which would support a finding that Storrie & Co. did not furnish materials as rapidly as Boomer needed them, and that this slowed up Boomer's progress and increased his cost. On December 3, 1027, Boomer finished pouring the third slab on the inner face of the dam. At that time all that remained to be done was to pour the fourth slab and complete the superstructure of the dam. It was Boomer's testimony that at that time there were not sufficient materials on hand to complete or proceed further with the work; that he waited until December 15, 1927, and, no further materials having been supplied to him, he moved off the job and never returned.

[1] It is well settled in California that a contractor who is prevented from performing his contract by the failure of the other party to furnish materials has a choice of three remedies: He may treat the contract as rescinded and recover upon a quantum meruit so far as he has performed; he may keep the contract alive, offering complete performance, and sue for damages for delay and expense incurred; or he may treat the repudiation as putting an end to the contract for purposes of performance and sue for the profits he would have realized. McConnell v. Corona City Water Co., 149 Cal. 60, 85 P. 929, 8 L. R. A. (N. S.) 1171. Storrie & Co. and Storrie's sureties admit this rule, but claim that the evidence will not support a finding that Boomer was prevented from performance by Storrie & Co.'s failure to furnish materials. They argue that Boomer did not intend to go any further than the pouring of the third tier, and that Storrie & Co. knew this. Boomer testified that he was prepared to complete the contract if the materials had been furnished, and that he waited on the job from December 3d to December 15th for that purpose. On November 27, 1927, Boomer sent the following wire to Storrie & Co.: "I am prepared to complete my contract on time. Ran out of material last night. Do you want me to hold crew here to put through the three unfinished slabs of the third section? This extra cost must be paid by you. I await your answer today."

Boomer also on cross-examination testified that in November, 1927, he came to the conclusion that they were not going beyond the third slab that year, that he was so informed by engineers on the job, and also possibly by Storrie.

[2] From this evidence it is argued that Boomer had no intention of completing the job, and Storrie & Co. knew this. However, the jury was not bound to find that Boomer ever agreed to a modification of the contract so as to provide only for the completion of the third slab in 1927. His mere knowledge that Storrie & Co. intended to go no further that year, if that was the fact, would not modify their obligation under the contract to furnish the materials for completion in that year. In his wire of November 27 he explicit-

ly stated: "I am prepared to complete my contract on time." He was entitled under the law to quit the job at that time for failure to supply materials, and his further language: "Do you want me to hold crew here to put through the three unfinished slabs of the third section? This cost must be paid by you," might reasonably have reference to the fact that that was the immediate unfinished work and that he was prepared to leave at that point unless materials were furnished at once. Whether or not this amounted to an expression of intention not to proceed beyond that point was for the jury. Boomer did not say: "I will not go beyond the third section." In effect he said: "Unless you furnish materials at once I will quit with the third section unfinished." He had previously more than once told Storrie & Co. that he would finish if they furnished the materials, but, if they did not, he would quit. On September 17, 1927, Boomer wrote Storrie & Co.: "We have notified you many times that we are out of cement more or less constantly and we want to call your attention to the fact that we expect to finish our work here on time this year."

[3, 4] The court instructed the jury: "If you find from the evidence in this case, that Boomer did not intend to use any materials that might have been furnished after he had completed the pouring of the third slab in December, 1927, and Storrie & Company were aware that if such materials were furnished they would not be used, then there was no obligation upon Storrie & Company's part to furnish such materials at that time, or until they were advised by Boomer that such materials would be needed."

Under this instruction the jury must have found that Boomer intended to proceed if materials were furnished. We are satisfied that under the evidence this was a question of fact for the determination of the jury, and that their implied finding on this point is not without substantial support in the evidence.

[5] It is also argued that Boomer was not prepared to proceed further under winter conditions which then existed, and that sufficient materials were actually reasonably available to proceed had Boomer desired. On both these questions we have examined the record and are satisfied that as to both there was a substantial conflict in the evidence.

[6] The jury was fairly instructed on the question of prevention of performance, no complaint is made of such instructions on this appeal, and the case is the familiar one of a conflict in the evidence on this point as to which the jury's verdict is conclusive on appeal.

[7] It is further urged that, "assuming that prevention of performance was shown, the contractor may not, where the contract has been fully liquidated up to a given stage, reopen the part of the contract which has been fully executed on both sides and seek to have his past work revalued." In this connection it is pointed out that, at the time Boomer left the job in December, 1927, the monthly estimates provided for in the contract had been made up to November 25, 1927, and Boomer had been paid in full for all work covered by these estimates, with the exception of the retained percentage of 10 per cent. for three months after May, 1927, in which months Boomer had not placed 40,000 cubic yards of material in the dam as provided in the supplemental agreement. It is conceded that the general rule, and the one followed in California, is that, where a contract has been rescinded for prevention of performance, the plaintiff may recover the reasonable value of what he has done or supplied under the contract, even though such recovery may exceed the contract price. Cox v. McLaughlin, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164; San Francisco Bridge Co. v. Dumbarton L. & I. Co., 119 Cal. 272, 51 P. 335; Laiblin v. San Joaquin Agr. Corp., 60 Cal. App. 516, 213 P. 529. It is insisted, however, that this general rule does not apply in cases where specific payment is provided in the contract for specific portions of the work, and such portions have been fully performed and payment for which has been fully ascertained and liquidated prior to the breach by the adverse party. In support of this contention are cited Rodemer v. Gonder, 9 Gill (Md.) 288; Doolittle v. McCullough, 12 Ohio St. 360; Wellston Coal Co. v. Franklin Paper Co., 57 Ohio St. 182, 48 N. E. 888; City of Philadelphia v. Tripple, 230 Pa. 481, 79 A. 703; and Farnum v. Kennebec Water Dist. (C. C. A.) 170 F. 173. To these cases might be added 2 Sedgwick on Damages (9th Ed.) § 665b, p. 1319; 3 Sutherland on Damages (4th Ed.) § 713, pp. 2690, 2691; Keener on Quasi-Contracts, pp. 312, 313; and the Restatement of the Law of Contracts, § 351. The statements of these text-writers, and we may assume section 351 of the Restatement of the Law of Contracts, are based upon the doctrine of those of the above-cited cases which squarely apply the doctrine contended for. Of these there are only three, the Rodemer Case, the Doolittle Case, and the Farnum Case. The other two cases, while referring to the rule, held that under the facts involved it was not applicable.

The Rodemer Case was one wherein plaintiff had a contract for grading a railroad payable on monthly estimates of quantities as the work progressed, four-fifths immediately and the balance on completion of the work. Estimates and four-fifth payments were made to October 29, 1845, and on November 6, 1845, defendant expelled plaintiff from the work. Plaintiff sued for the reasonable value of all the work done. The court held that as to those portions of the work as to which the monthly estimates had been made the plaintiff could only recover the balance due upon these settlements, and could not reopen and revalue them upon a quantum meruit. The court said, in part: "He is concluded by these settlements, and by reason of their being closed as distinct and separate portions of the contract, he cannot open them again to prove and recover the actual value of his work. His claim has in fact been liquidated upon the quantity of work done and the value ascertained by the prices in the contract, and he is effectually barred by adopting the adjustments and receiving payments under them. The partial payments bind him to the whole settlement. And so far as the work has been ascertained and adjusted under the contract, he is entitled to recover only the balance upon the basis of these settlements, whatever may remain in arrear including the twenty per cent."

The Doolittle Case was also a railroad construction case at unit prices, with installment payments on the basis of such unit prices. Defendants wrongfully terminated the contract after part performance. Said the court, at page 368 of 12 Ohio St.: "It is certain that where there has been a part performance, and that part paid for, under the contract, according to its terms, and the contract has then been terminated wrongfully, by the party so having paid, it cannot be that the termination of the contract occasions damage or gives any right of action to the other party in regard to the part so performed and paid for under the contract."

The Farnum Case, while it may be taken as supporting the same rule, is weakened as an authority on the point by the fact that it was decided under the law of Maine, and Maine is one of the states holding to the minority view, which is not the law in California, that upon rescission for prevention of performance the recovery in quantum meruit cannot exceed the contract rates. If in no event can the recovery exceed the contract rates, then it plainly cannot exceed that price when the price for the work done has been ascertained and liquidated.

The Wellston Coal Co. Case was one decided in Ohio. It cited the Doolittle Case with apparent approval, but distinguished it on its facts. In that case plaintiff had a contract with defendant for the sale of coal to defendant for one year at an uniform price per ton. The price of coal varied with the season. Defendant took coal from plaintiff under the contract, and paid at the contract rate during the portion of the year when the contract price was lower than the market price and repudiated the contract when the market price fell below the contract price. The court said, at pages 889, 890 of 48 N. E., 57 Ohio St. 182:

"The general rule is that, when full performance of a contract has been prevented by the wrongful act of the defendant, the plaintiff has the right either to sue for damages, or he may disregard the contract, and sue as upon a quantum meruit for what he has performed. The plaintiff has pursued the latter course; and it seems well settled, both in reason and authority, that he had the right to do so. 2 Sedg. Meas. Dam. (8th Ed.) 654; Chamberlin v. Scott, 33 Vt. 80; McCullough v. Baker, 47 Mo. 401; Kearney v. Doyle, 22 Mich. 294; Buffkin v. Baird, 73 N. C. 283; U. S. v. Behan, 110 U. S. 338, 4 S. Ct. 81 [28 L. Ed. 168]; Merrill v. Railroad Co., 16 Wend. [N. Y.] 586 [30 Am. Dec. 130]; Clark v. Mayor, etc., of New York, 4 N. Y. 338 [53 Am. Dec. 379].

"But it is claimed, on the authority of Doolittle v. McCullough, 12 Ohio St. 360, that the contract price must still be the measure of the plaintiff's recovery. There are many expressions in the opinion in that case that seem to support this view, and much of the reasoning is to the same effect. But all that is there said must be taken as said with reference to the facts of that case. The rule there stated may be regarded as a proper one in a case where, as in that case, it appears from the claim of the plaintiff that the breach of the contract by the defendant worked no loss, but a benefit, to him, on the ground, as appears, that, had he been required to complete the work, he would have suffered a much greater loss; for, if the least inexpensive part of the work could not have been done without loss, it follows that the doing of the remaining part, under the contract, would have resulted in a still greater loss. The action upon a quantum meruit is of equitable origin, and is still governed by considerations of natural justice. Hence, when one has performed labor or furnished material under a contract that is wrongfully terminated by the other party before completion, the question arises whether the party not in fault should be confined to the contract for what he did, or to a quantum meruit; and this must depend upon whether the act of the other party in terminating the contract works a loss or not to him, regard being had to the contract. If it works no loss, but is in fact a benefit, as in the case of Doolittle v. McCullough, there are no considerations of justice requiring that he should be compensated in a greater sum for what he did than is stipulated in the contract. These considerations exercised a controlling influence in the case just referred to. The plaintiff had a contract with the defendant for the making of certain excavations in the construction of a railroad. He was to receive for the entire work 11 cents per cubic yard. He had performed the least inexpensive part of the work when the contract was wrongfully terminated by the defendant; and on this part, by his own showing, he had suffered a loss. The proof showed that the performance of the remainder, being hardpan, would have cost him a great deal more. It was then evident, as the court observed, that he had sustained no loss, but a benefit, from the termination of the contract by the defendant. But in the case before us the facts are very different. They are in fact just the reverse. The contract was for the delivery of coal at a price generally received during the dullest season of the whole year. The defendant received the coal during the season when the market was above the contract price. He had the benefit of the difference between the market and the contract price; but when the dull season arrived, and the advantages of the contract would accrue to the plaintiff, the defendant repudiated it. The difference between the two cases is thus apparent. In the case before us, justice and fair dealing require that the defendant, having repudiated the contract, should pay the market price for the coal at the time it was delivered. In the former case, as the repudiation of the contract by the defendant did not enrich him to the loss of the plaintiff, there were no considerations of justice on which the plaintiff could claim more than the contract price for what he had done under the contract. The object in allowing a recovery of this kind is not to better the condition of the plaintiff under the contract, were it performed, but to save him from a loss resulting from its wrongful termination by the defendant, or, in more general words, to prevent the defendant from enriching himself at the expense of the plaintiff by his own wrongful act. The real test in all cases of a plaintiff's right to recover as upon a quantum meruit for part performance of a contract, wrongfully terminated by the defendant, depends upon the consideration whether the defendant is thereby enriched at the loss and expense of the plaintiff. If so, then the law adds a legal to the moral obligation, and enforces it."

As thus limited, the question whether plaintiff can recover in excess of the contract price depends upon whether it is equitable to permit him to do so in the particular case.

City of Philadelphia v. Tripple, a Pennsylvania case, discussed the Doolittle Case and distinguished it, but cannot in our judgment be said to have expressed approval of it. Rather the reasoning of that case may fairly be said to be opposed to the reasoning of the Doolittle Case as explained in the Wellston Case. The Pennsylvania Supreme Court in that case adopted as its opinion the report of the referee. The claim was made, as in the Doolittle Case, that to permit the plaintiff to recover on a quantum meruit in excess of the contract rates would allow him to make a profit where, if he had fully performed the contract, he would have suffered a loss. The court said, however, at page 706 of 79 A., 230 Pa. 481:

"Even, however, if it be assumed that McMenamy, if allowed to complete his work, would have lost money in so doing, the referee is of opinion that the act of the defendant Dietrich, in discharging the plaintiff from further obligation to perform, gave rise to a right on the part of the plaintiff to recover for his disbursements. Let it be assumed that, in an extreme case, a builder has actually expended in the course of his work a sum in excess of the contract price and has not yet completed performance. If, under such circumstances, the builder finishes his work, the owner, upon paying the contract price, will receive the benefit of a large expenditure actually made, in return for the payment of a smaller sum of money. This result, which may well involve a hardship upon the builder, is made necessary by a proper regard for the contractual rights of the owner. The owner has made a valid contract, and this contract must be protected and enforced, even if the builder suffers.

"Let it further be supposed, however, that the owner, who finds himself in this position of advantage, voluntarily puts an end to his contract rights in the premises. This in legal effect he does if he himself breaks the contract or discharges the builder from his obligation to perform it. The situation which then presents itself is one in which the builder has in good faith expended money in the course of work done for the benefit of the owner, and has, in the absence of contract, an equitable claim to be reimbursed. The owner, on the other hand, has deprived himself of the legal right which would have sufficed to defeat the equity. He accordingly stands defenseless in the presence of the builder's claim.

"Such, it is submitted, is the legal analysis of the situation in which the parties to this action find themselves. It may, of course, be contended that Dietrich did not receive an actual benefit coextensive with McMenamy's expenditure. It is a sufficient answer to this contention to observe that (upon the facts as heretofore found) McMenamy expended the money in good faith and in the course of attempted performance. This is sufficient to give him an equitable claim for reimbursement.

"The defendants do not dispute the general proposition that a plaintiff may, as if in the absence of contract, recover the cost of work and materials in case he is prevented by the owner from finishing his work. The defendants earnestly contend, however, that the rule meets with an exception in case the disbursements exceed the contract price. In other words, they regard the difference between the price specified in the contract and the sum of the disbursements as the measure of recovery, and they insist that if the aggregate of disbursements equals or exceeds the contract price there can be no recovery at all.

"This view, as is indicated by the analysis made above, appears to the referee to involve a confusion of thought. How can the plaintiff's claim for disbursements actually made be met by the limitation contained in a contract, unless the defendant retains the right to enforce the contract? And how can it be contended that the defendant retains such a right when the contract has been discharged by his own act? It may well be that a plaintiff, upon defendant's breach, may offer the discharged contract as evidence of the value of that for which he is seeking recovery. The plaintiff in such a case has not broken the contract; he may fairly contend that its terms are at least an admission by the defendant which the jury should take into consideration."

It will thus be seen from this examination of the cases relied on by Storrie & Co. and Storrie's sureties that in only three of them is the rule contended for by them actually applied, and in only two, the Rodemer Case and the Doolittle Case, was the application of the rule necessary to the decision; since under the law of Maine the recovery would have been limited to the contract rates in the Farnum Case in any event.

**[8, 9]** We are not impressed by the rule announced in these two cases. It being settled as the general rule that upon prevention of performance the injured plaintiff may treat the contract as rescinded and recover upon a quantum meruit without regard to the contract price, why should he be limited to the contract price in case payments for portions of the entire contract have been made or liquidated? Those payments were received in full only on condition that the entire contract be performed. But, if the contract is rescinded, the prices fixed by the contract are also rescinded. As aptly said by the Pennsylvania Supreme Court in the passage quoted supra from City of Philadelphia v. Tripple: "Where the defendant undertakes to limit the plaintiff's recovery by treating the contract price as a limitation upon such recovery, he is asserting a right under the very contract which he himself has discharged."

To hold that payments under the contract may limit recovery where the contract is afterwards rescinded through the defendant's fault seems to us to involve a confusion of thought. A rescinded contract ceases to exist for all purposes. How then can it be looked to for one purpose, the purpose of fixing the amount of recovery? "A contract is extinguished by its rescission." Civ. Code, § 1688. "Generally speaking, the effect of rescission is to extinguish the contract. The contract is annihilated so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken." 6 R. C. L. p. 942; Dyer Bros. Golden West Iron Works v. Central Iron Works, 72 Cal. App. 202, 209, 237 P. 386; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25. In Clark v. Manchester, 51 N. H. 594, a case wherein payments for a portion of the services had been made according to the contract, the court said: "The contract being entire, the defendants cannot break one part of it and still insist upon the performance of the other part. When the defendants rescinded the contract, they put it out of their power to enforce it upon the other party, but the other party may consider it as rescinded and claim pay just as though it had never existed."

In Steere v. Formilli, 38 Cal. App. 194, 175 P. 806, where a building contract was breached by the owner and the contract provided for an estimate of the work done and materials furnished every three weeks and the payment of 75 per cent. of the value thereof upon such estimates, a recovery was had on quantum meruit for all the work done. The court said at pages 195, 196 of 38 Cal. App., 175 P. 806: "The principal point made by the appellant is that the work done and materials furnished during each three weeks constituted, under the terms of the contract, a separate contract, and the settlements made at the end of the three-week periods became accounts stated. This same point is presented in several ways, but the effect is the same. The point is not new. It has been expressly held that the contract provision in question does not operate to make the contract separable, but is a means provided by the contracting parties for estimating the amounts of the progress payments."

In this case the Rodemer Case was cited to the court, and it refused to follow it.

In Woodward on Quasi-Contracts, § 269, the author has this to say of the Rodemer and Doolittle Cases: "This rule is doubtless a sound one when applied to an agreement which is severable in the sense that it really constitutes two or more separate contracts. But the propriety of its application to cases like Rodemer v. [Gonder &] Hazelhurst and Doolittle v. McCullough is at least questionable. Payments pro tanto in such cases are not received in extinguishment of the defendant's liability; or, at most, the extinguishment is subject to the condition that the contractor be allowed to complete the job and receive compensation, at the contract rate, for the whole of it. This is very clearly pointed out in a New Hampshire case, Clark v. Manchester (1872) 51 N. H. 594."

In Laiblin v. San Joaquin Agricultural Corporation, 60 Cal. App. 516, at pages 532, 533, 213 P. 529, 536, the court quoted from Williston on Contracts, § 1459: "More frequently, however, the plaintiff is allowed to recover the real value of the services, though in excess of the contract price. The later rule seems more in accordance with the theory on which the right of action must be based—that the contract is treated as rescinded." The author adds: "and the plaintiff restored to his original position as nearly as possible."

We conclude that the rule of the Rodemer and Doolittle Cases is illogical and not supported by reason; that a contract rescinded is no longer in existence for any purpose; that the defendant, by his own wrong having put an end to the contract, cannot insist on its terms to limit the recovery, even though part payments have been made for part performance because the payments are received as satisfaction only on condition that the entire contract be performed according to its terms; but that, the contract having been rescinded through defendant's fault, he should place the plaintiff as nearly as possible in statu quo by paying the reasonable value of plaintiff's performance.

Storrie & Co. and Storrie's sureties say that to permit such recovery in this case is to allow Boomer to recover over $250,000, when if he had completed the contract, he would have received no more than $20,000. The answer to this is found in the language of City of Philadelphia v. Tripple, quoted supra:

"Let it be assumed that, in an extreme case, a builder has actually expended in the course of his work a sum in excess of the contract price and has not yet completed performance. If, under such circumstances, the builder finishes his work, the owner, upon paying the contract price, will receive the benefit of a large expenditure actually made, in return for the payment of a smaller sum of money. * * *

"Let it further be supposed, however, that the owner, who finds himself in this position of advantage, voluntarily puts an end to his contract rights in the premises. * * * The situation which then presents itself is one in which the builder has in good faith expended money in the course of work done for the benefit of the owner, and has, in the absence of contract, an equitable claim to be reimbursed. The owner, on the other hand, has deprived himself of the legal right which would have sufficed to defeat the equity. He accordingly stands defenseless in the presence of the builder's claim."

Even if it were true, then, that Boomer would only have received an additional $20,000 for the completion of his contract, we are of the opinion that that does not prevent him from recovering the reasonable value of his services upon its rescission for Storrie & Co.'s breach. But Boomer points out that he had large claims for damages against Storrie & Co. for continued delays and increased expense of operation due to their misconduct. If this is so, it would furnish an additional reason for disregarding the rule of the Rodemer and Doolittle Cases even if we felt disposed to follow them. It was stated in the Wellston Case that the rule of the Doolittle Case should only be applied where it was equitable to do so. Upon the rescission of the contract, it ceased to exist for all purposes, including the purpose of relying upon its terms for the purpose of recovering damages for any breach. 13 C. J. p. 623, § 684. If Boomer had valid claims for damages arising under the contract by reason of the fact that his cost of operation had been wrongfully increased, it would seem inequitable to limit him to the recovery of the contract price upon a rescission for Storrie & Co.'s failure of performance.

[10] The jury might well have found that Boomer's cost of operation had been substantially increased by Storrie & Co.'s continuing breaches. There is substantial evidence that Boomer suffered delays and increased costs by Storrie & Co.'s failure to deliver materials to the job as rapidly as required. There is evidence that Boomer's costs were considerably increased by failure of Storrie & Co. to excavate the cut-off trench as rapidly as should have been done. There is evidence that the diversion of air from the compressors to other portions of the work and the delay in restoring the burned air compressors hampered Boomer and increased his costs. As to the latter items of cut-off trench excavation and operation of the air compressors, Storrie & Co. points out that under the contract the cut-off trench should have been excavated by Boomer and the air compressors operated by him. The court instructed the jury as follows: "The obligations of the parties under the contract were not changed by the fact that in carrying out the work one party may have from time to time done and performed part of the work which the agreement contemplated should be performed by the other party, unless you find from a preponderance of the evidence that the parties agreed that the obligation should be shifted. Mere performance of an act by one party for the benefit of the other, or acquiescence by one party in the performance by another, would not operate to shift the contractual obligation as to performance."

No complaint is made of this instruction, and the record does not show at whose request it was given. We may therefore assume that it was requested by Storrie & Co. Under this instruction, the jury could find that the parties agreed that these obligations should be shifted if there was substantial evidence to support such finding. Such an agreement might be express or implied from the conduct of the parties. "An implied contract is one, the existence and terms of which are manifested by conduct." Civ. Code, § 1621; Williston on Contracts, vol. 1, § 3; 6 Cal. Jur. p. 20, § 7; 13 C. J. pp. 241–243, § 8.

[11] As to the cut-off trench, Boomer testified that Storrie & Co. in 1926 refused to let him take over its excavation. It is true, as pointed out by Storrie & Co., that the supplemental agreement of 1927 provided that Storrie & Co. should continue the work required of Boomer under the original contract until Boomer should notify Storrie & Co. that he was prepared to resume work on the scale contemplated by the supplemental agreement.

But this referred to all the work as a whole, not to the cut-off trench alone. Boomer resumed the rest of the work, and Storrie & Co. continued to excavate the cut-off trench. Boomer constantly complained to Storrie & Co. about their delays in such excavation, and Storrie & Co. at no time replied that the obligation was Boomer's, or in fact made any reply. Upon these facts the jury would be justified in finding that Storrie & Co. impliedly agreed to assume the obligation of excavating the cut-off trench. The same is true of the operation of the air compressors. Boomer frequently complained of the diversion of air to other parts of the work, and, after the compressors were burned, insistently demanded that they be replaced promptly. Storrie & Co. did not suggest that Boomer take over their operation and assumed to have the burned compressors repaired and replaced. The jury could well find that Storrie & Co. impliedly agreed to assume these obligations.

That the jury must have so found is made clear by another instruction given to the jury: "In determining the reasonable value of work performed by Boomer prior to the termination of his contract, if you find that he was prevented from completing the same, this finding should be limited to the reasonable cost and expense of performing the work contemplated by said agreement, or extra work performed by him, if any, at the instance of Storrie & Company, under the conditions which actually existed at the time of performance, but the reasonable value so estimated does not and should not include any loss or damage suffered by Boomer as the result of his own failure to perform the whole or any part of his obligations, express or implied, under said agreement in a reasonably efficient manner, if you find that any loss or damage did result from such causes."

[12] Counsel for Storrie & Co. are at pains in their brief to demonstrate that in the amount awarded by the jury the items of increased cost due to delay in excavating the cut-off trench and the operation of the air compressors and the failure to replace the burned air compressors were included. If the jury did include these items we must assume in support of their verdict that they found that these obligations were not Boomer's, but had been assumed by Storrie & Co.

[13, 14] Storrie & Co. and Storrie's sureties insist that Boomer's election to rescind came too late, and that the right to treat the contract as rescinded was waived by the filing of the mechanic's lien suit in the first instance in which Boomer alleged the completion of his contract. They admit "the general rule in California that the plaintiff does not need to elect his course of action between contract and quantum meruit until the case is tried, and that a complaint may contain inconsistent counts." But they say: "The rule for which we contend is that a plaintiff cannot make his election at the time the alleged breaching occurs to stand on his contract as having been completed, and then later turn and say that it was not in fact completed." In support of this contention they cite no California cases. Boomer quit the job after a prevention of performance. He then had the right to pursue either of the three remedies mentioned in McConnell v. Corona City Water Co., supra, including the right to treat the contract as rescinded and sue on a quantum meruit. The doctrine of election of remedies is based upon the ground that, if the defendant is prejudiced thereby, plaintiff is estopped to pursue one remedy after having adopted another. Campanella v. Campanella, 204 Cal. 515, 521, 269 P. 433; Roullard v. Rosenberg Bros. & Co., 193 Cal. 360, 224 P. 449; Cullinan v. Mercantile Trust Co., 80 Cal. App. 377, 387, 252 P. 647; Mansfield v. Pickwick Stages, 191 Cal. 130, 215 P. 389. Storrie & Co. knew that Boomer had not completed his contract, but had quit after they failed to supply him with materials. They could not have been prejudiced in any way by the filing of the mechanic's lien suit so as to estop Boomer afterwards to treat the contract as rescinded and sue on a quantum meruit.

[15] Storrie & Co. asked the court to submit certain special interrogatories to the jury. This the court refused to do. The matter was one in the discretion of the court. Oberholzer v. Hubbell, 36 Cal. App. 16, 171 P. 436. We find no abuse of discretion in this regard.

[16] The witness Wapple was permitted to testify as to yardage in a drainage trench in excess of the engineer's estimates. The contract having been rescinded, the engineer's estimates were no longer conclusive, and the testimony was material to the reasonable value of the work.

On the whole case, without further discussing the evidence, we are satisfied that the money judgment finds ample support and should be affirmed. Having reached this conclusion, it necessarily follows that the judgment against Storrie & Co. in their action for damages against Boomer and his surety must likewise be affirmed.

[17] The amendment to conform to the proof from which Storrie & Co. have taken a separate appeal should likewise be affirmed. The case having been tried on the theory of rescission, it was proper to allow Boomer to amend the complaint in the mechanic's lien suit to state that theory. We cannot see how Storrie & Co. were prejudicially affected by the fact, if it be a fact, that some of the allegations of the amendment find no support in the evidence.

[18, 19] This leaves for consideration only the appeal from the order granting Storrie's sureties a new trial. The order granting the

new trial was made on the single ground that under section 1183 of the Code of Civil Procedure Storrie's sureties could not be held liable for any amount in excess of the price agreed upon between Storrie & Co. and Boomer. Section 1183 provides that: "Said several liens shall not in any case exceed in amount the reasonable value of the labor done or material furnished, or both, * * * nor the price agreed upon for the same between the claimant and the person by whom he was employed. * * *" It is the contention of Storrie's sureties that this language limits a recovery on the bond given by them under section 1183 of the Code of Civil Procedure to the price agreed upon between Boomer and Storrie & Co., in view of the fact that the reasonable value exceeds the agreed price. If the contract had not been rescinded, this might well be true, although Boomer's counsel argue that the limitation applies only to an action to foreclose the lien and not to a recovery on the bond. But, the contract having been rescinded, is there any longer a price agreed upon between Boomer and Storrie & Co. within the meaning of the Code section? We have heretofore pointed out that a rescinded contract has no existence for any purpose. How then can it have an existence for the purpose of fixing a "price agreed upon"? If Boomer had undertaken the work originally at the request of Storrie & Co. without any contract as to price, he would be entitled to recover from Storrie & Co. the reasonable value, and, there being no agreed price, he would likewise be entitled to a lien for the reasonable value. But, having elected to rescind the contract, Boomer is in exactly the same position. He has done labor for which he is entitled to recover the reasonable value because there is no longer an agreed price. He is therefore entitled to recover the reasonable value, likewise, from Storrie's sureties. The words "price agreed upon" must refer to a legally enforceable "price agreed upon," and are intended to give the owner as favorable treatment as the contractor. To give them the effect contended for by Storrie's sureties would permit the owner to profit by the contractor's wrongful conduct at the expense of the materialman or mechanic. There are apparently no express authorities on the question of whether a rescinded contract can be held to establish a "price agreed upon" within the meaning of this Code section, but we are satisfied that a rescinded, i. e., nonexistent, contract cannot be made the basis of proving an agreed price for the purpose of this section any more than it can be so used between the parties to the contract themselves.

The money judgment in favor of Boomer is affirmed.

The judgment against Storrie & Co. in their action for damages against Boomer and Ætna Casualty & Surety Company is affirmed.

The order granting Boomer leave to file an amendment to the complaint to conform to the proof is affirmed.

The order granting a new trial to Fidelity & Deposit Company of Maryland, Globe Indemnity Company, Hartford Accident & Indemnity Company, Maryland Casualty Company, and United States Fidelity & Guaranty Company is reversed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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133 Cal.App. 468

## PEOPLE v. RUSSO.

Cr. 1705.

District Court of Appeal, First District, Division 1, California.

July 28, 1933.

**1. Homicide 🔑14(2).**

Although intent to kill must be result of deliberate premeditation, and must be formed on pre-existing reflection, there need be no appreciable space of time between intention to kill and act of killing, to constitute murder in first degree (Pen. Code, §§ 188, 189).

**2. Homicide 🔑253(1).**

Evidence justified conviction of first degree murder (Pen. Code, §§ 187–189, 192).

**3. Criminal law 🔑1036(1).**

Accused cannot complain of admission of evidence to which he made no objection during trial.

**4. Criminal law 🔑438.**
**Homicide 🔑171(4).**

Photographs of body showing location of wounds inflicted by knife, and testimony as to vile name accused called deceased at commencement of fight, *held* admissible in murder prosecution.

**5. Witnesses 🔑376.**

On redirect examination in murder prosecution, testimony that accused had engaged in unprovoked altercations with witnesses *held* admissible, where accused had gone into matter on cross-examination to show unfriendly feeling on part of witnesses towards him.

**6. Witnesses 🔑70.**

In murder prosecution, investigator in district attorney's office *held* not disqualified from describing wounds on body of deceased as he observed them.

**7. Criminal law 🔑1129(1).**

Absent assignment of error, accused cannot complain of district attorney's conduct during trial.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

T. Russo was convicted of murder in the first degree, and, from the judgment, and from an order denying his motion for a new trial, he appeals.

Affirmed.

Forrest H. Bailey, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

KNIGHT, Justice.

Appellant was found guilty of murder in the first degree, and in accordance with the recommendation of the jury was sentenced to imprisonment for life in the state prison. From the judgment of conviction and the order denying his motion for a new trial, he prosecutes this appeal, the main contention made being that the evidence at most establishes only the crime of manslaughter; that the verdict of first degree murder was the product of an undue prejudice created against him by certain evidence about which he admits no complaint was made during the trial, but which he now claims was inadmissible, and by the emphasis placed on such evidence by the district attorney in his argument to the jury; and he asks, therefore, that the judgment of conviction be modified by reducing the crime of which he was convicted to manslaughter or that said judgment be reversed and he be granted a new trial. The trial judge, after having given careful consideration to the same contention in hearing the motion for new trial, determined that the verdict of the jury should be allowed to stand, and from our examination of the entire record we find nothing therein to prove that the conclusion reached by the trial judge is not well founded.

The circumstances leading up to and immediately following the homicide were as follows: Russo, the appellant, and Taylor, the man appellant killed, were itinerant laborers working in the fruit industry in the vicinity of Brentwood, Contra Costa county. With several others, named Iesiello, Green, Garland, Haley, and Hall, they had been camping for two weeks or more in the railroad stock pens or corrals near the Brentwood Station. On Saturday, August 13, 1932, the day preceding the homicide, Russo, Iesiello, and Green purchased an old automobile, and the next morning, accompanied by Hall and Haley, started out in the machine intending to drive to a swimming pool. Taylor and Garland remained at the camp. Shortly before noon a man named Coatney called at the camp to see Green, but, finding him absent, stayed and visited Garland. Meanwhile, on the way to the swimming pool, an argument arose between the five men, and Haley and Hall quit the party; Haley returning to the camp. Upon entering the stock pen he took a coat belonging either to Russo or Iesiello from the fence and immediately departed, his whereabouts afterwards being unknown. About an hour later Russo, Iesiello, and Green returned. Coatney, Garland, and Taylor were there at the time, and Russo immediately started an altercation with Taylor about the missing coat; Taylor replying in substance that he had about all he could do "to look after his own stuff." At the same time Taylor took his own coat from the fence and placed it over his arm. Continuing the altercation, and advancing toward Taylor in a menacing attitude, Russo called Taylor the vilest kind of a name, and told him "to get the hell out of the camp"; that, if he did not do so he (Russo) would kick him out. As Russo continued to advance toward Taylor, the latter threw his coat to one side, and Russo immediately struck him. A fist fight followed, and soon after it started Iesiello ran up behind Taylor and struck him on the head with a bucket. Garland then interfered to drive Iesiello away, which started another encounter between the latter two. They fought their way out of the pen, and Iesiello, who was much the younger man, picked up a club and struck Garland with it. Russo and Taylor, continuing their fight, eventually grappled each other and fell to the ground; and at this juncture Russo commenced to stab and cut Taylor with a paring knife having a blade some four or more inches long, which, unknown to any of the parties present, Russo had picked up from the top of a box in the pen just as the fight started or during its progress. As soon as Taylor was stabbed, he quit fighting, and Russo jumped up, yelled something in a foreign language to Iesiello, both of whom were Sicilians, and ran toward the automobile, at the same time commanding Green to get in the automobile and bring with him a sack of provisions which was hanging in the pen. Immediately Iesiello stopped fighting with Garland and rushed to the automobile, and Russo, Iesiello, and Green drove away in it. Both Coatney and Garland realized that Taylor had been hurt, but did not know he had been stabbed; and Coatney left at once to summon medical aid. As soon as Coatney had gone, Taylor succeeded in getting up and staggered out of the stock pen. Garland went to his assistance, but Taylor dropped to the ground and died almost instantly. Garland then discovered that Taylor had been stabbed. In this connection the evidence shows that he was stabbed four times, once near the heart, once just below the ribs on the left side, again in the back on the left side near the kidneys, and in the left hip. The evidence further shows that the wound in the hip was not a clean cut, the knife having been thrust into the flesh and then "churned around," as one witness described it, cutting much of the flesh from the bone. Some four or five days later Russo was arrested in a camp in the river bottom near Turlock. Iesiello had disappeared. The circumstances showing the manner in which Taylor was killed were established by the testimony of Coatney, Garland, and Green. So far as the record shows, Russo made no statement at any time with reference to the killing, nor did he testify at the trial. Evidently he rested his case on the cross-examination of the witnesses for the prosecution.

[1] The distinction between murder and manslaughter is clearly pointed out by the Code sections, and the jury was fully instructed accordingly; that is to say, murder is the unlawful killing of a human being with malice aforethought (Pen. Code, § 187); while manslaughter is the unlawful killing of a human being without malice (Pen. Code, § 192). And the Code sections proceed to declare that such malice may be express or implied, that it is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature, and that it is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned or malignant heart. Continuing, the Code sections declare that all murder which is perpetrated by means of poison, or lying in wait, torture, or any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate certain enumerated felonies, is murder of the first degree. Pen. Code, §§ 188 and 189. And it is well settled, that although the intent to kill must be the result of deliberate premeditation, and must be formed upon pre-existing reflection, there need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind.

[2] It will be seen from the evidence hereinabove narrated, which is without any substantial conflict, that Russo was the aggressor; that, after starting the fight, he took an unfair advantage of his adversary by obtaining possession of and using a knife. Furthermore, it shows that Taylor was not armed with any instrument or weapon whatever, but was fighting fairly with his fists. In other words, there is nothing in the record indicating that Russo used the knife in self-defense or that he was in any danger of great bodily harm when he began to stab Taylor therewith. It is true, as appellant contends, that the unlawful killing of a human being, without malice, upon a sudden quarrel or heat of passion, is manslaughter and not murder. But in the present case the fact that appellant obtained possession of the knife at the beginning of the fight or during its progress, and stabbed Taylor three times in vital parts of the body, and the further fact that he used the knife in an unusually cruel manner in inflicting the fourth wound, together with the other circumstances above mentioned, showing that he started the fight with little or no provocation and carried it on by unfair means, were sufficient to justify the belief on the part of the jury that there was manifested a deliberate intention on his part unlawfully to take away the life of a fellow creature, and that the circumstances attending the killing showed an abandoned and malignant heart. It is beyond the power of this court, therefore, to interfere with its verdict finding appellant guilty of first degree murder.

[3-6] The evidence about which appellant complains as being inadmissible consists mainly of certain photographs, introduced by the prosecution, of Taylor's body, showing the location of the wounds inflicted by the knife, the testimony as to the vile name appellant called Taylor at the commencement of the altercation, and the testimony given by Green, Garland, and Coatney in redirect examination by the prosecution showing that previously Russo had engaged in unprovoked altercations with them and others in the camp, from which it would appear that he was possessed with a quarrelsome disposition. As already stated, appellant concedes that he made no objection whatever to such evidence during the trial. For that reason alone he is not entitled to complain about the matter on appeal; but, aside from such reason, it is at once apparent that there is no legal ground whatever upon which to base such complaint. The photographs were clearly admissible in evidence (People v. Magsaysay, 210 Cal. 301, 291 P. 582; People v. Gomez, 209 Cal. 296, 286 P. 998; People v. Ferlin, 203 Cal. 587, 265 P. 230; People v. Saenz, 50 Cal. App. 382, 195 P. 442), as was the declaration of the appellant made at the commencement of the fight tending to show hatred and malice toward the deceased; and the testimony as to previous quarrels was elicited from said witnesses on redirect examination only after appellant had gone into the matter on cross-examination in an effort to show an unfriendly feeling on the part of said witness toward appellant. Therefore, since such testimony was properly admitted, the district attorney was entitled to comment on the same in his argument to the jury. Nor is there any merit in the further contention that the witness Harrison was disqualified from testifying in connection with said photographs as to the appearance of the wounds on Taylor's body merely because he was in the employ of the district attorney's office as an investigator. His testimony was confined to a description of the wounds as he observed them, and was not given in the nature of expert testimony.

[7] Appellant complains also of the conduct of the district attorney in asking certain lead-

ing questions and in commenting in his argument to the jury on the nationality of appellant. No assignment of error was made thereof during the course of the trial, however, and consequently the matter is not open to review on appeal; moreover, we have found nothing in the conduct of the district attorney nor in his argument to the jury to warrant a reversal. The record shows that at all times the trial judge was alert in seeing that the trial was fairly conducted and that appellant was accorded all his legal rights; and from our examination of the case we cannot say that the verdict has resulted in a miscarriage of justice.

The judgment and order are therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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133 Cal.App. 481

## WARNKE v. GRIFFITH CO. et al.

Civ. 7867.

District Court of Appeal, Second District,
Divison 2, California.
July 28, 1933.

**Hearing Denied by Supreme Court Sept. 25, 1933.**

**1. Appeal and error 🔑1064(1).**

Instruction that linemen's helper, standing near pole in street being paved when struck by paving contractor's hired truck, was mere licensee as to such contractor, which was not required to provide him safe place to work, *held* not error prejudicial to him, even if he was invitee.

**2. Negligence 🔑105.**

Even invitee assumes obvious dangers on premises he is invited to enter.

**3. Automobiles 🔑163(1).**

Street paving contractor's liability for injuries to linemen's helper, struck by contractor's truck while standing near pole in street, *held* dependent on failure to exercise ordinary care, whether helper was mere licensee or invitee.

**4. Automobiles 🔑246(58).**

Instruction that linemen's helper, struck by street paving contractor's truck while standing near pole awaiting lineman's audible signal to lower fuse box, had right to assume that dangerous instrumentalities would not be thrust on him without warning, *held* properly refused.

Court instructed jury that workman is not required to exercise same diligence to avoid accidents while performing duties on premises as pedestrians using place merely for locomotion, and helper testified that trucks backed in every four or five minutes, that he was standing about 2½ feet from pole, watching lineman tying fuse box on hand line to see when he could lower it, without looking for trucks backing in, and was reaching for line after lineman hollowed for him to lower box when hit by truck.

**5. Automobiles 🔑206.**

Linemen's helper, standing near pole in street being paved, could not assume that he would not be injured by paving contractor's passing truck, but was required to keep such lookout therefor as ordinarily prudent person would have kept under similar circumstances.

**6. Automobiles 🔑219.**

Linemen's helper, struck by street paving contractor's truck while standing near pole in street, was bound to use greater care and look more vigilantly for trucks, if noise of concrete mixer affected his ability to hear them, than otherwise.

**7. Negligence 🔑65.**

While test of negligence is conduct of ordinarily prudent person under same or similar circumstances, amount of care required varies with differences in circumstances surrounding parties.

**8. Negligence 🔑141(4).**

Instruction that it was plaintiff's duty to exercise his faculties of sight and hearing to apprise himself of danger, and to use ordinary care at all times in exercising such senses, *held* not erroneous as instructing jury that it was his duty to exercise such senses at all times to apprise himself of danger.

**9. Automobiles 🔑246(58).**

Instruction that to look or listen carelessly is not to look or listen at all *held* warranted by evidence in action for injuries to one struck by truck.

**10. Automobiles 🔑246(30).**

Instruction that parties to personal injury suit assumed ordinary risks involved in being on and moving over ground where others were working *held* not erroneous as leading jury to believe that plaintiff assumed risks of defendants' negligence.

**11. Automobiles 🔑246(30).**

Instruction that linemen's helper, standing in rut behind backing truck, driver of which could not see him, assumed ordinary reasonable risks of dangers which were or should have been apparent to him, *held* not error, even if susceptible of construction as meaning that he assumed risk of truck driver's negligence in backing truck against him.

**12. Automobiles 🔑246(30).**

Instruction, in action for injuries to pedestrian struck by defendant's truck, that duty of each party to exercise ordinary care was equal, *held* not erroneous as informing jury that plaintiff must exercise same amount of care as defendant.

**13. Automobiles 🔑160(1), 216.**

Both truck driver and pedestrian must exercise degree of care which ordinarily prudent men would exercise under circumstances for pedestrian's safety.

**14. Automobiles 🔑160(1), 216.**

Amount of care required of truck driver for safety of pedestrian is greater than that required of latter for his own safety.

**15. Automobiles 🔑246(4).**

Instruction that driver of motor vehicle, a "dangerous instrumentality," is charged with greater care than pedestrian for latter's safety, *held* properly refused as confusing, erroneously classifying truck as dangerous instrumentality and indicating that jury should compare amount of care required of driver thereof with that required of pedestrian.

**16. Appeal and error 🔑1050(1).**

Admission of testimony of three truck drivers as to noise made by backing trucks after three other drivers testified practically to same effect without objection by appellant *held* not prejudicial error.

**17. Appeal and error 🔑1064(1).**

Instruction submitting question whether driver of truck injuring plaintiff was defendant's employee or independent contractor *held* not ground for reversal of judgment for defendant; presumption being that jurors found plaintiff contributorily negligent, as defendant contended.

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Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Richard O. Warnke, by Myrtle Weber, his guardian ad litem, against the Griffith Company, a corporation, and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Nimmo, Leighton & Heath and Mark A. Hall, all of Los Angeles, for appellant.

Finlayson, Bennett & Morrow, Henry L. Knoop, and Penn Cummings, all of Los Angeles, for respondent Griffith Co.

David D. Stuart, of Los Angeles, for respondent Alexander Marrett.

ARCHBALD, Justice pro tem.

From a judgment in favor of defendants in an action for personal injuries plaintiff has appealed.

For convenience of description we shall assume that, near the scene of the accident involved here, East Fourth street in the city of Los Angeles runs east and west and the intersecting streets run north and south. Merrick street intersects it at right angles from the north, but does not extend beyond it. About one city block west of this intersection Hewitt street comes into Fourth from the south. The city of Los Angeles, at the time in question, was improving East Fourth street, which was originally 40 feet wide, by acquiring a strip 20 feet wide on the north side thereof between said intersecting streets. Defendant Griffith Company had the contract for the construction of gutters, new curb, and paving. At the time of the accident the old curbing had been removed along the old north line of Fourth street and header boards had been set in its place, which rose from 6 to 8 inches above the ground level and acted as retainers for the fresh concrete. A curb had been constructed along the new north line of the street to within from 100 to 200 feet of Merrick street, and forms had been set or were being set for the rest of the new curb and gutters. Along the south edge of the strip, about 1 foot north of where the old curbing had been, there was a row of electric light poles which carried wires belonging to the bureau of power and light of the city of Los Angeles and others belonging to the Los Angeles Gas & Electric Corporation. A row of new poles had been set just north of the strip, outside the new curb line, and it was necessary to dismantle and remove the old poles, one of which stood near the place which had formerly been the northwest corner of Fourth and Merrick, designated on the map introduced in evidence as "old pole No. 1," and another, west of old pole No. 1 about 120 feet, designated as "old pole No. 2." This dismantling and removal was being done under an order of the bureau of power and light, which authorized a joint pole agreement for such work. This work of dismantling and removal was being carried on at the time of the accident by about fifty employees of the bureau of power and light and the electric corporation.

Plaintiff was an employee of the Los Angeles Gas & Electric Corporation as helper to the linemen. His duty required him to remain on the ground near the pole on which the linemen were working and assist them by raising and lowering materials or tools by means of a pulley and hand line suspended from a crossbeam of the pole. At the time of the accident two of the linemen were engaged in dismantling old pole No. 1, and plaintiff was assisting them. At the same time defendant company was engaged in paving the 20-foot strip and had already laid the pavement thereon from the westerly end of the strip to within approximately 215.4 feet west of Merrick street. This operation had for some time required the trucks carrying materials to the concrete mixer from the company's plant at Ninth street and the Los Angeles river to back into the strip from Merrick street, in order to dump their loads at the mixer. On the day of the accident there were eight trucks being so employed and they followed each other in regular order, one coming out over the strip as another was backing in. All of the trucks were of about the same design and size. None of them belonged to the Griffith Company, but were engaged by it to do such hauling at an agreed price per load. The above-mentioned forms and their braces extended some 2½ feet into the strip from the new curbing. At the northwest corner of Merrick and Fourth streets there was a small pile of lumber next to the forms, and a carpenter, Fred Felix, was working on the forms. This forced the trucks to enter the strip from Merrick street at some distance from the new curb, and the evidence shows that they followed one route, marked by ruts made in the soft dirt over which they traveled. Just prior to the accident plaintiff had been called by one of the linemen on old pole No. 1 to lower some materials, and he took his position, standing north of the hand line and from 2 to 3 feet from the pole. The line was hanging from 12 to 18 inches due north of the pole. Plaintiff stood looking up the pole, watching the lineman tie a fuse box onto the hand line, waiting for that to be done so he could lower it to the ground. While so standing defendant Marrett backed his truck, loaded for the mixer, into the east end of the strip. The right rear corner of the truck struck plaintiff, knocking him headlong to the ground. The right rear double wheels pinned his foot down, and the backing vehicle ran up plaintiff's legs and onto his pelvis, severely injuring him. Marrett was then warned by some one, and immediately drove the truck forward and off the injured man's legs.

Appellant concedes that, if the case had been submitted to the jury under what he terms "proper instructions," the evidence would support the verdict; and also that, if proper instructions had been given, the jury would have been justified in implied findings that plaintiff's injuries were caused by the negligence of both defendants, and that plaintiff was not guilty of contributory negligence, and that the jury would most probably have so found. He contends, however, that the court erred (1) in giving instructions regarding the question of whether Marrett was an employee of Griffith Company or an independent contractor; (2) in instructing the jury that plaintiff was a mere licensee; (3) in giving and refusing instructions relative to plaintiff's alleged contributory negligence, his rights and duties as a workman, and the quantum of care required of him; (4) in instructions concerning the relative amount of care required of plaintiff and defendants; and (5) in excluding certain evidence and permitting the introduction of other evidence, overruling certain objections to evidence, and denying motions to strike same, and in refusing as well as in giving certain other instructions. In view of the conclusion reached we shall leave the discussion of the first contention until the last.

Marrett's truck was so constructed that he could not see any one of ordinary stature for some distance directly back of it, either by looking around the left side where he sat or through the window at the back of the cab, much less any one back of the opposite rear corner of the vehicle, which struck plaintiff. There were but six of the fifty utility employees engaged about the job directly engaged, as was appellant and the two linemen working with him, making but two "ground men" and four "linemen." It does not appear from the evidence that the second "ground man," who was working at old pole No. 2 while appellant was working at old pole No. 1, at any time stood in the strip over which the trucks were constantly passing. At this distance (at least 120 feet) he heard the lineman shout to appellant, "Get on the hand line." Respondent Marrett knew that the utility men were working around the job, but did not see appellant in the strip before he backed. Likewise appellant knew that the trucks were backing into the strip and passing out, and had already seen "not more than six or eight trucks in all" back past him before he was hurt. The latter testified that before he stepped onto the strip he looked toward Merrick street, but did not see any trucks. Attorneys for defendants have united in filing a joint brief for both respondents, as most of the exceptions involve them mutually.

[1-3] 2. We see no error prejudicial to appellant in the giving of the instructions here complained of. The court did not say that plaintiff was a "mere licensee." After advising the jury by the instruction that plaintiff "had a legal right to be on the premises where he was performing his work," the court said (italics ours): "However, so far as the defendant Griffith Company was concerned, the plaintiff was a mere licensee; *that is, the defendant Griffith Company was not required to provide a safe place for him to work.*" The court neither in this nor any other instruction we find defines what the words "mere licensee" mean, nor did it say what the duty of the Griffith Company was to "a mere licensee, as compared with an invitee." The only thing the jury could have understood by the use of the words in the instruction was that the Griffith Company was not required to provide plaintiff with a safe place to work. Appellant was not an employee of the defendant Griffith Company, nor was he performing any work for them. He was working solely in the interest of his

employer, the Los Angeles Gas & Electric Corporation, which had an equal right with the Griffith Company, though a different job to do, upon the premises—which belonged to the public, although the public was excluded from their general use while the improvement was under way. In the same instruction the court did tell the jury that "it was the duty of the defendant Griffith Company to refrain from committing any overt act of negligence in connection with its direction and control of the manner and place in which the trucks were necessarily required to pass"; that "if, therefore, you conclude that in the exercise of such reasonable prudence and care, under all of the conditions as they appear to have existed in connection with the backing of the trucks, taking into consideration the difficulty, if not impossibility, of the drivers of the trucks to see in the rear and both sides of the trucks as they backed in, and taking into consideration the further fact that workmen were working along and near the path of the moving trucks, the Griffith Company should have maintained a flagman or other means of notifying the workmen of the approach of each truck, then the defendant Griffith Company was guilty of negligence." In our opinion the instruction given is as favorable as appellant could have asked, even assuming he was an invitee. Even an invitee assumes all obvious dangers on the premises he is invited to enter. Shanley v. American Olive Company, 185 Cal. 552, 197 P. 793. In view of the last sentence of the instruction, which we have quoted, the jury could not conclude from the statement made (of which appellant does not complain) that it was the duty of the Griffith Company to refrain from committing "overt" acts of negligence in connection with the use of its trucks; nor in view thereof could the jury infer from such last statement that the Griffith Company would be liable only for such "overt" acts. Other instructions given show that the case was presented to the jury, not upon the question of the degree of care due a "mere licensee," but liability based upon the failure of such company to exercise ordinary care in carrying on its operations, which we are of the opinion is the true meaure of its liability.

[4] 3. Appellant urges that there was only one place he could stand and do his work, and also, evidently, that he was required at all times to keep his eyes on the linemen; that he was not bound to neglect his work in order to maintain a constant lookout for approaching danger; that he was not bound to assume the risk caused by the negligent use by others of instrumentalities likely to cause him injury, and that he had a right to presume that such others would not run him down without warning; that, such being the law, the court erred in instructing the jury (a) that he was required "constantly" and "at all times" to keep on the lookout for approaching danger, (b) that he assumed the risks from the negligent operation of dangerous instrumentalities at the place where he was working, and (c) in refusing to instruct the jury that he had a right to presume that dangerous instrumentalities would not injure him without warning.

(c) At the request of plaintiff the court, in substance, instructed the jury that there is a difference between the amount of care required of a pedestrian who might enter premises where there is danger of being injured by motor vehicles or other instrumentalities and that required of a workman forced to be upon the premises in performance of his duties—"not that the workman is bound to exercise any lesser degree of care, but because the care to be exercised must be determined from a different standpoint"—and that what might be negligence on the part of a pedestrian or stranger might be due care on the part of the workman; that in both cases the parties are required to exercise ordinary care and to use their senses before entering upon a place of danger, "but that the duty which devolves upon the pedestrian or stranger to continue to exercise his sense of sight does not devolve with the same strictness upon the workman. The workman is not called upon to exercise the same amount of diligence in avoiding accidents as pedestrians or others who use the same place merely as a medium of locomotion. * * *" The court refused to give as a part of such instruction the further statement that such workman was not bound to neglect his work in order to avoid an injury which might be caused by want of ordinary care on the part of operators of vehicles, but has a right "to assume that other persons will exercise due care for his safety," "that dangerous instrumentalities will not be thrust upon him without warning," and that "it should not necessarily be said that he contributes to his own injuries by doing that which his employment required him to do."

We are of the opinion that under the testimony of appellant himself there was no place in the instructions for the portions thereof refused. He testified that the trucks backed in on an average of one every four or five minutes; he must have known from observation that the driver operating the truck in question could not see any one standing by the pole; he knew he was standing in the depression made in the dirt by the truck wheels. Knowing all that, he testified that just before the accident he was standing 8 or 10 feet west of the pole; that he heard one of the linemen "holler" to him and he "walked in a northeasterly direction toward where the hand line was hanging, just north of the pole. As I walked forward, I looked ahead of me to see if any trucks were ready to back in. I could see clear across Merrick street. There was no truck approaching or backing in. The hand line was hanging about 15 inches north of the pole. I took my position just north of the hand line, and faced to the south, with the hand line between me and the pole. I was standing about 2 feet or 2½ feet north of the pole. I looked up the pole to see what the lineman wanted, and I saw Mr. Bolton tying a fuse-box, or birdcage, onto the hand line. *I stood looking up at him, watching to see when he would have it tied on so that I could lower it. I stood there about a minute while he was tying it on; all that time I was looking up at him, and during that time I did not look to the east to see if any trucks were backing in. I did not change my position during that time. Mr. Bolton hollered for me to lower the bird cage, and I was just reaching for the hand line* when I felt something hit me on the rear portion of my left side." Appellant could just as well have watched the lineman tying the load on the line from a safe position. He was certainly not performing any part of the duty required of him by watching the lineman perform his duty, and, if he had glanced occasionally in the direction from which danger approached him, until the lineman gave the signal to lower the fuse box which it is evident he was waiting for, the deplorable accident could not have happened. In our opinion the only instructions warranted under the circumstances shown by plaintiff's own evidence were those given by the court. It is true there was evidence that the line had to hang where it was on the pole and that the lineman placed it, and not appellant; but the only reason shown by the evidence as to why appellant had to stand where he did instead of closer to the pole is "because if I had done so I would have been in danger from something falling down the pole. Sometimes the linemen drop things out of their hands, or drop pliers or other things out of their belts," and "you have to stand with your face to the pole in order to control the hand line and keep the materials on the line from swinging in toward the pole." It is evident from appellant's own testimony that he was not yet operating the hand line when struck, but was simply waiting for the load to be tied on and the signal given; and, even though plaintiff testified that he was "looking up the pole to see when the lineman was ready for him to lower," it is evident from his own testimony that it was an audible signal that he was waiting for and upon the giving of which he reached for the line.

[5] (a) The court instructed the jury to the effect that defendant Marrett had a right to back his truck over the strip of ground, and that such right was equal in every respect to the right of appellant to be where he was at the time of the accident; that just as their rights were equal, so also was the duty of each to exercise ordinary care under all the circumstances; and that "plaintiff could not assume or act or rely upon the assumption that he would not be injured" by a truck passing by the place when he was working, "but that he was required to keep such a lookout for such trucks as under similar circumstances an ordinarily prudent person would have kept for his own safety and protection." Appellant urges that, under the case of Egan v. Southern Pacific Company, 15 Cal. App. 766, 115 P. 939, 940, and Jones v. Southern Pacific Company, 74 Cal. App. 10, 239 P. 429, he had a right to assume the very thing the court instructed the jury he could not. In the case of Egan v. Southern Pacific Company, supra, an employee of the railroad was struck by a string of cars which passed him on the way up grade, and after switching a car apparently remained motionless on the track, with no one in sight except the fireman, "who was sitting in the cab door with his feet upon the steps." Seeing this, the plaintiff resumed his work upon the track, and while so engaged was struck by the cars, which, "without any warning or signal, backed the same down the track, and by reason of the grade no indication of their approach was observed by plaintiff." The court there said that plaintiff had a right to assume that the train would not be backed down upon him without warning, and that it should not be said that he contributed to his own injury in the doing of that which his employment required that he should do. The verdict in that case was in plaintiff's favor, and it was one of the contentions of appellant that contributory negligence was shown on the part of plaintiff. That the court did not intend the statement made should be used as an instruction to the jury under the facts of this case is clear, not only from the great difference in the facts of the two cases, but from the use of the following language, which would seem to be applicable to the facts here, viz.: "It cannot be disputed that one familiar with the dangers connected with an employment as a general rule assumes the risks, incident thereto." Plaintiff in the instant case testified that he "knew it was a dangerous place." There is testimony that the noise made by the trucks in backing the heavy load was greater than would be made by a horn. Mr. Ward, the other ground man, who was working at the time at old pole No. 2, at least 120 feet closer to the mixer, testified that when the mixer was 100 feet away the truck could be heard at a distance of 25 feet. The statement we have quoted from Egan v. Southern Pacific Company approves the principle of law criticized in the instruction given and which we think is peculiarly applicable to the facts of this case. In the Jones Case, supra, the deceased was an employee of an independent corporation which had been requested by defendant to make necessary repairs on defendant's tracks, and, as in the Jones Case, the statement was in the nature of an argument by the court showing that under the facts

of that case plaintiff was not guilty of contributory negligence as a matter of law, but that such question was one of fact properly submitted to the jury. In view of what we have said, we see no error in the instruction complained of in appellant's ninth specification of error.

[6, 7] Nor do we see any error in the instructions given to the effect that, if the jury found that the noise of the concrete mixer affected appellant's ability to hear the trucks as they were backing up, "then I instruct you that the plaintiff was bound to use a greater amount of care for his own safety and protection and to be more vigilant in looking than if his hearing were not so affected." The amount of care varies with the circumstances surrounding a party. While the test which determines negligence or lack of it is the conduct of an ordinarily prudent person under the same or similar circumstances, necessarily the amount of such care varies with the differences in such circumstances. This instruction but calls the attention of the jury to the fact, which is a commonplace, that, if the circumstance of excessive noise is present, alertness to danger must increase; that is, the amount of care must be greater in order that the common measuring stick of ordinary care may be applied.

[8, 9] The court also instructed the jury that: "It was the duty of plaintiff to exercise his faculties of sight and hearing to apprise himself of danger, if any, and to use ordinary care at all times in exercising his senses of sight and hearing. To look in a careless manner or to listen in a careless manner is not to look or listen at all." To the first part of such instruction appellant urges that it was error to instruct the jury that "it was plaintiff's duty to exercise his senses of sight and hearing *at all times* to apprise himself of danger." We do not believe that construction can be placed on the language used by the court. That it was appellant's duty to exercise such faculties for such purpose and to use ordinary care at all times in such exercise could hardly be questioned, and that is all the court said. The only objection made to the last phrase of the instruction is that there is "no evidence at all that plaintiff looked or listened 'in a careless manner' or that he did 'not look or listen at all.'" In our opinion there is ample evidence to support either conclusion on the part of the jury.

[10, 11] (b) The court gave three instructions designated as C, E, and G, respectively, of which appellant complains in his thirteenth, fourteenth and seventeenth specifications of error. The general ground of such objection is that the court failed to apply the law applicable to workmen bound to carry on their employment in a place of danger. We have already shown that in our opinion such contention is not good under the evidence in this case. The instructions properly state the law applicable to this case. Instruction E says in part: "Each [referring to plaintiff and defendants] in turn assumed the ordinary risks involved in being upon and moving over ground where others were occupied in working and handling or moving objects that might cause injury." And we fail to see anything in such language which the jury could construe as meaning that appellant assumed the risks of respondents' negligence, as urged, particularly in view of all the instructions given by the court. The same objection is made as to instruction G, wherein the court said: "The plaintiff went upon the premises and assumed all of the ordinary and reasonable risks of the dangers involved in the general conditions as they existed there, as they were apparent or should have been apparent to him." Even if such a construction could be placed thereon by the jury, we are of the opinion that, if it was apparent to appellant that the truck drivers could not see him if he was standing in the ruts made by the vehicles' wheels as they were backing into the strip (and it would seem to be plainly apparent to anyone), such negligence in so backing might very well be one of the ordinary dangers involved, and, if appellant failed to use ordinary care in performing his duties as the court otherwise instructed, he might well be said to have "assumed" the risks of such negligence.

In his eighteenth and nineteenth specifications of error appellant attacks the following instruction as not properly stating the law relating to workmen and in calling for constant vigilance and watchfulness on the part of one in a position of constant danger: "While the plaintiff was only required to exercise ordinary care for his own safety and protection, nevertheless the amount of that care which he was required to exercise must be measured by the extent of his exposure to danger. A person who is in a position of danger must exercise care proportionate to the danger; he must be as vigilant and watchful as the danger of his position requires. If he is in a position of constant danger he must be constantly vigilant and watchful. He must exercise such amount of care which an ordinarily prudent person in a like position of danger would exercise for his own safety and protection. Therefore, if you find that at and immediately prior to the accident the plaintiff was in a position of danger and that he failed to exercise an amount of care commensurate with such danger, then he was negligent, and if you further find that such negligence proximately caused or contributed to the accident and injuries he cannot recover, and in such event your verdict should be in favor of both defendants."

In the case of Kenna v. Central Pacific R. Co., 101 Cal. 26, 35 P. 332, 333, plaintiff's intestate was employed by defendant as a plumber in fitting and connecting pipes alongside its tracks in the construction of a signal tower, and while walking upon the end of the ties on the outer tracks from the tower to his work bench, for the purpose of cutting a piece of pipe, the deceased was struck in the back by a locomotive and killed. Defendant's motion for a nonsuit was granted. The Supreme Court said, in affirming the judgment of nonsuit: "It may be assumed, however, that the defendant was guilty of negligence to such a degree that, in the absence of any other evidence, it would be liable in damages, but the contributory negligence of the deceased was, nevertheless, such as to prevent a recovery against the defendant. It appears from the evidence that Fallon was a prudent, cautious man, 22 years old; that he knew the danger of the place in which he was working; had talked with his uncle about it; had had the experience of several days in which to learn the frequency with which the trains passed over the track, and to become acquainted with the danger; and that owing to the curve in the track, and the obstruction caused by the tower, he could not see an approaching train until it came within a few rods of him. It was therefore incumbent on him to exercise a corresponding care and vigilance to avoid danger, rather than negligently and recklessly expose himself to injury. 'His employment and the theater of his services may not be disregarded. They made him conversant with the locality, the character and frequency of trains, the necessity for incessant vigilance to avoid injury, and the fact that no one could venture upon the tracks, and escape injury, without the greatest circumspection.' Bresnahan v. Railroad Co., 49 Mich. 413, 13 N. W. 797. The law demands that one who is working in a place where he is exposed to danger shall himself exercise his faculties for his own protection, and does not permit a recovery for damages resulting from a neglect of this rule." The court there held plaintiff negligent as a matter of law. Here the trial court left the question to the jury, and in our opinion but one conclusion could be reached under the facts presented, and we think the court properly advised the jury as to the law applicable. "The care required must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect. The greater the risk of danger the greater must be the care. What is ordinary care in the case of extraordinary danger would be extraordinary care in a case of ordinary danger." 29 Cyc. 428, 429, quoted with approval in Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 98, 239 P. 709, 41 A. L. R. 1027. See, also, Ramos v. Service Brothers, 118 Cal. App. 432, 5 P.(2d) 623, wherein plaintiff, *an experienced road worker*, was ordered by his employer to remove some oil which had leaked on the road (these last facts appear only in the transcript) and was struck by a backing truck.

[12-15] 4. The court refused to give a very long instruction requested by plaintiff which in part charged, so far as the driver of the truck was concerned, that, while both plaintiff and defendant Marrett were charged with the same degree of care, "the amount of care exacted of the driver of a motor vehicle is far greater than the amount of care exacted of the foot-passenger. The driver of a motor vehicle—a dangerous instrumentality capable of inflicting fatal injuries—is charged with a greater amount of care than the pedestrian." Another phase of the same instruction combined the two defendants and instructed the jury that, if it should find "that the truck which Mr. Marrett was driving, and the operations which the Griffith Company was carrying on, were dangerous instrumentalities, and that they were more likely to injure the plaintiff than he was to injure them * * *, that in order to exercise the same degree of care" defendants were required to exercise a greater amount than plaintiff, and, if the jury found that they failed to exercise the degree of care required of them, and that plaintiff did exercise the degree of care required of him, that then they should find for the plaintiff. The particular part of the instruction above referred to is urged to have been erroneously refused.

The court did instruct the jury that "all persons must exercise ordinary care when their conduct may affect any other person, or when they may be affected by the conduct of any other person," and that "it is as much the duty of a person to exercise ordinary care for his own safety and protection as it is his duty to exercise ordinary care with respect to the safety and protection of others"; and then, applying such instructions to the case on trial, the court said: "It was as much the duty of the plaintiff to exercise ordinary care for his own safety and protection as it was the duty of defendants, or either of them, to exercise such care with respect to the plaintiff's safety and protection." In another instruction given the jury was told that Marrett had a right to back his truck over the strip of ground, and that such right was equal in every respect to the right of plaintiff to be where he was at the time; that "just as their rights were equal, so also was the duty of each to exercise ordinary care under all the circumstances equal." The quoted language is urged as erroneous, just as the language of the instruction previously referred to, in that it informs the jury that plaintiff was required to exercise the same amount of care as defendants, and the same complaint is made of certain language taken from instruction E, heretofore mentioned, which says that the "obligations of the plaintiff and the defendants were coequal, in a sense, and reciprocal." We cannot agree with appellant that such is the effect of the instructions when read as a whole. As so read they clearly conform to the rule that each is required to use that degree of care which ordinarily prudent men would exercise under the circumstances in which each found himself; and while it is undoubtedly true that the amount of care required of the driver of the truck was greater than that required of appellant, as set forth in the part of the instruction refused by the court, and while such instruction sets forth a correct principle of law, we are of the opinion that the charges given by the court are equally sound as principles of law. In addition to being sound, those given afford some help to the jury. The one refused does not. What would a jury get out of the one refused? Nothing but confusion. It seems clear the only hope one might have in proposing it would be that the jury might get the idea that in some way, in the eyes of the law, appellant was in a more favored position than defendants, regardless of the facts. Nor do we think the proposed instruction fair in stating that the truck is a "dangerous instrumentality." That language has been used, inadvertently we think, in referring to motor and other vehicles propelled by power. They are only dangerous, in themselves, in the hands of an incompetent or careless driver. That there is possibility of great danger from them if carelessly operated, or if pedestrians or others are negligent around them, is undoubtedly true, but that of itself is not enough to warrant so classing them in an instruction—which would only seem to have the purpose of inflaming a jury at a helpless and inanimate piece of machinery, with the hope possibly that the feeling would spread to the driver or owner. How would the jury compare the amount of care required of the driver with that required of the pedestrian? Of course, that is impossible. How would it help even if they could do so? It clearly could not. Furthermore, in our opinion, such proposed instruction clearly indicates to the jury that some such comparison is to be made, and it can only be in the final analysis a comparison of negligence, which they were properly instructed by the court they could not make, as appellant admits. Similar instructions have been by different appellate courts approved as not constituting error. This court so held in the case of Morgan v. Los Angeles R. & G. Corp., 105 Cal. App. 224, 287 P. 152. We are of the opinion that, while such a charge might not be erroneous if given in connection with proper instructions as to the degree of care necessary for each to use to avoid being negligent, still it falls short of being a good instruction in many particulars; and we think the court exercised sound judgment in refusing to give it. We are not unmindful of the fact that the refusal of a similar instruction has been held to be error, in the case of Vedder v. Bireley, 92 Cal. App. 52, 267 P. 724, but with the conclusion reached there as to such instruction we cannot agree.

[16] 5. The drivers of three of the trucks used on the work referred to testified without objection as to the noise made by their machines in backing into the strip and as to conditions generally prevailing as to noises. We see no prejudicial error in permitting three other drivers to testify thereafter, over appellant's objection. The testimony of the last three was practically the same as that of the first three, whose evidence was already in the record. It would seem to be more a matter of weight than competence anyway, considering that it was unquestioned that the trucks were of practically the same size and design and carried about the same weight and were operated over the same tracks, and that some of them were coming out while others were going in, at least two of them being in close proximity at the time of the accident.

We find no merit in the other miscellaneous errors urged by appellant.

[17] 1. If the jury had found Marrett guilty of negligence and appellant free from contributory negligence, the question of whether or not he was an employee of Griffith Company would have been material. If the jury found him guilty of negligence, but also found appellant guilty of contributory negligence, it would still have had to find for Marrett. In view of the fact that we find no error which prejudiced appellant, we must assume that the jurors found him to have been negligent himself, in which event it would have been immaterial whether he was employed by the Griffith Company or not, or whether one or both of the defendants were negligent. Nor could an instruction leaving the question of employment to the jury have changed the verdict in any respect.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

218 Cal. 779

## KNOX v. BENBO.

### L. A. 14081.

Supreme Court of California.
Sept. 14, 1933.

**New trial 🔑104(1).**

New trial was properly denied, in action to have paternity of child adjudicated, where allegedly newly discovered evidence was cumulative only and would not have changed result.

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In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Rueben Knox against Jane Doe Benbo, wherein defendant filed a cross-complaint. From the judgment, plaintiff appeals.

Affirmed.

Willis O. Tyler, Edwin L. Jefferson, and Floyd H. Bowers, all of Los Angeles, for appellant.

Orbison & Irwin and Charles J. Orbison, all of Los Angeles, for respondent.

PER CURIAM.

The plaintiff brought this action to have the paternity of a minor child of the defendant adjudicated. The complaint alleged that the defendant claimed that the plaintiff is the father of the child, but that the claim is without foundation. The defendant answered and filed a cross-complaint alleging that the plaintiff is the father and prayed for judgment so declaring and awarding support for the child. Findings and judgment were made and entered in favor of the defendant and cross-complainant, and from the judgment the plaintiff has appealed.

Two points are made in support of the appeal: First, that the evidence is insufficient to support the findings; and, secondly, that the court erred in denying the plaintiff's motion for a new trial.

It is deemed unnecessary to relate the evidence adduced in support of the findings. The record has been carefully reviewed. Although sharply conflicting, the evidence on behalf of the defendant is amply sufficient to support the findings. We find nothing therein which would justify the conclusion contended for by the plaintiff that the testimony on behalf of the defendant is inherently improbable.

The motion for a new trial was made on the ground, among others, of newly discovered evidence. It appears that the evidence alleged to be newly discovered was at the time of the trial known by and available to the then counsel for the plaintiff, who was substituted out of the case and does not appear as counsel on the appeal. However, the evidence, if produced, would have been cumulative only and in view of the record presented would not have changed the result. The motion for a new trial was therefore properly denied.

The judgment is affirmed.

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218 Cal. 671

## SANTINI v. JUSTICES' COURT OF SAN BERNARDINO TP. et al.

### L. A. 14067.

Supreme Court of California.
Aug. 21, 1933.

**Prohibition 🔑5(1).**

Writ of prohibition *held* not to lie to restrain issuance of execution to enforce judgment.

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In Bank.

Application by August Santini for writ of prohibition to be directed to the Justices' Court of San Bernardino township, San Bernardino county; George W. Holbrook, Justice of Peace of the township.

Peremptory writ denied, and proceeding dismissed.

Joseph R. Rensch, of San Bernardino, for petitioner.

T. T. Clark, of Colton, for respondents.

SHENK, Justice.

Prohibition to restrain the respondents court and justice of San Bernardino township from taking any steps to enforce a judgment rendered in said court, in an action entitled Joseph Holdener v. August Santini.

The action was on a promissory note, and the judgment was for the plaintiff in the sum of $92.50. On appeal to the superior court the judgment was affirmed and the record returned to the respondent court. The issuance of an execution is threatened, and it is sought in this proceeding to restrain its issuance.

The foundation for the petitioner's position is the fact that the justice of the peace who tried the cause in the respondent court was called in by the respondent justice pursuant to section 105 of the Code of Civil Procedure, but was ineligible to sit in that court because he was a justice of a township of less than 30,000 population and was not and is not admitted to practice before the Supreme Court of this state as required by section 922 of the

Code of Civil Procedure and section 4185a of the Political Code (added by St. 1929, p. 839).

In the original briefs counsel discussed rather extensively the rules which should apply under the facts presented as to the right of the justice of the peace called in to try the case in the respondent court. By a supplemental brief the respondents have raised the question of the propriety of the writ of prohibition to restrain the issuance of an execution (a ministerial act) to enforce a judgment.

The point thus raised effectually disposes of the present proceeding in favor of the respondents. Harris v. Recorder's Court, 15 Cal. App. 103, 113 P. 687, and cases therein cited; 50 C. J., p. 660.

The peremptory writ is denied, and the proceeding is dismissed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

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## SOUTHERN CALIFORNIA EDISON CO., Limited, et al., v. STATE BOARD OF EQUALIZATION.*

L. A. 14008.

Supreme Court of California.
Aug. 1, 1933.

Rehearing Granted Aug. 31, 1933.

**1. Taxation** ⟹382.

Gross receipts of public utility corporation's subsidiary are computed as part of gross proceeds from parent company's operations in assessing taxes thereon (Const. art. 13, § 14).

**2. Taxation** ⟹382.

Taxes of electric company and its subsidiary railroad company *held* properly computed on basis of gross receipts of each, including amount paid latter by former for transporting materials and supplies (Const. art. 13, § 14).

In Bank.

Application by the Southern California Edison Company, Limited, and another for a writ of mandate to the State Board of Equalization.

Alternative writ discharged, and petition denied.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for petitioners.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for respondents.

CURTIS, Justice.

Petitioners, the Southern California Edison Company, Limited, a corporation, and the San Joaquin & Eastern Railroad Company, a corporation, filed herein their petition asking for an alternative writ of mandate requiring respondent, the state board of equalization, to grant certain credit on future payment of taxes to become due from petitioners, and to issue the certificate to the state board of control provided for under subdivision 3 of section 3669 of the Political Code, stating the amount of said credit. Petitioners further pray, upon a hearing after the return on said alternative writ, that the writ be made peremptory. The alternative writ was issued and regularly served upon the respondent. The return of respondent to the writ is a demurrer thereto on the ground that the petition does not state facts sufficient to constitute a cause of action or any ground for relief.

Petitioner Southern California Edison Company, Limited, hereinafter referred to as "Edison Company," is engaged in the business of generating and distributing electric energy as a public utility. A part of its generating system, known as the Big Creek project, is located in the mountains of Fresno county. Petitioner San Joaquin & Eastern Railroad Company, hereinafter referred to as "Railroad Company," was originally organized at the instigation of Pacific Light & Power Corporation, Edison Company's predecessor in the ownership of the Big Creek project, for the purpose of building and operating a short line railroad between El Prado and Big Creek, Fresno county, Cal., to be used in constructing, maintaining, and operating the Big Creek hydroelectric plants. At the time Edison Company acquired the Big Creek project in 1917, it also acquired the ownership of all the stock of the railroad company, and since that time has operated the railroad through its subsidiary, the railroad company, as a necessary adjunct to the maintenance and operation of the Big Creek project. The railroad system has also at all times been operated as a common carrier, and during the past few years the railroad company has also operated in connection with its railroad system the highway transportation system between Fresno and Huntington Lake, which is a part of the Big Creek project. This highway transportation system, like the railroad system, has been operated as a common carrier, and also for the transportation of freight and express used by the Edison Company in the maintenance and operation of the Big Creek project.

In computing petitioners' taxes for the fiscal year 1932–1933, respondent board included

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⟹For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 31 P.2d 384.

in the gross receipts of the railroad company intercompany revenue derived by the railroad from carrying materials and supplies as freight and express for the Edison Company in connection with the operation and maintenance of the Big Creek project. This method of computing the taxes has resulted in an increase over what it would have been if computed by the old method of $448.86 on the railroad system, and of $474.22 on the highway transportation system. At the same time, respondent board assessed taxes against all the operative properties of Edison Company used by it in the generation and transmission of electric energy.

The first half of the tax thus assessed on the railroad company's property has been paid by petitioners under protest, and, after making this payment, they filed with the board a claim for credit on the next taxes to become due from them, after the allowance of such claim, on account of the alleged erroneous method followed by the board in computing the taxes against the railway system and the highway transportation system of the railroad company. These claims are for $224.43 on account of the overpayment of taxes on the railroad system and for $237.11 on account of the overpayment of taxes on the highway transportation system. These claims the respondent board denied on the ground that the intercompany revenue should be included as a part of the gross receipts upon which such taxes are computed.

Subdivision 3 of section 3669 of the Political Code provides that whenever any taxes, paid to the state treasurer, shall have been paid more than once, or shall have been erroneously or illegally collected, or shall have been computed contrary to law, the state board of equalization shall certify to the state board of control the amount of said taxes collected in excess of what was legally due, from whom they were collected, or by whom paid, and, if approved by said board of control, the same shall be credited to the person or company to whom it rightfully belongs, at the time of the next payment of taxes.

[1, 2] It is the contention of petitioners that the two amounts of $224.42 and $237.11, aggregating the sum of $461.53, were erroneously collected from them as taxes for the fiscal year 1932–1933. This claim is based upon the fact that the amount paid by the Edison Company to the railroad company during said year for the transportation of materials and supplies as freight and express in connection with the operation and maintenance of its light and power enterprise—referred to above as intercompany business—should not be included as a part of the gross receipts of the railroad company. There seems to be no question that the railroad company is but a subsidiary company of the Edison Company, the latter company being the legal owner of all the stock of the former. In such a case its gross receipts are computed as a part of the gross proceeds of the Edison Company. San Francisco-Oakland T. Rys. v. Johnson, 210 Cal. 138, 154, 155, 291 P. 197. Therefore petitioners contend that, when the Edison Company paid the railroad company freight and express charges for carrying its own commodities, it was in reality paying these charges to itself, and that such receipts by the railroad company should not be considered in computing its gross receipts. We must admit that the argument of the petitioners is quite persuasive, and, were the question an open one, we would be inclined to give the same considerable weight. But the same question was before this court in the case of Pacific Gas & Electric Co. v. Roberts, 176 Cal. 183, 167 P. 845, 847, and was decided adversely to the present contention of the petitioners. In that case the facts show that plaintiff did business in a certain locality through a subsidiary corporation, the Suburban Light & Power Company. During the year it sold at wholesale rates gas and electricity to the Suburban Company at a cost of $52,717.99. The Suburban Company then distributed this gas and electricity to its consumers residing in the locality served by it, and for that year its gross receipts were $188,401.60. The plaintiff, the parent company, paid taxes on its gross receipts, including said sum of $52,717.99. It also paid taxes on $188,401.60, the gross receipts of the Suburban Company. The taxes on the gross receipts of $52,717.99 were paid under protest, and in that action the plaintiff sought to recover them from the state treasurer. This court construed the words "gross receipts from operation" used in section 14 of article 13 of the Constitution as the basis for fixing the amount of taxes to be paid upon certain classes of property used exclusively in the public service, and held that these words were not the equivalent of "gross earnings" or "gross profits," but that the clear intent of this provision of the Constitution "was to base the tax upon the income derived from the exercise by the corporation of functions reasonably within their charter powers." In applying this construction of the Constitution to the question before it in that case, the court held: "So in the case now before us the money paid by the Suburban Company for gas in bulk was paid to appellant and received in its capacity as a wholesale dealer, while the amounts received by the Suburban from its customers were paid for delivering gas to them—an entirely different service. There is no more reason to make a deduction because the two corporations were engaged in the same sort of business than there would be to subtract from the grand total of plaintiff's gross receipts the amounts paid for oil used in the manufacture of gas by said corporation."

Applying the rule thus announced to the

facts in the present case, it follows in our opinion that the action of the board of equalization must be sustained and that the board correctly computed the taxes due from petitioners by taking the gross receipts of each as the proper basis for making such computation. The service rendered by the railroad company was entirely different from the service rendered by the Edison Company, and therefore the amount of tax which each should pay was properly based upon the income derived from the exercise by each of its corporate functions.

Other questions raised by respondent, in view of the above conclusion, need not be given consideration in this opinion.

The alternative writ heretofore issued is discharged, and the petition is denied.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

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218 Cal. 619

## WALKER v. HANSEN et al.

Sac. 4756.

Supreme Court of California.

July 31, 1933.

**1. Judgment** 🔑688.

Judgment for plaintiff's predecessors in title, in action to quiet title by administrator with the will annexed, *held* res judicata in subsequent litigation between trustee of same estate and plaintiff (Code Civ. Proc. § 1908).

**2. Quieting title** 🔑43.

Allegation of title by adverse possession did not preclude plaintiff from relying solely on record title and possession.

**3. Appeal and error** 🔑843(2).

Whether evidence sustained allegation of title by adverse possession was immaterial, where evidence showed record title and possession.

In Bank.

Appeal from Superior Court, Humboldt County; T. H. Selvage, Judge.

Action by Frank B. Walker against Henry A. Hansen and others, wherein the defendant Fidelity Philadelphia Trust Company filed a cross-complaint against plaintiff. From a judgment for plaintiff, the Fidelity Philadelphia Trust Company appeals.

Affirmed.

Marc. F. Morrison, of Eureka, for appellant.

A. W. Hill, of Eureka, and Casper N. Torp, of Arcato, for respondent.

SHENK, Justice.

This is an appeal from a judgment in favor of the plaintiff in an action to quiet title. The defendant Fidelity Philadelphia Trust Company, trustee of the estate of Thomas A. Scott, deceased, is the sole appellant.

The complaint alleged title and possession in and to numerous parcels of land in township 1 south, range 2 west, H. M., in Humboldt county. The appellant filed an answer and a cross-complaint seeking to establish the right in the estate in and to oil, gas, and mineral rights in certain lands described in the complaint, lying south of a line running easterly and westerly through the center of sections 15 and 16 in said township.

The plaintiff proved record title and possession in himself and his predecessors in interest, and the court found the allegations of the complaint to be true. The court also found the allegations of the cross-complaint to be untrue, and quieted the plaintiff's title as against the claims of the trustee of the Scott estate.

Other points are discussed in the briefs, but it is at once apparent that the subject-matter of the controversy on this appeal is res adjudicata.

[1] In January, 1915, J. C. McFarland, as the administrator with the will annexed of the estate of Thomas A. Scott, deceased, commenced an action in Humboldt county to quiet the title of the estate of Scott in and to said oil, gas, and mineral substances as against the predecessors in title of the plaintiff herein. Judgment was entered in favor of the defendants in said action. On appeal the judgment became final by affirmance thereof in April, 1919. MacFarland v. Walker, 40 Cal. App. 508, 181 P. 248. Said final judgment was interposed as a defense to the claim of the cross-complainant herein. The court found that the oil, gas, and mineral rights described in the cross-complaint were included in the same rights asserted and involved in the prior action, and that the plaintiff herein is the successor in interest and title of the defendants in the former action. These findings are conclusively supported by the record. While the plaintiff in the former action was the administrator of the estate and the appellant is the trustee, both were the representatives of the real party in interest, viz., the estate of Thomas A. Scott. We therefore find this case to be squarely within the rule declared by section 1908 of the Code of Civil Procedure and the many cases affirming the same doctrine. In re Estate of Clark, 190 Cal. 354, 212 P. 622; 15 Cal. Jur., pp. 95 et seq.

[2, 3] The fact that the plaintiff also alleged

title by adverse possession did not preclude him from relying on the record title and possession as complete proof of his title. During the trial counsel for the plaintiff announced to the court that the plaintiff was not relying on title by adverse possession, and the court recognized that the rule in such cases was not applicable to the facts presented and relied upon by the plaintiff. This condition of the record makes it unnecessary to discuss the question of whether the plaintiff's title by adverse possession was established.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; IRA F. THOMPSON, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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218 Cal. 729

## CAPITAL BOND & INVESTMENT CO. v. HOOD et al.

L. A. 13706.

Supreme Court of California.
Aug. 30, 1933.

**1. Appeal and error 🔑865.**

Supreme Court must look solely to judgment roll to determine validity of judgment foreclosing street bonds, on appeal from order setting judgment aside on motion of defendant who defaulted and failed to redeem.

**2. Constitutional law 🔑143.**

Judgment foreclosing street bond issued prior to statute permitting foreclosure of street bonds by court action *held* void (St. 1911, p. 763, § 76, as amended by St. 1921, p. 297, § 10).

**3. Judgment 🔑28.**

Circumstances showing that valid portion of judgment foreclosing street bond could not be separated from void portion foreclosing another bond, entire judgment was void and could be set aside on motion of defendant who defaulted and failed to redeem (St. 1911, p. 763, § 76, as amended by St. 1921, p. 297, § 10).

Circumstances disclosed that each bond was made a lien on a different lot; that judgment roll declared that all defendants owned both lots; the amounts due on both bonds were lumped in one sum, and no segregation was made as to the liability chargeable to each lot; the total sum was declared a lien on both lots; the lots were sold without segregation, and attorney's fees and costs of foreclosure were allowed as to both, also in a lump sum.

PRESTON, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by the Capital Bond & Investment Company against Clara E. Hood and others. Judgment in favor of plaintiff. From an order setting aside the judgment, plaintiff appeals.

Affirmed.

Elliott H. Barrett, of Los Angeles, for appellant.

Silk & Ratner, of Los Angeles, for respondents.

SHENK, Justice.

Appeal by the plaintiff from an order setting aside a decree of foreclosure of street bonds.

The plaintiff was the holder of two street assessment bonds issued by the city of Los Angeles pursuant to proceedings taken under the 1911 Street Improvement Act (St. 1911, p. 730, as amended). One bond was issued on May 13, 1921, and was made a lien on lot 20 of Tract 3263. The other bond was issued on November 20, 1924, and was made a lien on a lot in another tract, to wit, lot 30 of Tract 3440.

On October 31, 1929, the plaintiff sued to foreclose both bonds. The complaint sets forth a single cause of action. In it both bonds are described and it is alleged that all the defendants, sued under fictitious names, are the owners of said lots and that both bonds constitute liens on both lots. Without segregating the sums due on each bond, it is alleged that the defendants are in default in the payment of said bonds in the total sum of $453.14. The plaintiff prayed that the bonds be foreclosed; that the property be sold to satisfy the indebtedness and for attorney's fees and costs.

The defendants were served with summons and defaulted. Judgment was entered on August 23, 1930, foreclosing the bonds as prayed, fixing attorney's fees, and taxing costs. A commissioner was appointed, a sale was decreed, and the lots were sold en masse. After the time for redemption had expired, and in January, 1932, one of the defendants, the Pacific Construction Finance Company, moved to set aside the judgment on the ground that the same was void on its face. The motion was granted, and the plaintiff appeals.

[1] On the hearing of the motion it was first disclosed that when the action was commenced the Pacific Construction Finance Company was the owner of lot 30 and its codefendant was the owner of lot 20. This fact is not disclosed by the judgment roll. In cases such as the one now presented we must look solely to the judgment roll to determine its

validity. Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 P. 880; 15 Cal. Jur. p. 59.

[2] Attached to the complaint and made a part thereof are copies of the bonds involved herein. The bond on lot 20 was issued prior to the amendment in 1921 (St. 1921, p. 297, § 10) of the act of 1911, § 76 (St. 1911, p. 763), permitting the foreclosure of such bonds by court action and the allowance of attorney's fees therein. As to this bond the court was without jurisdiction to entertain an action to foreclose the same. Jeffreys v. Point Richmond Canal, etc., Co., 202 Cal. 290, 260 P. 548. When the court entered a judgment of foreclosure of this bond and the sale of lot 20, it had no jurisdiction of the subject-matter. Its action in this respect was not an error in the exercise of its jurisdiction, and the rule of Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann. Cas. 520, and other cases to like effect, is not applicable. Here the court was without power to act in foreclosing said bond and its judgment in so doing was void.

[3] It is argued that the court had jurisdiction to order the foreclosure as to lot 30, and therefore that the judgment as to that lot is not subject to attack herein. But this is not a case where that portion of the judgment which the court had jurisdiction to order may be separated from the void portion and the judgment be immune from attack as to the valid part. See Freeman on Judgments (5th Ed.) vol. 1, pp. 647–649, § 324. Here the judgment roll declares that the defendants own both lots; the amounts due on both bonds are lumped as one sum; and no segregation is made as to the liability chargeable to each lot; the total sum was declared a lien on both lots; the lots were sold without segregation; and attorney's fees and costs of foreclosure were allowed as to both, also in a lump sum. Under these circumstances the charges for the unauthorized foreclosure must be held to have been imposed upon the Pacific Construction Finance Company to its prejudice and unlawfully. Since the void portion of the judgment cannot be separated from the valid portion, the entire judgment on the record here presented is void on its face. As such it may be set aside by the court at any time. Baird v. Smith, 216 Cal. 408, 410, 14 P.(2d) 749; 15 Cal. Jur. p. 55. The motion was therefore properly granted.

The order is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.; TYLER, Justice pro tem.

PRESTON, Justice (dissenting).

I dissent. The complaint was to foreclose six street bonds, each of a different series, and four tracts of realty are described therein. The moving party herein was served as a defendant by a fictitious name. It defaulted and judgment passed for foreclosure of two of the six bonds. The fact that each of the bonds was a lien upon a separate tract is ignored. The decree foreclosed both bonds as though each bond was a lien on both tracts. Petitioner did not redeem or attempt to redeem the lot in which alone it was interested. It waited until after the period of redemption, and now, since the lot has for some reason become valuable (perhaps it may have a building on it), petitioner comes in and says the decree is void on its face because it included two bonds, one of which could not be foreclosed and, moreover, was never a lien on the lot sold and here involved. Now the lot was subject to sale for the proper amount; that gave the court jurisdiction to act and decree a sale. The debt for which it was sold was simply in excess of the just amount due. Petitioner did not object by appearing, but suffered default and never even essayed to redeem. Personally I think it should not be heard to claim the absence of jurisdiction.

218 Cal. 698

## Ex parte MILLER.

Cr. 3644.

Supreme Court of California.

Aug. 24, 1933.

Rehearing Denied Sept. 22, 1933.

**1. Automobiles ⚷359.**

Statutory felony of unauthorizedly taking automobile did not become misdemeanor under statute immediately upon imposition of fine therefor (Pen. Code, § 17; Gen. Laws 1931, Act 5128, §§ 146, 153 (c, d), 153½).

> Pen. Code, § 17, provides that crime punishable by fine or imprisonment in county jail or in state prison in court's discretion shall be deemed misdemeanor for all purposes after judgment imposing punishment other than imprisonment in state prison. Gen. Laws 1931, Act 5128, § 146, relates to felony of taking automobile without owner's consent, and sections 153 (c, d), 153½, specify punishment therefor.

**2. Fines ⚷12.**

Under statute punishing unauthorized taking of automobile, court justifiably imposed $5,000 fine with alternative of one day's imprisonment in county jail for each $2.74 (Gen. Laws 1931, Act 5128, §§ 146, 153 (c, d), 153½).

**3. Criminal law ⚷27.**

Statute providing that, if punishment other than imprisonment in state prison be

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imposed, offense constitutes misdemeanor, means misdemeanor only for purposes subsequent to judgment (Pen. Code, § 17).

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In Bank.

Application by Joseph Miller for a writ of habeas corpus against the Sheriff of Los Angeles County.

Writ discharged, and petitioner remanded.

Gladys Towles Root, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

WASTE, Chief Justice.

Application for writ of habeas corpus.

[1] Petitioner entered a plea of guilty to a charge of taking an automobile without the consent of the owner, a felony, in violation of section 146 of the California Vehicle Act (Deering's Gen. Laws 1931, p. 2523). He was sentenced to pay a fine of $5,000, with an alternative of imprisonment in the county jail until the fine be satisfied, the court allowing a credit toward the payment of such fine of $2.74 for each day of imprisonment. In the event of nonpayment of the fine, this will necessitate petitioner's incarceration in the county jail for a period of five years. He has now served in excess of thirteen months, and urges that, by reason of the provisions of section 17 of the Penal Code, the imposition of a fine characterized his offense as a misdemeanor, and that under section 153 (c) of the California Vehicle Act, supra, the maximum period of confinement for a violation of the act amounting to misdemeanor is, in the absence of other provisions to the contrary, six months.

We cannot accept petitioner's theory. Under section 146 of the act, the driving or taking of an automobile without the owner's consent, to which charge petitioner entered a plea of guilty, is declared to be a felony. In the absence of a contrary provision, every person convicted of a felony for a violation of the provisions of the act "shall be punished by a fine of not less than one thousand dollars, nor more than five thousand dollars, or by imprisonment in the state penitentiary for not less than one nor more than five years, or by both such fine and imprisonment." Section 153 (d). Section 153½ of the act declares that: "A judgment that the defendant pay a fine for any violation of this act may also direct that he be imprisoned until the fine be satisfied. But the judgment must specify the extent of the imprisonment, which must not exceed one day for every two dollars of the fine, nor extend in any case beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted."

[2] In view of these several sections there can be no doubt as to the propriety of the trial court's action in imposing a $5,000 fine on petitioner, with alternative imprisonment of one day for each $2.74 of such fine unpaid. Nonpayment of the fine would not result in petitioner's incarceration for a longer period than that specified for such offense, viz., five years.

[3] We find nothing in section 17 of the Penal Code opposed to this conclusion. That section provides in part that, "when a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison." In Doble v. Superior Court, 197 Cal. 556, 576, 577, 241 P. 852, we held, in effect, that the quoted provision had a prospective operation. It is only for purposes subsequent to judgment, if a fine or county jail sentence be imposed, that the offense is deemed to be a misdemeanor. Any other conclusion would nullify section 153 (d) of the act, authorizing the imposition of a fine of not less than $1,000 nor more than $5,000, for if, as petitioner urges, the imposition of a fine immediately and for all purposes characterizes the offense as a misdemeanor, the fine could not exceed $500 under section 153 (c), which section specifies the penalty for misdemeanors under the act. Such construction of the act is unreasonable and not required by the authorities.

The offense to which petitioner entered his plea of guilty is designated in the statute as a felony. It remained such until the court had completed the rendition of judgment, and, inasmuch as the judgment imposed was one authorized by the act, there can be no successful attack upon its validity. In other words, the offense not being a misdemeanor at the time judgment was pronounced, the court was empowered to impose any judgment consistent with sections 153 (d) and 153½ of the act. The judgment here in question complies with these sections.

The writ is discharged, and petitioner is remanded.

We concur: PRESTON, J.; SEAWELL, J.; LANGDON, J.; SHENK, J.; SPENCE, Justice pro tem.

218 Cal. 755

## BEAL v. BEAL.

S. F. 14841.

Supreme Court of California.
Sept. 2, 1933.

**1. Divorce** ⚷303(3), 309.

Order modifying final divorce decree as to custody of children, and allowance for their support and education, could be made without finding as to unfitness of parents to have custody of children.

**2. Divorce** ⚷303(3), 309.

Application for modification of final divorce decree as to custody of children and allowance for their support and education was addressed to court's discretion (Civ. Code, § 138).

**3. Divorce** ⚷303(3), 309.

Under showing made, court was justified in modifying final divorce decree as to custody of children and allowance for their support and education (Civ. Code, § 138).

> Under original decree wife had custody of sons and was allowed $750 monthly for their support and education. The modification awarded the custody of sons jointly to husband and wife with other provisions as to support. The court's power to modify the decree, under Civ. Code, § 138, was recognized in the property settlement agreement of the parties.

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In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Helen E. Beal against Carl H. Beal. From an order modifying provisions of final decdee of divorce as to custody of children and allowance for their support and education, plaintiff appeals.

Affirmed.

Robert R. Moody, of San Francisco, for appellant.

James, Brann & Rowe, of San Francisco, and Ross & Ross, of Redwood City, for respondent.

PRESTON, Justice.

Appeal from order of the San Mateo county superior court, modifying provisions of final decree of divorce, relating to custody of children and allowance for their support and education.

On January 23, 1928, these parties executed a written property settlement agreement whereby, after specifying the terms of property division, it was agreed that the wife should have the custody of the two minor sons of the marriage, Carlton Beal, then about thirteen years of age, and Thomas Evans Beal, then about ten years of age, the husband reserving the right to visit them at all reasonable times. It was also agreed that the husband should pay to the wife $750 monthly for the support and education of said sons; that he should require no accounting as to disposition of said payments; that, in event of divorce, the decree should provide for their continuance, but, other than as set forth in said agreement, neither party should assert against the other any property claim. Lastly, said agreement provided: "Nothing in this agreement, however, shall interfere or be construed to interfere with the rights and powers of the courts of California with respect to children."

On January 27, 1928, plaintiff wife, upon grounds of extreme cruelty, secured an interlocutory decree of divorce, wherein the court adjudged said property settlement to be just, fair, and equitable, and awarded custody of the sons to her, with allowance for their maintenance as above set forth. On January 28, 1929, a final judgment of divorce was entered. It ordered that the provisions of the interlocutory decree relating to custody, control, maintenance, care, and education of the minors and the right of the father to visit them at all reasonable times and places "are hereby carried into this final decree of divorce, subject to the further order of the court."

Frequent controversies had from time to time arisen between the parties over attempts of the father to exercise his right to visit the children and he had, on occasions, invoked the aid of the court to secure orders permitting him to take the children out and to have them visit him during school vacations. In fact, on December 11, 1928, the wife was cited for contempt because of her failure to obey an order of the court permitting the father to take the sons to a Stanford-California football game and to dinner and places of amusement on nonconsecutive week-ends. Finally, in September, 1929, with the consent of both parties, the court made an order modifying the final decree of divorce by placing the elder son, Carlton, in the joint custody of the parents; leaving the younger son in the custody of the mother; relieving the father from said $750 monthly payments during the portions of the summer vacation that the children spent with him; ordering enrollment of the elder son in the Menlo School for Boys, to attend there until graduation, with rights to both parents to visit him; ordering the mother to pay his school expenses from said allowance and to permit him to rent a saddle horse and to have $25 a month spending money; and, lastly, giving the father the right to visit the younger son and to have both children during at least one-half of the summer vacation periods.

Some three years later, on October 4, 1932, the court made its further order modifying said final decree of divorce, which is the order here appealed from. It awarded custody of both sons jointly to husband and wife. It provided that until January 1, 1933, Carlton, then recovering from a severe injury, should live with defendant at Los Angeles; that Thomas should live with plaintiff and attend the San Mateo High School; that until said date defendant should pay plaintiff $375 monthly for support of Thomas, but that he should be relieved from paying anything to plaintiff for support of Carlton. It further provided that, if the parties should, on or before said January 1, 1933, file their written consent to placing said minors in a private boarding school, to be mutually selected by them, then the children should be placed in such school commencing with the January, 1933, term; that, if no written consent should be filed, then both children should be placed in the Menlo School for Boys at the opening of said school term, to remain in attendance there until the further order of the court; that beginning January 1, 1933, the father should pay directly to the school where the children attended, the entire expense for their tuition and living, and all incidental expenses, and should be relieved from making any payments to plaintiff for their support.

Plaintiff bases her appeal from said order upon three grounds: First, that the moving papers of defendant for modification of the decree, and the evidence presented by affidavit in support thereof, did not state facts sufficient to warrant the order; second, that a court may not arbitrarily substitute its own peculiar ideas as to the custody of minor children in place of those of the parents, without evidence of unfitness of the parents; and, third, that a court may not, upon the theory of making an order beneficial to the children, make a new contract for the parents, without evidence of unfitness.

[1-3] These contentions have no merit. The appeal is before us upon bill of exceptions which contains lengthy affidavits and counter affidavits, in addition to copies of all moving papers and orders of the court made prior to the giving of the order here in question. The showing so made is abundantly sufficient to support the action of the court. A finding as to the unfitness of one or both parents to have custody of the children was not essential; the application for modification was addressed to the discretion of the court. Section 138, Civ. Code; Guardianship of Shannon (Cal. Sup.) 23 P.(2d) 1020. Admittedly the elder son, who, pursuant to the order of September, 1929, had previously attended the Menlo School for Boys, was suffering severely from injuries received in an airplane accident, and, having been removed from the Stanford Hospital to the southern part of the state, was under medical care at the father's home there, and at his expense. This boy was standing on the very threshold of maturity; the younger son was also rapidly approaching that critical age when the counsel and companionship of his father would be invaluable. Admittedly also, there had been a great deal of friction between these parents in the matter of arranging for the father to see the children and the latter had contributed directly to payment of some of their bills in addition to making the monthly allowance to plaintiff, for which he received no accounting. Properly exercising its discretion in this situation, it is apparent that the court was wisely guided by the considerations specified in section 138 of the Civil Code, to wit: "(1) By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; * * * (2) As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father."

We find in this record no basis for the claim that the efforts of the father, asserted to be for the welfare of the sons, were a mere subterfuge to cloak his purpose to be relieved of the monthly payments to the mother for their support. Indeed, the court has not relieved the father from supporting the sons; it has merely ordered that the payments be made direct to the school rather than through the mother. It is too clear for controversy that the court had power to so modify the final decree with respect to changing the custody of the children (Van Der Vliet v. Van Der Vliet, 200 Cal. 721, 254 P. 945, and cases cited), and that it had also the incidental and accompanying power to order that the payments for their support and education be made directly to the person, or school, actually furnishing such support and education. This inherent power, conferred by said section 138 of the Civil Code, was recognized in the property settlement agreement, as witness the provision thereof that "nothing in this agreement * * * shall interfere or be construed to interfere with the rights and powers of the courts of California with respect to children." Furthermore, such authority was also expressly reserved to the court by the final decree of divorce wherein are adopted the provisions of the interlocutory decree, relating to custody, control, maintenance, care, and education of the children, "subject to the further order of the court."

Cases cited by appellant, such as Parker v. Parker, 55 Cal. App. 458, 203 P. 420, and Johnson v. Johnson, 104 Cal. App. 283, 285 P. 902, involving awards of alimony against the innocent party, are not in point. The case of Armstrong v. Armstrong (Cal. App.) 23 P. (2d) 50, merely holds that the statutory power of the court to modify its decrees may not be denied where the property agreement, although incorporated in the complaint, is neither adopted by nor referred to in either interlocutory or final decree of divorce. Appellant's position seems to be that that case in effect holds that, where a settlement agreement is adopted by the court in its decree, the decree is thus rested on the agreement; hence the agreement is a part of the final judgment and can only be modified in the same manner as other final judgments. But this statement, if correct, would not be applicable here, for, as above set forth, both by the quoted clause of the property settlement itself and by the express language of the final decree, the court retained its authority to modify said decree with respect to matters affecting the custody of the children and their support, education, and general welfare.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; IRA F. THOMPSON, J.

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218 Cal. 752

## SOLON v. STATE BAR OF CALIFORNIA et al.

S. F. 14994.

Supreme Court of California.

Aug. 31, 1933.

**1. Attorney and client** ⚷31.

Statute *held* to require that newly elected member of state bar board of governors maintain law office outside city in which holdover member, representing same district, maintained office (St. 1927, pp. 39, 40, §§ 9, 14, as amended by St. 1933, c. 430).

**2. Evidence** ⚷41.

It is matter of judicial knowledge that attorneys in city of Oakland outnumber those in other portions of same state bar district.

In Bank.

Application by Philip O. Solon for a writ of mandate to the State Bar of California and others.

Petition denied.

William H. Hollander, of Oakland, for petitioner.

Philbrick McCoy, of Los Angeles, for respondents.

PER CURIAM.

Petitioner has filed an application for a writ of mandate directing the respondents to include his name on the list of candidates and on the ballot for the election of members of the board of governors of the State Bar, to be voted for in state bar district No. 3 at the election to be held between the dates of August 30 and September 13, 1933. It is not disputed by the respondents that petitioner has offered to the respondents for filing the necessary nomination papers required by the State Bar Act. Respondents, however, contend that, under the State Bar Act (St. 1927, p. 38) as amended by the recent act of the Legislature (St. 1933, c. 430), the petitioner is not qualified to be a candidate at said election in state bar district No. 3, for the reason that he now maintains, and if elected would maintain, his principal office for the practice of law inside the city of Oakland.

[1] Section 9 of the State Bar Act provides that two members of the board of governors shall be elected to state bar district 3, and that "one member of the board from State Bar District 3 to be elected in 1933 for a two (2) year term, and any successor to said member, at the time of his election shall, and any member from said district may, maintain his principal office for the practice of law *outside* of the city of Oakland." (Italics added.) Petitioner contends that the language just quoted refers only to the successor to the member of the board of governors elected in 1933, and does not apply to the one to be voted for and elected this year.

A further provision of the State Bar Act (section 14) provides that: "The eight (8) members of the board [of governors] whose terms of office do not expire until the annual meeting to be held in 1934 shall continue in office until the expiration of their terms, and shall be deemed to have been elected from the respective State Bar districts in which their respective principal offices were located at the date of their election." It appeared during the argument as a fact that one of the eight members of the board of governors elected at the election held in 1932, and whose term does not expire until the meeting to be held in 1934, resides in, and maintains his office for the practice of law in, the city of Oakland. Under the provisions of the State Bar Act just quoted, he will be a member of the board of governors representing state bar district 3 for the ensuing year. It seems reasonable, therefore, to apply the mandatory provision relative to the maintenance of his principal place of business to the member of the board from district 3 to be elected in 1933, and to hold that it was the intention of the framers of the amendment to the State Bar Act to require such member and his successor to maintain their principal offices for the practice of law outside of the city of Oakland, and to permit the other member from the district to maintain his office either within or without the city of Oakland.

[2] If it were not a matter of judicial knowledge, as we think it is, the roll of attorneys of this court shows that the attorneys in the city of Oakland outnumber the attorneys in other portions of district 3, composed, as it is, of the counties of Alameda, Contra Costa, and Santa Clara. The purpose of the framers of the amendment to the State Bar Act appears to have been to provide that at all times one member of the board of governors from the district shall maintain his principal office for the practice of law outside the city of Oakland. The same situation exists in state bar district No. 7, comprising the county of Los Angeles. A very much larger number of attorneys have their principal offices in the city of Los Angeles than in the rest of the county. The State Bar Act, as amended, contains a provision with reference to district 7 similar to that relating to district 3. The situation in these two districts furnishes the reason for the legislation, and assists us in arriving at the intention of the framers of the act.

The petition for the writ of mandate is denied.

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218 Cal. 192

## POTHAST v. KIND et al.

## KIND et al. v. CITIZENS' NAT. TRUST & SAVINGS BANK.

L. A. 13061, 13062.

Supreme Court of California.

May 24, 1933.

1. **Escrows** 🔑3(2).
Vendor's delivering deed to escrow party, pursuant to mutual covenants, became irrevocable act, and his attempted cancellation thereof during escrow period was ineffectual.

2. **Escrows** 🔑9.
Duty of purchaser under escrow agreement to provide consideration within escrow period was continuing one, which could not be waived by vendor's unauthorized attempt to cancel agreement.

3. **Escrows** 🔑9.
Escrow agent could not deliver deed after expiration of escrow period unless all terms of escrow were fully complied with.

4. **Escrows** 🔑9.
Performance must be made within time limit of escrow agreement.

5. **Escrows** 🔑9.
Where purchaser failed to deposit cash within escrow period as required under escrow agreement, vendor *held* entitled to cancel executed deeds and mortgage and to quiet title thereto.

In Bank.

Appeals from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Henry Pothast against Cora S. Kind and others, and action by named defendant and others against the Citizens' National Trust & Savings Bank, wherein first-named plaintiff was substituted as defendant. Judgment for first-named plaintiff in both actions, and defendants in first action who were plaintiffs in other action appeal.

Affirmed.

Wheeler & Wackerbarth and Henry E. Carter, all of Los Angeles, for appellants.

Victor R. Hansen, of Los Angeles, for respondent.

PRESTON, Justice.

We have for review upon separate judgments, two causes heard together. Separate clerk's and one reporter's transcripts have been filed. The judgments were for Henry Pothast in both cases, he being a plaintiff in the one and a substituted defendant for Citizens' National Trust & Savings Bank in the other; appellants are defendants in the one case and plaintiffs in the other. The judgments are consistent with each other and adjudicate the title to each of two lots, Nos. 35 and 36, both owned by said respondent prior to his negotiations with appellants, as a result of which his title to both was clouded by a written escrow agreement and its amendments. This agreement the trial court has, by its judgments, declared inoperative. The applicable principles of law are simple and require an affirmance of both judgments. The facts giving rise to the application of these principles, however, are quite complicated. But it suffices to say that on April 26, 1929, respondent and appellant Cly entered into a written escrow agreement, making defendant bank the escrow agent. The essence of the agreement was that respondent was to deliver to the escrow party deeds to Cly or his assigns for the lots, in return for two notes which were second liens on other property, together with another second lien on one of the lots to be conveyed, plus a cash payment of $2,000. This cash payment is to be noted as the important item in the consideration of these appeals.

The deeds were duly made and deposited by respondent and the deed to lot 35 was actually delivered to the grantee and recorded and later a mortgage lien was placed thereon by said grantee. This transaction was the subject of the judgment in the case of Pothast, Plaintiff, v. Kind et al., Defendants. The relief there given was a cancellation of the deed and mortgage, together with a decree quieting respondent's title to said lot on payment of the sum of $500. The second judgment decreed that respondent was entitled to a return from the escrow of the deed to lot 36.

The escrow agreement was indivisible and the delivery of the deed that was recorded was not a separate transaction as the consideration from the purchasers moved to respondent in bulk for both lots. Said agreement was dated April 26, 1929, and allowed ninety days for deposit of the above-mentioned cash payment of $2,000. The immediate controversy between the parties, however, is disclosed by the following additional facts: On June 24, 1929, appellants and certain third parties entered into a supplementary escrow with the same escrow agent, but to which respondent was not a party, pursuant to which $2,500 was paid to said escrow agent to be used under certain restrictions. From this sum appellants intended to have paid the $2,000 called for by said first-mentioned escrow agreement.

On July 16, 1929, by written notice, respondent undertook to cancel the entire escrow and demanded the return of his deed to lot 36, together with a reconveyance of lot 35. Following this event, and on July 22, 1929, the $2,500 in the supplemental escrow was returned to the party who advanced it. Appellants did not redeposit any sums whatsoever until August 3, 1929, some nine days after expiration of the time limit provided for by the escrow agreement with respondent. The whole controversy, therefore, turns upon the effect, if any, of respondent's attempt to cancel the escrow upon the duty of appellants to make and maintain said cash deposit during the prescribed period.

[1, 2] It is the contention of appellants that when respondent undertook to repudiate the escrow agreement, they were thereby relieved of any further duty to deposit said $2,000 and the deposit thereof was waived by such anticipatory breach of the agreement. But it seems clear that appellants have a misconception of the nature of an escrow agreement of the type here in question. When respondent delivered the deeds to the escrow party, pursuant to the mutual covenants of the parties, it became an irrevocable act upon his part and his attempted cancellation thereof during the escrow period was wholly ineffectual for any purpose. And, correspondingly, the duty of appellants to provide the $2,000 within ninety days was a continuing one, which could not be waived by the unauthorized action of respondent in the premises.

[3-5] This was not a case where the parties were dealing directly with each other and where an anticipatory breach by one might have excused performance by the other. Under well-settled rules of law, governing escrow agreements, the escrow agent was without power to deliver the deed after expiration of the ninety days unless all the terms of the escrow had been fully complied with. It is well settled that performance must be made within the time limit of the escrow agreement. The failure to have the cash deposited with the escrow agent within the time limit provided by the agreement therefore entitled respondent to the relief given him by both judgments. The provision of said agreement to the effect that the purchaser would carry out the escrow on his part after the expiration of the ninety-day period unless a written demand for return of the money and instruments deposited by him was made, does not alter the situation. Respondent had the right to rely upon the terms of the escrow that required deposit of the $2,000 within said prescribed period.

This opinion could be extended by a recital of further facts and the citation of authority but enough has been said to make applicable the settled principles of law above alluded to.

The several judgments are affirmed.

We concur: SHENK, J.; LANGDON, J.; CURTIS, J.; THOMPSON, J.; SEAWELL, J.

218 Cal. 622

**HANSEN et al. v. COVELL, and four other cases.**

**Sac. 4428.**

Supreme Court of California.

July 31, 1933.

**1. Appeal and error 🔑418.**

Notice of appeal *held* to have effect of appeal from whole of judgment, where notice of intention to appeal and to prepare transcript also filed by appellant contained such notice.

**2. Damages 🔑118.**

Parties may lawfully designate who shall bear loss under specified contingencies.

**3. Damages 🔑124(1).**

Provision in building contract that time during which contractors might be delayed by acts of owner should be added to time of completion indicated exclusive remedy available to contractors for delay caused by owner.

**4. Contracts 🔑305(1).**

Where contractors agree to accept extension of time for completion of building for delay caused by owner, damages otherwise collectible are waived.

**5. Damages 🔑124(1).**

Award of damages to contractors for delay in completion of building caused by owner *held* error, where contract provided for extension of time for completion for delay caused by owner.

**6. Damages 🔑123.**

Contractors who substantially performed *held* entitled to sums due under contract less reasonable amount for defective workmanship.

**7. Interest 🔑19(2).**

Where amount of claim under contract is liquidated, or is ascertainable but is reduced by reason of unliquidated set-off or counterclaim, interest is properly allowed on balance from time it became due (Civ. Code, § 3287).

**8. Interest 🔑19(1).**

Where delay in payment is due to vexatious conduct on part of defendant, defendant must pay interest though balance due to plaintiff is unliquidated (Civ. Code, § 3287).

**9. Interest 🔑19(1).**

Contractors who substantially performed *held* entitled to interest on unpaid balance of contract price after deducting amount for defective workmanship and amounts paid to lien claimants by owner (Civ. Code, § 3287).

**10. Interest 🔑19(1).**

Contractors could not recover interest upon amount due for extras in building (Civ. Code, § 3287).

**11. Appeal and error 🔑877(2).**

Building owner who owed money to contractors could not complain that lien claimants were awarded interest on their claims, where contractors and their surety did not appeal from judgment awarding interest to claimants.

**12. Costs 🔑32(2).**

Contractors who sued owner for unpaid balance and for damages *held* entitled to costs in trial court, where after deducting payments to claimants and interest thereon owner still owed contractors money.

**13. Subrogation 🔑23(1).**

Building owner who paid lienors' claims could be subrogated to their rights against contractors' surety.

In Bank.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by C. H. Hansen and another, copartners doing business under the firm name and style of Hansen & Buchen, and also under the firm name and style of Hansen & Buchen Company, against George F. Covell, and cross-complaint by defendant, and actions against named plaintiffs and others, by the Stockton Plumbing Supply Company, by J. R. Bickel, and by J. M. Adams. From the judgment, the first-named plaintiffs appeal and the first-named defendant and another cross-appeal.

Judgment modified, and affirmed as modified.

For prior opinion, see 14 P.(2d) 889.

Edwin V. McKenzie, of San Francisco, and Arthur J. Carlson, of Modesto, for appellants.

Hartley F. Peart, of San Francisco, M. G. Gallaher, of Fresno, Sylvester J. McAtee, of San Francisco, J. M. Walthall, of Modesto, Gus L. Baraty, of San Francisco, Nutter & Rutherford, of Stockton, and L. J. Maddux and R. R. Fowler, both of Modesto, for respondents.

SHENK, Justice.

The cross-appeals involved herein are from a judgment establishing a balance due from the defendant George F. Covell to the plaintiffs C. H. Hansen and Joseph C. Buchen, contractors under a building construction contract. The contractors sought to recover unpaid balances under the contract plus certain items of extras and damages alleged to be due from said defendant, who is the owner of the property involved. A cross-complaint was filed by Covell against the contractors alleging abandonment on the part of the contractors and the cost of completion by said defendant for which he sought recovery against the contractors and their surety. These two actions and three other actions to foreclose mechanics' liens were consolidated for trial. The word "plaintiffs" used herein refers, unless otherwise noted, to the plaintiffs the contractors Hansen and Buchen, and the word "defendant" refers to the defendant Covell, the owner.

On May 25, 1923, the plaintiffs and the defendant entered into a contract whereby the former agreed to construct, exclusive of the steel work on the real property of the latter situated in the city of Modesto, a four-story and basement hotel building, in accordance with certain plans and specifications, for the contract price of $125,500. The building was to be completed on or before the first day of October, 1923, plus such additional time as the contractors might become entitled to under the contract. The Globe Indemnity Company was the surety on the contractors' bond. The contract and the bond were duly filed for record.

Work was commenced on May 26, 1923, and possession of the structure was taken by the defendant on February 21, 1924. Progress payments were to be made as the construction proceeded, and final payment was due thirty-five days after completion. On February 21, 1924, a progress payment in the sum of $11,295 remained unpaid. The final payment in the sum of $12,550 also remained unpaid. In the meantime mechanics' liens of subcontractors were filed against the property. By their action the plaintiffs sought to recover the two sums of $11,295 and $12,550 with interest; also the sum of $3,303.65 alleged to be due for extras, and the further sum of $33,737, comprising twenty-one items of damages alleged to have been caused to the plaintiffs by the acts, neglect, and delay of the owner.

By his answer and cross-complaint the defendant resisted the claims of the plaintiffs and sought to recover from the plaintiffs the sum of $7,284.80 alleged to be the amount expended by the defendant in completing the building, and further sums totalling $29,592.05 as damages.

During the course of the trial the owner paid the claims of mechanics who had filed liens to the extent of $9,183.32, and the surety company paid off a similar amount. There remained for determination in the consolidated actions also the claims of Stockton Plumbing Supply Company for $7,719.50, J. R. Bickel for $6,334.30, and J. M. Adams for $345.76.

After a protracted trial on the numerous issues raised, the court found that the plaintiffs had substantially performed their contract so as to become entitled to a judgment for the sums of $11,295 and $12,550 remaining unpaid; but that the defendant was entitled to an offset for certain imperfections and defective workmanship, including the sum of $2,824.02 for the cost of removal and reinstallation of bathtubs; $512.50 for imperfect columns and plastering; and $50 for concrete sidewalks—making a total to be deducted for offsets of $3,386.52. The defendant was adjudged entitled to a further credit on account of the sum of $9,183.32 paid by him to lien claimants. The court found various items of damages caused to the plaintiffs by the delay of the defendant, including also damages for withholding portions of certain progress payments beyond the times when the same became payable in sums aggregating $2,827.99. Extras to which the plaintiffs were found to be entitled aggregated the sum of $495.65. Interest was also awarded to the plaintiffs on the two unpaid installments on the contract price from the dates they respectively were payable to the time of entry of judgment in the total sum of $8,195.35. The balance of $22,794.15, computed on the basis of the above counter awards, was decreed to be due from the defendant to the plaintiffs with costs.

In addition to the above the court adjudged the amounts due to the three lien claimants, and decreed the amounts found to be due to be a lien against the property of the owner to the following extent: Stockton Plumbing Company, $4,855.48 with interest from the commencement of foreclosure proceedings in the sum of $1,608.16; J. R. Bickel, $5,818.50, with interest in the sum of $1,900.68; and J. M. Adams, $298.26, with interest in the sum of $97.08—a total as against the owner of $14,578.16. As against the contractors and the surety company, the court added to the above amounts respectively the sums allowed as a deduction to the owner for defective workmanship; or, in other words, as against the contractors and the surety company, the court allowed the claims of the subcontractors without deduction for the respective items of offset involved in their claims and allowed to the owner for defective workmanship, thus making the total principal due from the contractors or the surety company to the lien claimants the sum of $14,278.06, with interest in the sum of $4,697.75.

[1] The plaintiffs and the defendants Covell and Globe Indemnity Company have appealed from the foregoing judgments, the plaintiffs and the Globe Indemnity Company from that portion of the judgment awarding damages to the defendant in the sum of $3,386.52 for defective workmanship, and the defendant Covell from the whole of the judgment. A question is raised by the plaintiffs whether the notice of appeal filed by the defendant Covell has the effect of an appeal by him from the whole of the judgment. However, the notice of intention to appeal and to prepare transcript, also filed by the defendant Covell, contained such a notice and as such has the effect of a notice of appeal from the whole judgment. Purity Springs W. Co. v. Redwood Ice Delivery, 203 Cal. 286, 263 P. 810.

A consideration of the record leads us to the conclusion that the contentions relating to the sufficiency of the evidence to support the awards to the plaintiffs for extras and damages, and to the defendant on account of imperfections and defective workmanship, are unfounded and that such awards may not be disturbed on the ground that the evidence is insufficient to support them. The defendant, however, contends that the plaintiffs have by the contract waived any damages which might otherwise accrue by delay caused by the acts or neglect of the owner. The contract provides that "the time during which the contractors may be delayed by the acts or neglect of the owner or his employees * * * or by the act of God * * * which are not caused by, or the continuance of which is not due to any reasonable acts or conduct on the part of the contractors, shall be added to the time of completion." Throughout the record it is shown that the contractors applied for extensions by virtue of the very acts of delay for which the court awarded damages. By the terms of the contract the contractors were also expressly entitled to an extension by virtue of the withholding of any progress payment by the owner, in addition to which the owner agreed to pay any damages suffered by the contractors for delay in making progress payments. No agreement to pay damages by reason of any other cause of delay was included in the contract.

[2-5] The obvious purpose of providing for the extension in the event of delays for the causes named is to prevent the operation of another clause in the contract which made the contractors liable to the owner at the rate of $25 per day for each day the completion of the building was delayed beyond the contract period. The case of Seebach v. Kuhn, 9 Cal. App. 485, 99 P. 723, relied upon by the defendant as in point, does not involve the precise question nor an interpretation of that clause in the contract with reference to its effect on the liability of the owner for damages for delay caused by him. That case, however, does indicate and is authority for the proposition that the parties may lawfully designate who shall bear the loss under specified contingencies; and elsewhere it has been held that the inclusion of such a clause in the contract indicates the exclusive remedy available to the contractor for any delay caused by the acts or neglect of the owner. It has been held that by such an agreement the damages otherwise collectible are waived, when the contractors agree to accept an extension of time for the delay caused by other contractors (W. G. Cornell Co. v. Schuylkill County (C. C. A.) 222 F. 876; Goss v. Northern Pacific Hospital, 50 Wash. 236, 96 P. 1078; Haydnville Min. & Mfg. Co. v. Art Institute (C. C.) 39 F. 484); or for delay caused by the owner himself (Richard v. Clark, 43 Misc. 622, 88 N. Y. S. 242); and that the acceptance of the extension of time and the waiver of damages by the owner is intended as the exclusive remedy to the contractors for the delay of the owner or other contractors. See, also, 9 C. J. 790, 791. The trial court found that the time for completion was extended by the delay of the owner and his architect. The parties had a right to agree upon the exclusive remedy available to the contractors by reason of such delay. The trial court therefore erred in awarding damages to the plaintiffs caused by the owner's delay, except such as may properly be awarded by way of interest charges as hereinafter noted. The items of damage attributable by the trial court specifically to the delay caused by the acts or neglect of the owner total the sum of $2,694, leaving the sum of $227.99 due to the contractor as damages for delay caused by withholding progress payments as hereinabove noted and other damages not attributable to delay for other causes.

There is another item which should here be mentioned. As to this item there was a concession by stipulation on the part of the plaintiffs which, probably through oversight, was not included in the award of offsets in favor of the defendant. That item is the installation of the mail chute, which was done by the owner although included in the contract, and a credit therefor in favor of Covell is conceded in the sum of $958.61.

An examination of the record also discloses that the findings of the trial court in effect that the defendant was guilty of defaults and breaches of contract causing vexatious delay to the plaintiffs in the completion of their contract, and that such defaults and delay on the part of the defendant were responsible for the filing of mechanics' liens and the commencement of foreclosure proceedings thereon, are supported by the evidence.

[6] The trial court applied the principles relating to the doctrine of substantial performance which are correctly stated in the case of Seebach v. Kuhn, supra, at page 488 of 9 Cal. App., 99 P. 723, and we perceive no justifiable criticism of the resulting finding that the contract was substantially performed by the plaintiffs. That finding is the foundation for the conclusion that the unpaid and liquidated balances provided by the terms of the contract became due and payable on the respective dates hereinabove mentioned.

It is contended by the defendant that the court incorrectly awarded interest to the plaintiffs. It is urged that the application of section 3287 of the Civil Code renders the net balance, if any, owing from the defendant to the plaintiffs an unliquidated sum on which the plaintiffs are not entitled to an award of interest prior to the entry of judgment. The position thus taken by the defendant is that whenever a liquidated sum becomes due under a contract but which is subject to deduction by reason of an unliquidated offset, the balance due is not a sum "capable of being made certain by calculation" because the "person liable does not know what sum he owes, and therefore can be in no default for not paying." Cox v. McLaughlin, 76 Cal. 60, 67, 18 P. 100, 104, 9 Am. St. Rep. 164.

[7] On the theory that a debtor may not defeat the creditor's right to interest on a liquidated sum by setting up an unliquidated claim as an offset, the result reached in the case of Pearson v. Ryan, 42 R. I. 83, 105 A.

513, 3 A. L. R. 805, has been applied in a number of jurisdictions. In a note to that case in 3 A. L. R. p. 809 et seq., the general rule is stated that: "Where the amount of a claim under a contract is certain and liquidated, or is ascertainable but is reduced by reason of the existence of an unliquidated set-off or counterclaim thereto, interest is properly allowed on the balance found to be due from the time it became due. * * *" California is credited with having adopted that doctrine in the case of McCowen v. Pew, 18 Cal. App. 482, 123 P. 354, 355. The trial court in the present case applied the rule, which is also stated in the same note, that where the plaintiff's demand is liquidated, the plaintiff is given interest on the full amount and the defendant's unliquidated demand is treated as a discount and not as a payment. See Smith v. Turner, 33 Or. 379, 54 P. 166; note 3 A. L. R. at pages 812, 813 and cases cited. The latter principle, however, appears to be applicable in cases where the claim for deduction could not be said to be demandable at the time when the original liquidated claim became due, but was rather the proper subject of a counterclaim for damages than of an offset in the nature of a payment.

[8] In McCowen v. Pew, supra, the court stated and approved both rules, either being properly applicable depending upon the circumstances of the particular case. Thus the same rule later adopted in Pearson v. Ryan, supra, that the offset for defective workmanship may reduce the liquidated demand but "does not impair the claim for interest on the balance when adjusted by the verdict of the jury" was quoted with approval from the case of Tappan & Noble v. Harwood, 2 Speers (S. C.) 551. The court also cited and quoted with approval the same rule from the case of Healy v. Fallon, 69 Conn. 228, 37 A. 495, 497. The case of McCowen v. Pew is also authority for the equitable view, announced in effect in the case of New Zealand Ins. Co. v. Earnmoor S. S. Co., 24 C. C. A. 644, 79 F. 368, that where delay in payment is due to vexatious conduct on the part of the defendant, "it is only just that he should repair the damage that has followed from the breach of his obligation" although the balance due to the plaintiff is "in a certain sense unliquidated." Healy v. Fallon, supra. Application of the foregoing principles resulted, in the case of McCowen v. Pew, supra, in an award of interest on the balance due after deduction of the offset. The leading case of Cox v. McLaughlin, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164, which confirmed the rule under the present Code section that interest on unliquidated demands is not recoverable, expressed the view of the court illustrated by cases cited in the opinion that the rigid test there laid down as to what constitutes a liquidated or unliquidated demand was by no means not subject to modification. Among other cases the court especially referred to Mix v. Miller, 57 Cal. 356. We have seen that further exceptions to the rule there stated have since become established.

[9, 10] An award of interest to the plaintiffs in the present case therefore is supported by authority and the only question to be determined is on what amount is the interest properly chargeable. We conclude that the two bases hereinabove mentioned are consistent and that one or the other is applicable, where interest is chargeable, depending upon the facts and circumstances of the particular case. Where, therefore, in cases such as here presented, the deduction is for defective workmanship, or is otherwise of a character such as to constitute payment to the contractor, and on the theory that the contractor is entitled to interest only on such amount of the use of which he has been deprived during the period of default, the court may properly allow interest only on the balance found to be due after deduction of such offsets and payments. The reason is that to that extent only has the plaintiff been damaged. The court properly disallowed interest on the amount found to be due to the plaintiffs for extras. Stimson v. Dunham, Carrigan, Hayden Co., 146 Cal. 281, 285, 79 P. 968. It follows that the plaintiffs here are entitled to interest on the balance of the two liquidated principal sums after deduction of the amounts found to be due to the defendant for defective workmanship and the installation of the mail chute, and the amount paid by the defendant to lien claimants.

Cases relied upon by the defendant, such as Perry v. Magneson, 207 Cal. 617, 279 P. 650; Stephens v. Phoenix Bridge Co. (C. C. A.) 139 F. 248; Delafield v. Village of Westfield, 41 App. Div. 24, 58 N. Y. S. 277; and Excelsior Terra Cotta Co. v. Harde, 90 App. Div. 4, 85 N. Y. S. 732, where the plaintiff sued upon an unliquidated claim, cannot control in cases where the action is upon a demand originally liquidated.

The result reached on these appeals is not to be construed as interfering with the application in a proper case of any general rule that where the liquidated demand is subject to reduction by virtue of an unliquidated claim the balance due is deemed to be an unliquidated sum upon which interest is not recoverable. Still v. Hall, 20 Wend. (N. Y.) 51; Excelsior Terra Cotta Co. v. Harde, 181 N. Y. 11, 73 N. E. 494, 106 Am. St. Rep. 493. What we do hold is that the principles hereinbefore stated are applicable in cases such as the one before us, and that the award of interest under the facts herein and the authorities hereinabove cited is limited to the balance of the original liquidated amounts found to be due after the deductible cross-demands have been established.

It is urged by the plaintiffs that the application in this case of these principles and authorities results in an award of interest to both parties, to the plaintiffs on the full amount of their liquidated claim and to the defendant on the deductible offsets involved, which as to the interest thus allowed to the defendant it is claimed is contrary to section 3287 of the Civil Code and the cases relied upon by the plaintiffs. We may say that if the result of the authorities deemed controlling is to cause the modification of the general test or the exception to the general rule as to what constitutes a liquidated sum to be applied to the deductible offsets involved, that fact must obviously be taken as the established result, rather than as constituting any cogent or compelling reason why the authorities should not be followed.

We are not persuaded that there is merit in the defendant's contention that he is entitled to attorney's fees for defending twelve actions commenced by lien claimants. The trial court found that the defendant was not entitled to such fees and on the record presented the finding should not be disturbed.

It is readily apparent that the claims involved on these appeals may be disposed of by a modification of the judgment. From the foregoing discussion these results will follow: The plaintiffs C. H. Hansen and Joseph C. Buchen will be entitled to receive from the defendant George F. Covell the sum of $23,845 (being the sums of $11,295 and $12,550 remaining unpaid under the terms of the contract), less the sum of $13,528.45 (comprising the sums of $3,386.52 for defective workmanship, $958.61 for installation of mail chute, and $9,183.32 paid to lien claimants). On the balance of $10,316.55 the plaintiffs are entitled to interest at 7 per cent. per annum from February 21, 1924, to the date of the entry of judgment, to wit, February 7, 1929, amounting to the sum of $3,580.71. The plaintiffs are also entitled to recover from the defendant Covell the further sums of $495.65 due for extras, and $227.99 for damages, making a total on these items of $723.64, which latter sum will draw interest only from the date of the entry of judgment. It thus appears that the plaintiffs are entitled to have a judgment entered in their favor against the defendant Covell in the sum of $14,620.90.

[11-13] In view of the established liability of the defendant under the supported findings, it is a matter of no concern to him that the lien claimants are awarded interest on their claims, and neither the plaintiffs nor their surety have appealed from that portion of the judgment. The total of the lien claims plus the interest thereon awarded as against the owner, viz., the sum of $14,578.16, deducted from the amount found due to the plaintiffs from the defendant, still leaves a balance due to the plaintiffs, and this condition under the findings also disposes of the contention that the contractors are not entitled to their costs in the trial court. It further appears, however, that the trial court erred in depriving the defendant Covell of any rights of subrogation which he might have against the Globe Indemnity Company. The defendant Covell complied with all of the statutory requirements by which such rights would become created in his favor. The redress of the surety company for any breach on the part of the defendant herein involved is its right to become subrogated to the rights of the contractors to damages awarded on account thereof.

The condition of the record and the application thereto of the principles herein stated sufficiently answer all of the questions raised by the parties, and no other point need be noted specifically.

It is therefore ordered that the judgment herein be modified as follows: By striking therefrom the amounts therein adjudged to be due to the plaintiffs and by inserting in lieu thereof the following: "It is hereby ordered, adjudged, and decreed that the plaintiffs, C. H. Hansen and Joseph C. Buchen, copartners doing business under the firm name and style of Hansen & Buchen and under the firm name and style of Hansen-Buchen Company, do have and recover of and from the defendant, George F. Covell, the sum of $14,620.90, and their costs incurred herein taxed at $———."

It is ordered that the judgment be modified further by striking from the paragraph therein which commences with these words: "It is further ordered, adjudged, and decreed that if the defendant and cross-complainant George F. Covell shall pay and discharge any of said judgments in favor of any of said plaintiffs, viz., Stockton Plumbing Supply Company, J. R. Bickel, and J. M. Adams, the amount or amounts so paid by him in discharge thereof shall pro tanto discharge and satisfy said judgment in favor of said C. H. Hansen and Joseph C. Buchen, copartners as aforesaid, against said defendant and cross-complainant George F. Covell," all of that portion thereof following the portion herein immediately above quoted, and inserting in lieu of the stricken portion the following: "and any such satisfaction or discharge by said defendant Covell of any of said judgments in favor of said lienholders, in excess of the sum found due from the defendant Covell to the plaintiffs C. H. Hansen and Joseph C. Buchen, shall subrogate said Covell to any rights of such lienholders against the defendant Globe Indemnity Company."

It is ordered further that the next immediately succeeding paragraph in said judgment be modified by adding thereto, after the words "discharged by it" at the end thereof, the following: "provided that such rights of subrogation shall not extend, as against the defendant Covell, beyond the amount of the judgment awarded to the plaintiffs C. H. Hansen and Joseph C. Buchen against said defendant Covell."

It is ordered further that said judgment be modified by striking therefrom the award of costs in favor of the defendant Globe Indemnity Company against said defendant George F. Covell.

Said judgment in all other respects shall remain without modification.

The judgment, as so modified, is affirmed; neither party to recover costs on appeal.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

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218 Cal. 614

## In re HINKEL'S ESTATE.

### HINKEL v. HINKEL.

S. F. 14745.

Supreme Court of California.

July 31, 1933.

**Trusts** 🔑262.

Evidence showed that trustee willfully commingled and used bonds and proceeds therefrom as trustee's own property; hence trustee was chargeable with entire loss of principal to trust fund which followed mingling and with simple interest at legal rate (Civ. Code §§ 2236–2238).

In Bank.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of John Hinkel, deceased. Objections by Undine H. Hinkel and another to the report of Ada M. Hinkel, testamentary trustee, were sustained, and the trustee appeals.

Affirmed.

Chas. C. Boynton and John T. Boynton, both of San Francisco, for appellant.

John L. McVey, of Oakland, for respondent.

SHENK, Justice.

This is an appeal by Ada M. Hinkel, former trustee under a testamentary trust, from a judgment in favor of American Trust Company, her successor as such trustee, and Undine H. Hinkel, the beneficiary of the trust. The court sustained objections of American Trust Company, as such successor, and of the beneficiary, to the report of the testamentary trustee, established the account of said trustee, and judgment was entered for the sum of $21,237.14 found to be due from said Ada M. Hinkel to American Trust Company as the balance remaining in the trust fund.

On May 25, 1926, John Hinkel, husband of Ada M. Hinkel, died testate. To his will was attached a codicil which provided that "in case Undine H. Hinkel, my son's wife, shall survive me, I hereby give, bequeath and devise to my wife, Ada M. Hinkel," the sum of $30,000 in trust to be invested and reinvested by the trustee and, in accordance with the terms of a certain property settlement agreement entered into between Undine H. Hinkel and the decedent's son, Hulbert, to which the decedent was also a party, to pay to Undine H. Hinkel the sum of $200 per month out of interest and principal, if necessary, until she remarried and in any event until her younger son attained the age of twenty-one years. Upon the termination of the trust the funds remaining were payable to Ada M. Hinkel or the legatee entitled thereto under her will. Undine H. Hinkel has not remarried. Ada M. Hinkel was named the trustee, and the executrix of her husband's will. At the time of the distribution of the estate of John Hinkel, the value of the estate approximated a sum between $600,000 and $700,000.

By the terms of the decree of distribution the sum of $30,000 was ordered distributed to Ada M. Hinkel in trust to carry out the provisions of the codicil. Prior to distribution the executrix had expended the sum of $1,725 as the proportion of the inheritance tax payable out of said trust property, and the sum of $2,400 to Undine H. Hinkel pursuant to the provisions of the trust. At the time of distribution there was due to the trust from the distributee the sum of $25,875.

The first and only report and account of Ada M. Hinkel as trustee was filed on January 15, 1932. By her second amended first report she admits that at the time of the distribution of the estate the decedent's estate was not possessed of cash in the sum of $30,000 and that she received no money from the estate as such trustee, but that nevertheless she, as trustee, executed a receipt to the estate for that sum. It is alleged in the report that, upon the advice of her attorney, in lieu of converting securities into cash, she selected from the estate distributed to her and set apart thirty $1,000 irrigation and reclamation district bonds which she designated as the "Undine H. Hinkel Trust." It was found by the court that said bonds could at that time have been sold for $28,500 or more and that on that date Ada M. Hinkel was willing to set apart said bonds as trust property in lieu of the sum of $25,875. The report accounts for interest received from said bonds and for payments of $200 per month made to Undine H. Hinkel to February, 1932. The report further shows that in November, 1930, five of said bonds were sold for $1,600; that in December, 1930, ten were sold for $3,000; and that in February, 1931, ten were sold for $3,700. The cash balance on hand as of the date of the report is alleged to be $2,046.56, and possession of the remaining five bonds at a valuation of $4,112.77 is also alleged. It is stated in the report that the trustee conferred in good faith with her attorney and was acting in good faith and with the intent to serve the interests of the beneficiary; and that such breaches of trust as occurred were committed without any wrongful intent, guilty knowledge, or consciousness of wrongdoing, and in reliance upon advice of counsel.

The court found that none of the bonds was set apart by Ada M. Hinkel as trustee as alleged; and that none of the bonds constituted any part of the corpus of the trust; that the purported transactions whereby the same were sold were individual transactions of Ada M. Hinkel; and that the moneys received from sales were converted to the use of Ada M. Hinkel, individually, and of her son, Hulbert Hinkel. The court made a finding that the allegations concerning the good faith of the trustee were immaterial. The balance of the principal sum of $25,875, after crediting the monthly payments to the beneficiary, with simple interest on the decreasing balances at the rate of 7 per cent. per annum, amounting in all to the sum of $21,237.14, was found to be due from Ada M. Hinkel as trustee. From the judgment entered on that finding the trustee appeals.

The main point made on the appeal is that the court should have made a finding on the issue of the good faith of the trustee. The appellant contends that, contrary to the trial court's conclusion, section 2238 of the Civil Code is applicable to the case, pursuant to which she claims complete exoneration for any breach of trust committed by her. That section provides: "A trustee who uses or disposes of the trust property in any manner not authorized by the trust, but in good faith, and with intent to serve the interests of the beneficiary, is liable only to make good whatever is lost to the beneficiary by his error."

The theory of the appellant is that the violation, which is assumed by the argument to be the setting apart of the bonds in lieu of converting property into cash, and investing and reinvesting as authorized by the trust provisions, was a mistake committed in good faith, on the advice of the counsel who had previously advised and acted for the testator and drawn the will (although not the counsel now representing the appellant); and that such setting apart was made with the intent to serve the interests of the beneficiary and did in truth benefit the trust which gained by the difference between the sum of $25,875 then due from the estate and the sum of $28,500 found by the court to be the value of the bonds at that time; and that inasmuch as the trust was the gainer by the excess, no loss was caused to the beneficiary by the error.

If all the facts were found as they are stated by the appellant, the point contended for by her might be resolved in her favor. Estate of Cousins, 111 Cal. 441, 448, 449, 44 P. 182. But neither the findings nor the record supports the premise upon which the appellant relies to relieve her from her unfortunate predicament. The court found that, although the trustee was willing at the time she executed a receipt for $30,000 as trustee, to set apart the designated bonds, said bonds were not in fact so set apart; that they and the proceeds therefrom were converted by the trustee and her son Hulbert Hinkel to their own use, and were treated in all respects as their individually owned property. That the findings are supported by the evidence and in turn support the judgment, and that the liability of the trustee is at least that declared in the case of Estate of Cousins, 111 Cal. 441, at page 445, 44 P. 182, is shown by the following briefly stated facts appearing in the record:

In March, 1922, Hulbert Hinkel, the son of the testator, and Undine H. Hinkel were husband and wife and had two minor sons. At that time Hulbert Hinkel and the testator, as first parties, executed a written agreement with Undine H. Hinkel, as second party, whereby the former agreed and guaranteed to pay to the latter the sum of $200 during her natural life, unless she remarried, and in any event until the younger son attained the age of twenty-one years. The testator further agreed, in the event he predeceased second party, that the payment of said sum monthly should be made a charge against his entire estate, except that in the event he should by his will direct the sum of $30,000 to be deposited in trust for the uses and purposes as provided in the codicil to his will, it was agreed among the parties that he and his estate should be discharged from any further liability.

In 1926, when John Hinkel died, Ada M. Hinkel was seventy-one years of age. The son Hulbert lived with his mother. He acted as her agent in all her business affairs, including the matter of the trust here involved. At no time was a separate account kept of any of the proceeds of the bonds claimed to have been set apart for the trust, and at no time was any account kept, either as a bank account or in any other manner, purporting to be an account of the trust funds. Hulbert testified that the bonds designated herein as having been sold were sold through his own individual account, and that the proceeds from the sales were deposited partly to his own and partly in his mother's individual account. Other investments and reinvestments were made with these proceeds and no separate or any account thereof was given or kept. The admissions and undisputed testimony of the conduct on the part of the trustee and her son fully support the conclusion that the entire matter was considered by them as a family affair, with no duty devolving upon the trustee or her son except to make the payment of $200 monthly to Undine H. Hinkel. Under such a state of facts, viz., where trust funds have never been set apart but have been willfully and unnecessarily commingled with and used as the trustee's own property, the liability of the trustee is settled and is at least the liability imposed by the court's decree herein. Sections 2236, 2237, Civ. Code; Estate of Cousins, supra, 111 Cal. 445, 44 P. 182; 26 R. C. L. pp. 1322, 1323, § 184; 39 Cyc. pp. 424–430. Pursuant to the facts and the findings herein, the application of the provisions of section 2238 may affect only the rate of interest with which the trustee is chargeable (Estate of Cousins, supra; 39 Cyc. pp. 428 et seq., § 5), which in this case the court found was simple interest at 7 per cent. per annum on the decreasing balances. The court, therefore, in effect did apply the provisions of said section in so far as the same are applicable to the facts presented.

The judgment is affirmed.

We concur: WASTE, C. J.; THOMPSON, J.; SEAWELL, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.

## CAPITAL NAT. BANK OF SACRAMENTO et al. v. STOLL et al.*

Sac. 4754.

Supreme Court of California.
Aug. 18, 1933.

Rehearing Granted Sept. 14, 1933.

Parent and child 🔑12.

Son, who relinquished profitable employment to manage aged father's business until final distribution in consideration of salary and child's share as in case of intestacy, had such beneficial interest in subject-matter that contract was not terminated by father's subsequent incompetency (Civ. Code, § 2356).

In Bank.

Appeal from Superior Court, Sacramento County; H. D. Burroughs, Judge.

Action by the Capital National Bank of Sacramento, as guardian of the estate of John T. Stoll, an incompetent person, and others, against Edwin P. Stoll, sometimes known as E. P. Stoll, and others. From a judgment for plaintiffs, defendants appeal.

Reversed, with instructions.

Howe, Hibbitt & Johnston and White, Miller, Needham, Harber & Mering, all of Sacramento, for appellants.

Inman & West and Sheridan Downey, all of Sacramento, Morgan V. Spicer, of San Francisco, and Ralph H. Lewis, of Sacramento, for respondents.

IRA F. THOMPSON, Justice.

This appeal is from a judgment in favor of plaintiffs declaring that a contract employing the defendant Edwin P. Stoll was terminated by the incompetency of his father and employer, John T. Stoll, and restraining the defendant Edwin P. Stoll from interfering with the possession of the property or its management by the guardian. The facts necessary to understand the controversy are few and free from complications. All the defendants are sons of John T. Stoll, one of the plaintiffs. The plaintiff Jennie T. Stoll is his wife and the stepmother of the defendants. We do not include the bank as a plaintiff for reasons hereinafter to be stated.

For more than eight years before October 26, 1929, Edwin P. Stoll had been employed by the Remington Arms Company, and on the date mentioned, and for about four years prior thereto, was manager of its western cutlery division at a salary of $350 per month, together with his traveling and other necessary expenses when away from his home. His prospects with that company were very good and the opportunity for further advancement excellent. He saw his father rather frequently at the latter's home in Sacramento—probably four or five times a year. For some time prior to 1929 his father had desired him to give up his employment with the Remington Arms Company and take over the management of his father's affairs. The son had put his father off. Finally, in June of that year he received a letter from his stepmother as follows: "Your father wishes me to write you that he is not able to write, let alone go down to Oakland, and he would like to have you come up." In response, he went to Sacramento, where his father, then eighty-seven years of age, insisted that he could no longer put him off, else he would have to make other arrangements. Edwin P. Stoll told his father that he would assume the burden if he could be protected in the term of his employment and his interest in the estate; which employment should continue until the decree of distribution was signed. After consulting with his

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 30 P.2d 411.

father's counsel, and after three different drafts of an agreement were submitted, the following contract was signed:

"This agreement, made and entered into this 26th day of October, 1929, by and between E. P. Stoll, of San Francisco, California, party of the first part, and John T. Stoll, of Sacramento, California, the party of the second part.

"Witnesseth: That the parties hereto are father and son:

"That the party of the second part being advanced in years desires the services of the first party to manage his business and properties during the remainder of his life, and thereafter until final distribution of the estate of said second party has been made, upon the terms and conditions hereinafter set forth;

"That said first party is now employed at a salary of $350 per month, and his interests are such that he cannot afford to relinquish said position without assurance of such employment as is herein provided, and this agreement is, therefore, predicated upon such relinquishment of employment by said first party and his employment, as herein set out, by said second party.

"That in consideration of the foregoing said second party agrees to employ, and said first party agrees to accept, such employment for a period of time commencing upon the 1st day of December, 1929, and ending with the final distribution of the estate of the second party, as above set forth, at a monthly salary of $350, payable monthly.

"That in consideration of the foregoing, first party agrees to devote his entire time and his best ability to the management, control and operation of the business and property of said second party during said term.

"That in further consideration of first party surrendering his said position said party of the second part agrees to take no action whatsoever that will in any manner reduce the share of the estate of said second party to which first party shall or would be entitled as an heir at law."

Edwin P. Stoll entered upon his employment as agreed and continued therein for two years. On December 2, 1931, his father was adjudged incompetent and the Capital National Bank was appointed guardian of his estate. On January 8, 1932, this action was commenced to have it declared that the contract was terminated and to restrain Edwin P. Stoll from interfering with the possession or management by the guardian of the property of his father. The first complaint was brought by the bank as guardian, but an amended complaint was filed wherein John T. Stoll appeared by the bank, the wife electing to join with the plaintiff, and the other sons with the defendant. The property consisted of three hotels, stores for thirteen or fourteen tenants, three ranches, and notes, etc., aggregating in value at the time of the contract $350,000 or more, with a monthly income of $1,800 or $2,000. Further, it was stipulated that Edwin P. Stoll performed the terms of his contract, and that there was no objection to his conduct of the position.

Various contentions are advanced by appellants. They complain that the action was commenced by the bank as guardian, but of necessity their argument in this particular must be accorded no further consideration in view of the amendment of the complaint to conform to the recognized procedure. Their other propositions may be included in the general problem of whether in the particular contract the power of the appellant Edwin P. Stoll was coupled with an interest so as to prevent the termination of the contract by virtue of the provisions of section 2356 of the Civil Code, which reads: "Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated, as to every person having notice thereof, by:

"1. Its revocation by the principal;

"2. His death; or,

"3. His incapacity to contract."

We have an unusual situation—a son sacrificing his employment and chances of further preferment in order to manage an aged father's estate upon the assurance that his employment shall continue until he receives his interest therein, which, it is agreed, shall not by any act of the father be reduced below that which he would take if his father were to die intestate. The intention of the parties is clear and unmistakable. Whether the appellant Edwin P. Stoll was possessed of an interest in the subject of the contract, as a matter of law, it is evident that the contracting parties, including his brothers, and at the time at least Mrs. Stoll, endeavored to so arrange, declare, and contract. We should have no hesitancy at all in declaring under the circumstances of the case, if John T. Stoll, possessed of all his faculties, were attempting to revoke the employment of his son under subdivision 1 of the above-quoted section, that he had parted with his right so to do, and that he would be answerable in damages for such a breach. Parke v. Frank, 75 Cal. 364–368, 17 P. 427; Roth v. Moeller, 185 Cal. 415–418, 197 P. 62. Nor can it be seriously questioned that in the event of his father's demise and the fulfillment of his part of the contract by Edwin P. Stoll he would be able to receive his share of the estate under the contract. Rogers v. Schlotterback, 167 Cal. 35, 138 P. 728; Roy v. Pos, 183 Cal. 359–367, 191 P. 542. And yet, while these observations are helpful, they do not answer the question of whether the intent of the parties is to govern in the disposition of the case. In Todd v. Superior Court, 181 Cal. 406, at page 419, 184 P. 684, 689, 7 A. L. R.

938, it was said: "It is plain from the foregoing authorities that the interest which the attorney in fact must have in the subject of the power in order to render the power irrevocable is such a beneficial interest in the thing itself, apart from the proceeds, that if the power were revoked he would be deprived of a substantial right. In other words, the relation of the attorney in fact to the subject-matter must be such that a revocation of the power would be inequitable." In Lane Mortgage Co. v. Crenshaw, 93 Cal. App. 411, 269 P. 672, 679, in which case we denied a hearing, it is said: "Each case is determined from its own facts and the conclusions reached by a consideration of the entire instrument creating the power in question." Again, in Norton v. Whithead, 84 Cal. 263, 24 P. 154, 156, 18 Am. St. Rep. 172, this language was employed: "The power of attorney also provides that it is irrevocable; and, although this is not conclusive, it nevertheless tends to prove that the parties understood that plaintiff had an interest in the subject-matter upon which it was to operate." In the instant case Edwin P. Stoll had not merely the expectancy of an heir. By the contract he could not be divested of that interest. It was to his advantage to so manage and operate the property that it would not be impaired or wasted. It was his security against the approach of years and the loss of his former employment. Nor is it an answer to say that he might have predeceased his father. First, because in the ordinary course of events such things do not ordinarily occur where the father is as aged as in the present case; second, an expectancy (and the instant interest is much more than that) is a valuable right, assignable in equity, as the following quotation from Pomeroy's Equity Jurisprudence, approved in Bridge v. Kedon, 163 Cal. 493–499, 126 P. 149, 152, 43 L. R. A. (N. S.) 404, will demonstrate: "'The assignee of an expectancy, possibility, or contingency acquired at once a present equitable right over the future proceeds of the expectancy, possibility, or contingency which was of such a certain and fixed nature that it was sure to ripen into an ordinary equitable property right over those proceeds as soon as they came into existence by a transformation of the possibility or contingency into an interest in possession. There was an equitable ownership of property in abeyance, so to speak, which finally changed into an absolute property upon the happening of the future event.'" See, also, In re Garcelon, 104 Cal. 570, 38 P. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134.

Considering, then, the intent and purpose of the parties to create an interest in the subject-matter of the power as an inducement to Edwin P. Stoll to relinquish his legitimate expectation of advancement in his previous occupation, we cannot but conclude that it would be manifestly unjust and inequitable to hold that his power or contract of employment was not coupled with an interest.

This conclusion renders a discussion of other arguments unnecessary, and inasmuch as the facts are not in dispute the trial court ought to enter judgment for the defendants.

Judgment reversed, with instructions to the lower court to enter judgment for the defendants.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

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218 Cal. 714

## BERKELEY GUARANTEE BUILDING & LOAN ASS'N v. CUNNYNGHAM et al.

S. F. 14940.

Supreme Court of California.

Aug. 25, 1933.

**Appeal and error** ⟹44.

Appellate and Supreme Courts *held* without jurisdiction to review judgment of superior court on appeal from justice's court of Brooklyn township in Alameda county in unlawful detainer action (Code Civ. Proc. §§ 76, 112, 1161a; Const. art. 6, §§ 4, 4b, 11a, 13).

In Bank.

Appeal from Superior Court, Alameda County.

Action by the Berkeley Guarantee Building & Loan Association, a corporation, against James R. Cunnyngham and another. From a judgment of the superior court affirming a judgment of the justice's court in favor of the plaintiff, the defendants appeal. On motion to dismiss the appeal.

Motion granted, and application for supersedeas denied.

See, also, 18 P.(2d) 703.

H. H. McPike, of San Francisco, for appellants.

J. S. Hutchinson, of San Francisco, and Robinson, Price & MacDonald, of Oakland, for respondent.

PER CURIAM.

Respondent has moved to dismiss the appeal in this cause. The action was one in unlawful detainer under the provisions of section 1161a of the Code of Civil Procedure, filed in the justices' court of Brooklyn township, Alameda county. Judgment was rendered in favor of plaintiff and against defendants. On appeal to the superior court of Alameda county, the judgment was affirmed, and remittitur was issued on May 9, 1933. Defendants thereupon gave notice of appeal to the Supreme Court from the judgment of the superior court. The motion is to dismiss this appeal on the ground that the judgment of the superior court of the county of Alameda affirming the judgment of the justices' court was final. The motion must be granted.

The Constitution, art. 6, §§ 11a and 13, provides that the Legislature shall determine the jurisdiction of the inferior courts of the state. Section 76 of the Code of Civil Procedure, as it read when this action was filed, gave the superior court jurisdiction in civil cases and proceedings except cases and proceedings in which jurisdiction was given by law to municipal or to justices' or other inferior courts. Under section 112 of the same Code, it is provided that justices' courts in townships having a population of thirty thousand or more shall have jurisdiction of actions of forcible or unlawful entry or detainer where the rental value is $100 or less per month, and where the whole amount of damages claimed is $1,000 or less. The foregoing provisions establish the jurisdiction of the justices' court of Brooklyn township in this cause.

Neither the District Court of Appeal nor the Supreme Court has appellate jurisdiction in such a cause. Const. art. 6, §§ 4, 4b. If it be contended that the title to real property is involved in this action, and the justices' court cannot try such title, the exact question has been but recently decided contrary to the contention. Hewitt v. Justice's Court of Brooklyn Township (Cal. App.) 21 P.(2d) 641. As to the finality of the decision of the superior court on appeal from the justices' court, see Johnston v. Wolf, 208 Cal. 286, 280 P. 980; McLean v. Freiberger, 215 Cal. 1, 7 P.(2d) 1023.

The application for supersedeas heretofore submitted is denied. The motion to dismiss the appeal is granted.

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218 Cal. 665

## DIAMOND MATCH CO. v. SAVERCOOL et al.

Sac. 4695.

Supreme Court of California.
Aug. 18, 1933.

**1. Dedication 🔑44.**

In action to quiet title to road, evidence *held* to support finding, in effect, of implied intention to dedicate road to public based on use by public for approximately 50 years and acceptance by public, constituting dedication.

**2. Dedication 🔑15, 31.**

To constitute dedication, there must be intention by owner to dedicate land to public use, and acceptance either by public user or formal resolution.

**3. Dedication 🔑15.**

Intention of owner to dedicate land to public use may be found in his acts and conduct, and may be either express or implied.

**4. Dedication 🔑15.**

Implied intention of owner to dedicate land to public use exists when his acts and conduct indicate clearly intention to devote land to public use.

**5. Dedication 🔑15.**

Intention to dedicate land to public use will be implied from long acquiescence in use of land for highway purposes under common-law presumption of dedication by adverse user.

**6. Dedication 🔑20(2).**

To establish dedication of highway by user, user must have been adverse, continuous, and with knowledge of owner, for required period of time.

**7. Dedication 🔑41.**

To establish dedication of highway by user, adverse character of use and knowledge and acquiescence of owner may be inferred from circumstances.

**8. Dedication 🔑41.**

Long-continued adverse user of road establishes against owner conclusive presumption of knowledge and acquiescence.

**9. Dedication 🔑39.**

Where owner of strip of land used as road permitted other landowners to acquire and improve their lands in reliance on apparent dedication of road without asserting claim to road as private property, owner *held* estopped to deny public character of road.

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In Bank.

Appeal from Superior Court, Tehama County; Ernest Weyand, Judge.

Action by the Diamond Match Company against James Savercool and others. From a judgment in favor of the defendants J. H. Davison and S. S. Errington, the plaintiff appeals.

Affirmed.

Fred C. Pugh, of Red Bluff, for appellant.

McCoy & Wetter and Wetter & Rankin, all of Red Bluff, for respondents.

WASTE, Chief Justice.

This is an action to quiet title to a road, approximately fifteen miles in length, running through plaintiff's timber lands in the Sierra Nevada Mountains in Tehama county. The defendants Davison and Errington alone defended the action. Judgment went in their favor, and plaintiff has appealed.

Plaintiff contends that the road is a private road and that defendants' use thereof has been permissive only and not such as to give rise to any right. Defendants urge that it is a public road, dedicated as such by many years' user, and that the plaintiff is estopped to deny its public character.

At the conclusion of the trial the court found that the defendants and other persons, and the public generally, have repeatedly used the road; that such user has been open, notorious, and adverse to the plaintiff and under claim of right; that such user has been uninterrupted since 1870; that plaintiff by means of a gate and lock, has attempted to interfere with but has never wholly prevented the use of the road by the public; that it is a public road dedicated as such by the plaintiff and its predecessors in interest; that the defendants, their predecessors in interest, the public generally, and the board of supervisors of Tehama county, have accepted such dedication; that the lands of the contesting defendants can be reached by vehicle only by said road; that the defendants acquired and improved their lands in the belief that the road was a public road; that during the improvement of said lands the plaintiff at no time asserted that the road was a private road; that had they been so informed defendants would not have improved their lands; that without the use of said road the lands of the defendants would be practically valueless; and that the plaintiff is estopped to assert that the road is a private road.

[1] Plaintiff contends that these findings are unsupported by the evidence. While there is considerable conflict in the evidence, defendants' showing is ample to warrant the findings and conclusions of the trial court. Under elementary rules of appellate procedure, we are bound by the findings of the lower court.

The witness McKenzie, called by the defendants, testified that he had lived in Tehama county over sixty years; that he first went over the road in question in 1870; that he then lived in the vicinity and hauled produce over the road many times. James Savercool, called by the defendants, testified that he lived in Mill creek canyon and that over a period of twenty-five years had used the road many times and had seen others using it during all of that time; that there was no other road capable of accommodating vehicles in this territory. A son of this witness substantiated much of his father's testimony. The witness Gallagher testified that he purchased land in the vicinity of the disputed road in 1918; that there was then no obstruction on or across the road; that he had no knowledge of the fact that any one claimed the road as a private road until 1924, when a gate was placed across the road; that the gate was closed only during the deer-hunting season; and that he repeatedly used the road. The defendant Davison testified that he purchased his property in 1923; that the road was then free of barriers of any kind; that at the time of purchase he spoke to agents and employees of the plaintiff and no one stated or intimated that the road was not a public way; that he and others having occasion to use the road did so many times without interference; that he improved his property with materials purchased from the plaintiff and was at no time informed that the road was claimed by it as a private road; that the plaintiff placed a gate across the road at its present location in 1928; and that the road in question is the only means of ingress and egress by vehicle to and from his property. The witness Kopplin, county clerk of Tehama county, produced the official record of the minutes of the board of supervisors of the county, wherein it appeared under date of May 5, 1879, that one D. Howard was directed to remove all obstructions from the road in question, and under date of June 9, 1879, the county roadmaster was directed to open the road and remove all obstructions therefrom. There is also evidence to the effect that persons using the road had from time to time worked on it, and that the forestry service occasionally runs a grader over it. In 1922 a portion of the road was rerouted by the federal government at government expense and the same has been since used by the public generally.

[2-5] The foregoing, and other evidence to which reference need not be made, amply supports the findings and conclusions of the court below. To constitute a valid and complete dedication, there must be an intention by the owner, clearly indicated by his words or acts, to dedicate the lands to public use (City of Venice v. Short Line Beach L. Co., 180 Cal. 447, 450, 181 P. 658), and an acceptance either by public user or formal resolution (Brown v. Bachelder, 214 Cal. 753, 7 P.2d 1027). The intention to which courts give heed is an intention manifested by the owner's acts and finding expression in his conduct. City of Los Angeles v. McCollum, 156 Cal. 148, 103 P. 914, 23 L. R. A. (N. S.) 378. It may be either express or implied, and is implied when the acts and conduct of the owner indicate clearly an intention to devote the land to the public use. People v. Myring, 144 Cal. 351, 354, 77 P. 975, 976. The law will imply an intention to dedicate from long acquiescence in the use of land for highway purposes, for it is settled that the common-law rule as to the presumption of

dedication by adverse user is applicable in this state. Schwerdtle v. County of Placer, 108 Cal. 589, 592, 41 P. 448.

In People v. Myring, supra, it is declared: "The dedication of a road as a public highway is the setting it apart by the owner of the land for the use of the public, and the subsequent use thereof by the public operates as an acceptance of the same, and makes it a public highway. Such dedication may be express, as by a grant to the public, or it may be implied from the circumstances under which the road is set apart and used. The adverse user of the road by the public, with the knowledge of the owner, for a period of time corresponding to that fixed for conferring a title by prescription, establishes, as against the owner, a presumption of dedication. 'It affords the conclusive and indisputable presumption of knowledge and acquiescence, while at the same time it negatives the idea of mere license.'"

[6-8] Of course, where the dedication of a highway is sought to be established by user, it must be shown that the user was adverse, continuous, and with the knowledge of the owner, for the required period of time. City of San Diego v. Hall, 180 Cal. 165, 168, 179 P. 889. So far as the element of time is concerned, periods varying from five to forty years have been held sufficient. Plummer v. Sheldon, 94 Cal. 533, 29 P. 947; Barnes v. Daveck, 7 Cal. App. 487, 94 P. 779. The adverse character of the use and the knowledge and acquiescence of the owner may be inferred from circumstances, and long-continued adverse user establishes against the owner the conclusive presumption of knowledge and acquiescence. Schwerdtle v. County of Placer, supra; People v. Myring, supra.

Though conflicting, there is substantial evidence in the record now before us to establish, in accordance with the trial court's findings, that the defendants and the public generally over a long period of years have openly, adversely, and under claim of right, used for highway purposes a definitely defined strip of land running through plaintiff's property, and that not until 1924, approximately fifty years subsequent to its original use for that purpose, did the plaintiff or its predecessors object to or attempt to interfere with such user by the public. Under the authorities this is sufficient to show an implied intention to dedicate and an acceptance thereof by the public. In addition thereto the board of supervisors appears to have exercised jurisdiction over the road as early as 1879. Plaintiff's tardy attempt to interfere with the public use of the road has proved unavailing and has not resulted in a loss of such right by nonuser, for there is evidence in the record tending to indicate that those members of the public having occasion to use the road continued to do so after plaintiff's attempted obstruction of the same, in some instances the lock having been shot from the gate erected by plaintiff.

[9] In conclusion, it should be added that, so far as the contesting defendants are concerned, the evidence tends to show that they, to plaintiff's knowledge, acquired and improved their lands in reliance on an apparent dedication of the road. At no time did the plaintiff or its agents inform defendants that the road was claimed as private property. Under the circumstances, the court below properly found that the plaintiff is estopped to deny the public character of the road.

For the foregoing reasons, the judgment is affirmed.

We concur: SHENK, J.; IRA F. THOMPSON, J.; LANGDON, J.; SEAWELL, J.

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218 Cal. 676

## MORRIS v. COLE et al.

Sac. 4717.

Supreme Court of California.
Aug. 21, 1933.

Rehearing Denied Sept. 19, 1933.

1. **Appeal and error** ⚷110.
Order denying new trial is not appealable.

2. **Appeal and error** ⚷781(4).
Propriety of order refusing to discharge attachment *held* moot question requiring dismissal of appeal therefrom, where, subsequent to judgment, writ of execution was levied on attached property, and property was sold thereunder.

3. **Action** ⚷6.
Courts will not decide moot questions.

4. **Appeal and error** ⚷1011(1).
Conclusion of lower court on conflicting evidence is final.

5. **Mines and minerals** ⚷59.
In action to recover purchase price of mining sublease for lessors' fraud, lessee *held* entitled to judgment where he offered to restore everything of value received under contract and evidence established lessors' misrepresentations.

6. **Mines and minerals** ⚷59.
That lessee's notice of rescission did not specifically tender sum of gold extracted by him under mining sublease purchased, did not

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

render such notice insufficient where as result of lessors' misrepresentations lessee had expended in excess of value of gold obtained and had allowed lessors credit therefor.

**7. Contracts ⚷266(2).**

In rescinding on ground of fraud, injured party is not required to restore that which he would be entitled to retain.

**8. Mines and minerals ⚷70(2).**

Lessee suing for purchase price of mining sublease *held* not in default on March 10 of specified year, under lease provision requiring him to pay specified percentage of all gold recovered in any month, on or before 10th day of succeeding month, where lessee did not make complete clean-up of gold until after March 1 of same year and no rentals fell due on March 10.

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In Bank.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by John Morris against R. C. Cole and others. From a judgment for plaintiff and from an order denying a motion to discharge an attachment, defendants appeal.

Appeal from order denying motion to discharge attachment and denying a new trial dismissed; judgment affirmed.

Charles L. Gilmore, of Sacramento, for appellants.

Rowan Hardin, of Sonora, and Paul R. Hutchinson, of Los Angeles, for respondent.

IRA F. THOMPSON, Justice.

[1] Judgment was rendered in favor of plaintiff that he recover from defendants $15,000, the purchase price of certain mining property, paid by plaintiff to defendants as the result of fraudulent representations made to him by them. A writ of attachment was issued upon the filing of the complaint and thereafter levied. The defendants made a motion to discharge the writ, which motion was denied. The appeal is from the judgment, from the order denying the motion to discharge the attachment, and there is a purported appeal from the order denying defendants' motion for a new trial. Inasmuch as the last-mentioned order is not appealable, an order dismissing the appeal therefrom will be found at the end of this opinion.

[2, 3] In so far as the appeal from the order refusing to discharge the attachment is concerned, it apparently presents nothing but an academic question. The record discloses that subsequent to the rendition of judgment a writ of execution was levied upon the attached property and it was sold thereunder. It does not appear from appellants' brief or otherwise how any disposition that we might make of the order could materially affect the interests of the parties. It is a familiar rule of law that courts will not consume time and labor by attempting to decide moot questions, for which reason there will also be found at the end hereof an order dismissing the appeal from the order denying the motion to discharge the attachment.

Turning therefore to the appeal from the judgment, we discover that the court found that on February 5, 1931, the defendants owned a lease and option on certain mining property known as the "Twin Pines Placer lying about 400 feet above the Goodwin dam on the south bank of the Stanislaus river," in Tuolumne county; that on that day and immediately preceding it the defendants represented to plaintiff and his agents that the earth and gravel therein "contained values of pure gold running from $18.00 to $20.00 per ton"; that they had run a drift or incline through a large deposit of gravel on the property which yielded from $18 to $20 per ton; that plaintiff was denied time to prospect or mine within the property, and that defendants represented that they had other parties standing ready and willing to purchase said lease or take a sublease thereon and pay $20,000 in cash for the same and if the plaintiff was to acquire the property he would have to take it immediately. It was also found by the court that defendants represented they had acquired from the owner of adjoining property the right to dump gravel taken from the mine upon his property; that they "had been taking from said property $100.00 per day or $3,000.00 per month, and that such values had continued through thirty or forty feet of the workings; that they could not produce receipts for the values thus obtained from said property as they had shipped such values and disposed of the same through channels other than through the mint or bank as they did not want the people in the vicinity of said property or around Oakdale to know of the rich values being taken from said property." The findings also disclose that defendants represented that one of them, D. V. Cole, was an experienced mining man of twenty-two years' experience and that the gravel channel was an ancient river channel, all of which representations induced the plaintiff to pay the $15,000 for a sublease of the property.

There then follow findings to the effect that all of the foregoing representations were false and known by the defendants to be false; that in truth, from all the work done by them on the property the defendants had not extracted in excess of $250; that, instead of being in an ancient river channel, the small deposit of gravel was made "by the modern river on a bench while in the process of cutting the present channel of the Stanislaus River."

[4] It would serve no useful purpose for us to set down here all of the testimony adduced by the plaintiff to support these findings. Suffice it to say that we have scrutinized it with care and each of the recited findings is amply supported. That the trial court might conceivably have adopted a different version of the affair from the testimony of the defendants is no reason why the reviewing tribunal should attempt to weigh the evidence. The conclusion of the lower court in such cases is, as has so frequently been said, final.

[5] It was also found that plaintiff had offered to restore everything of value received by him under the contract, and in fact the findings disclose that he did. Under such circumstances and findings there was nothing left for the trial court to do except enter judgment for the plaintiff.

[6, 7] The evidence discloses that respondent succeeded in extracting $489.61 from the property during his operation thereof. Appellants contend that since the notice of rescission did not specifically tender this sum it was for that reason insufficient. There is no merit in the contention, for, as developed by the findings, the respondent had as a direct result of the misrepresentations expended greatly in excess of the mentioned amount, and had allowed appellants credit therefor. Of course, it is elementary that in rescinding on the ground of fraud the injured party is not required to restore that which, in any event, he would be entitled to retain. Richards v. Fraser, 122 Cal. 456, 56 P. 246, and cases there cited.

[8] Appellants also contend that on March 10, 1931, respondent was in default under the provisions of the lease, which required him to pay to them as lessors twenty-five per cent. of all the gold recovered in any month on or before the 10th of the succeeding month, which position was assumed by them in the trial court, pursuant to a notice dated March 17th, in which they asserted their election to declare a forfeiture of the lease for the identical reason. A complete answer to this argument is set forth in the findings, based upon substantial testimony, that plaintiff did not make a complete or general clean-up of gold until after March 1, 1931, and that no royalties or rental fell due on March 10, 1931.

Whether the giving of the last-mentioned notice by the appellants, followed by the notice of rescission of respondent, amounted to a mutual cancellation of the lease, as found by the court, could not alter the outcome of the cause—hence discussion thereof is not necessary.

As already indicated, the following disposition of the appeal should be made: The appeal from the order denying motion for a new trial is dismissed. The appeal from the order denying the motion to discharge attachment is dismissed, and the judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

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218 Cal. 702

## SAN MATEO PLANING MILL CO. v. DAVENPORT REALTY CO., Inc., et al.

## SAME v. PENINSULA PROPERTIES CO. et al.

S. F. 14796.

Supreme Court of California.

Aug. 24, 1933.

**1. Building and loan associations 🔑40.**

Building and loan association furnishing building loans *held* liable on orders for payment of materials, drawn against building loans and accepted and payment guaranteed by loan association.

**2. Building and loan associations 🔑44.**

Second loan association taking over first association under agreement to assume and pay all obligations of first association, with specified exceptions, *held* liable on orders for payment of building materials, accepted and guaranteed by first association and not included within exceptions of sale contract (Civ. Code, § 1559).

**3. Building and loan associations 🔑44.**

Second loan association agreeing to assume all obligations of first association could not avoid liability for orders for building materials accepted by first association, on ground second association assumed only obligations contained in financial statement which excluded building material claims, where financial statement was adopted only for calculating amount payable to first association (Civ. Code, § 1559).

**4. Building and loan associations 🔑44.**

Second loan association assuming obligations of first association which furnished building loans *held* not liable for building materials furnished without order for payment, which materials first association did not promise to pay for and for which building funds would be exhausted by payment of accepted orders.

**5. Liens 🔑18.**

Ordinarily, equitable claims against common fund, insufficient to pay all claims in full, share pro rata in fund.

**6. Mechanics' liens ⚷113(2).**

Materialman *held* not entitled to share pro rata in building fund, for materials furnished without order for payment, where it failed to notify loan association of claims until building was almost completed, and loan association had already obligated itself to expend whole fund.

**7. Building and loan associations ⚷44.**

Second loan association agreeing to assume obligations of first association furnishing building loans *held* not liable for payment of materials furnished without orders for payment, and for which first association did not become liable.

**8. Mechanics' liens ⚷113(2).**

Notice under statute regarding notice to owner of labor performed and materials furnished, served by materialman on second loan association approximately four months after it had purchased assets of first association furnishing building loans *held* not "notice to withhold" so as to create equitable garnishment of building funds remaining in second loan association's possession (Code Civ. Proc. § 1184).

**9. Building and loan associations ⚷44.**

In action for building materials, evidence showing that materialman's claims against first loan association were not included in financial statement of agreement under which second loan association assumed obligations of first association *held* properly rejected as immaterial, where financial statement did not limit assumption of obligations in agreement.

**10. Trial ⚷377(2).**

Reopening case after trial is largely discretionary.

**11. Trial ⚷377(2).**

Refusing to reopen case three weeks after trial and before court's decision, for evidence not relating to material issue and known to complaining party before case was closed, *held* not error.

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In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Separate actions by the San Mateo Planing Mill Company against the Davenport Realty Company, Incorporated, the North American Building Loan Association, and others, and against the Peninsula Properties Company, North American Building Loan Association, and others. From judgments for plaintiff in each case, the North American Building Loan Association appeals.

Judgment against Davenport Realty Company and others affirmed, and against Peninsula Properties Company and others modified and as modified affirmed.

Fabius T. Finch and Paul F. Fratessa, both of San Francisco, for appellant.

Kirkbride, Wilson & Brooks, of San Mateo (John D. Willard, of San Francisco, of counsel), for respondent.

CURTIS, Justice.

These two actions were instituted by the plaintiff against certain defendants who are the same in each action, although in the first action the Davenport Realty Company, Inc., is named as the first defendant, and in the second action the Peninsula Properties Company is named as the first defendant. The material defendants in each action are the Davenport Realty Company, Inc., the Pacific American Building-Loan Association (hereinafter referred to as the Pacific American Association), and the North American Building-Loan Association (hereinafter referred to as the North American Association). In the first action plaintiff recovered a joint and several judgment against said three defendants in the sum of $567.13. In the second action plaintiff recovered a like judgment against the same defendants in the sum of $1,891.06, with interest at 7 per cent. per annum from certain dates stated therein. From these judgments the North American Association alone appeals. These two cases were tried together and by stipulation they are brought up on a single appeal.

The facts of this controversy, or rather controversies, although the two transactions involved are so closely connected that they might well be considered as one transaction, had their inception in a plan of the Davenport Realty Company, Inc., to construct a couple of houses upon two lots in a subdivision in San Mateo county, known as the Belmont Country Club. The Davenport Realty Company, Inc., purchased these two lots, which we will refer to as lots 28 and 34, from the Peninsula Properties Company for $500 each. It then negotiated two building loans to be secured by trust deeds from the Pacific American Association, one for $4,000 on lot 28, the proceeds of which were to be used to construct a dwelling house on said lot, and the other loan for $6,000, the proceeds of which were to be used to construct a building on lot 34. A second trust deed was executed in favor of the Peninsula Properties Company, on each lot to secure the sum of $500, being the purchase price of said lot, but by agreement of all parties interested the liens in favor of the Peninsula Properties Company were subordinated to those of the Pacific American Association. These trust deeds were all placed of record in the office of the county recorder of San Mateo county prior to the commencement of any work on either of said buildings. Thereafter the plaintiff furnished certain building materials which were used in the construction of said houses. The reasonable value of the materials so furnished and which were used in the construction of the dwelling house on lot 28 was $567.13, and those used in the construction of the house on lot 34 was $1,891.06. The materials for the house on lot 28 were furnished on or about April 14, 1930, and on that day the Davenport Realty Company, Inc., gave an order for the amount thereof, $567.13, on the Pacific American Association for said sum, which was accepted and payment guaranteed by said association on said day. Building materials of the value of $1,891.06 were furnished by plaintiff to the Davenport Realty Company, Inc., for the construction of the house on lot 34. Three orders totaling the sum of $1,318.75 were during the months of May and June, 1930, given by the Davenport Realty Company, Inc., on the Pacific American Association, and said association accepted and guaranteed the payments of said three orders. Thereafter negotiations were entered into between the Pacific American Association and the North American Association which resulted in a written agreement of sale of the assets of the Pacific American Association to the North American Association. This agreement was dated August 11, 1930, and was made subject to the approval of the building and loan commissioner, which approval was given in writing on September 10, 1930. By virtue of said agreement of sale the North American Association succeeded to the business and acquired all of the assets, with minor exceptions set out in said agreement of sale, of the Pacific American Association. Among the assets acquired was the sum of $3,950.63, which was designated in said agreement of sale as "Commitments on Incompleted Loans." Of this item, $101.93 was the part remaining of the $4,000 loan on lot 28, and $2,436.60 was the part remaining of the $6,000 loan on lot 34, and the balance was a part of a third loan with which we are not concerned. At the time of the purchase of the business and assets of the Pacific American Association by the North American Association, the house on lot 28 was practically completed while the house on lot 34 was in an unfinished state. On acquiring said business the two houses were completed, and the North American Association paid out for labor and materials used in their completion the total amount of said two loans, except the sum of $64.63 of the $6,000 loan.

Appellant, the North American Association, makes the following contentions on this appeal:

(1) Appellant bought no material from the plaintiff, and by its contract with the Pacific American Association did not assume any obligation of the Pacific American Association to the plaintiff.

(2) The court erred in refusing to permit the appellant to introduce parol evidence to explain the financial statement attached to the agreement of sale.

(3) The findings are not supported by the evidence as to the item of $572.31, which represented the lumber and building materials furnished by plaintiff in the construction of the building on lot 34, and for which no order in favor of the plaintiff was ever given to the Pacific American Association by the Davenport Realty Company, Inc.

[1] The decision of the first question raised by the appellant involves the construction of the agreement of sale whereby the appellant acquired the business and assets of the Pacific American Association. Preliminary to the decision of that question, it might be well to give a few further facts regarding the transactions which resulted in plaintiff supplying building materials for the construction of said buildings. Mr. Hurst, sales manager of the plaintiff, testified, and his testimony is uncontradicted, that at the time he agreed to furnish lumber and building materials to the Davenport Realty Company, Inc., for the construction of the house on lot 28, he knew of the two prior incumbrances against said lot and he was not willing to furnish said materials and rely upon a third lien against said lot as security for payment for said materials. He also knew that the Davenport Realty Company, Inc., was not able financially to construct said building without the assistance of said loan from the Pacific American Association. He, therefore, took up with this association the question of whether the money from the $4,000 on said lot 28 would be available to pay claims for materials furnished in the construction of the building on said lot. While he did not state the result of this interview, it must be inferred that he received satisfactory assurances that said money would be so available, for he immediately furnished materials amounting to $567.13, for the construction of said building, and thereafter an order was given for this amount and accepted by the Pacific American Association. When it came to the furnishing materials for the construction of the building on lot 34, Mr. Hurst stated that he knew of the two prior incumbrances on said lot, but he did not take up with the Pacific American Association the question as to whether the $6,000 loan would be available for the payments of materials furnished for the constructing of the building on said lot, but he did furnish to the Davenport Realty Company, Inc., lumber and other building materials of the value of $1,891.06, and received on account of the materials so furnished three orders which were subsequently accept-

ed by the Pacific American Association, amounting in all to $1,318.75, which left an open book account of $572.31 as a balance due for the said materials. As to the four accepted orders, one against the proceeds of the $4,000 loan and the three others against the proceeds of the $6,000 loan, there can be no question of the liability of the Pacific American Association upon these orders. Having accepted them and guaranteed their payment under the circumstances just related, the Pacific American Association became legally liable for their payment and this obligation on its part was outstanding and unsatisfied at the time this association sold out to the North American Association.

Taking up the agreement of sale, the parts thereof material to our present purpose are as follows:

"Whereas, First Party [North American Association] is desirous of purchasing certain of the engagements, funds and property of Second Party [Pacific American Association] and assuming all liabilities and obligations of Second Party, excepting its guarantee capital stock, surplus and undivided profits, and Second Party is desirous of selling such assets and conveying such liabilities upon the payment to Second Party by First Party for said assets and good will in connection therewith, the sums hereinafter referred to:

"Now Therefore, for and in consideration of the premises, stipulations, agreements and conditions contained and other good and valuable consideration, it is agreed as follows:

"Second Party agrees to sell, assign, grant, transfer, set over and convey unto First Party all of its engagements, funds and profits and assets of whatsoever kind or nature, including moneys on deposit in banks, loans, furniture and fixtures, cash on hand, good will, and any and all property as a whole belonging to or owned by Second Party, of each and every character, kind or nature and wheresoever situated, be it real, personal or mixed property, tangible or intangible property or easements or choses in action, excepting however, the following items of Certificate Loan $75.00; Notes and Accounts Receivable $200.12; Supplies and Deferred Expenses $6,355.78; and Organization Expense $87.50, appearing on the financial statement of Pacific American Building-Loan Association bearing date July 31, 1930, copy of which is attached hereto. In consideration therefor, First Party assumes and agrees to pay all obligations of Second Party excepting any liability which may exist by reason of or under any outstanding guarantee capital stock and any guarantee capital stock surplus and any undivided profits. * * *

"For the purpose of calculating the amounts to be paid Second Party by First Party in accordance with the provisions of this agreement, the same shall be determined as of the 31st day of July, 1930, upon the financial statement of Thomas & Moore, certified public accountants, heretoabove referred to and attached hereto."

[2, 3] We think it perfectly plain that by this agreement the North American Association assumed and agreed to pay all obligations of the Pacific American Association with certain minor exceptions therein stated, and that the claims of the plaintiff against the Pacific American Association were not within these exceptions. Appellant makes the further rather startling claim that the only reference in the agreement of sale to any assumption of liability by the North American Association is in the recital of said agreement where it is stated that the North American Association "is desirous of * * * assuming all liabilities and obligations of the Second Party," and that "no such statement is found in the contractual portion of the document." In the closing part of the next to the last paragraph of the agreement, which we have quoted above, is to be found a direct and express undertaking on the part of the North American Association "to pay all obligations of the Second Party" [the Pacific American Association] with certain exceptions which do not include the claims of the plaintiff. It is further contended by the appellant that according to the agreement of sale, the obligations assumed by it are those set forth in the financial statement prepared by Thomas & Moore, certified public accountants. But a casual reading of the quoted portions of the agreement, and they contain the only reference to the financial statement of Thomas & Moore in the entire agreement, shows that this financial statement was adopted as the basis "of calculating the amounts to be paid Second Party by First Party," and for no other purpose. Annexed to the agreement are the resolutions of the respective boards of directors of the two contracting parties authorizing the execution of the agreements by the proper officers. In these resolutions this financial statement of Thomas & Moore is referred to more in detail and a condensed report of assets and liabilities of the Pacific American Association is set forth therein. The claims of the plaintiff are not contained in said report of assets and liabilities, and there is no express authorization for the inclusion in the agreement of sale of any agreement to assume all the liabilities of the Pacific American Association by the North American Association. But reading these resolutions in their entirety, we think their intent and purpose were to authorize the purchase and sale of substantially all of the assets of the Pacific American Association, with a corresponding assumption of its liabilities and obligations, and that the agreement of sale as executed by the officers

of the two associations was well within the authority granted them under said resolutions. Our conclusion in this matter is that the appellant by said agreement of sale assumed and agreed to pay the obligations of the Pacific American Association, including the legal claims of the plaintiff against said last-named association. This agreement has never been rescinded by the parties thereto, and having been made for the benefit of the plaintiff, it may enforce the same against appellant. Civ. Code, § 1559.

[4-6] We have already disposed of the four accepted orders in favor of plaintiff, drawn and accepted by the Pacific American Association, and having been assumed by appellant, the judgment against appellant as to these claims is valid and binding upon appellant. The claim for $572.31, for which no order was given, stands upon a different basis. The building materials, represented by this claim, were sold to the Davenport Realty Company, Inc., and were used in the construction of the dwelling house on lot 34. The Pacific American Association made no promise, either express or implied, to pay said claim. It had, however, certain funds in its hands to pay the cost of constructing said building, and it was in duty bound to apply said funds to that purpose. Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898; Pacific Ready Cut Homes, Inc., v. Title Ins. & Trust Co., 216 Cal. 447, 14 P.(2d) 510. When it transferred this fund to the North American Association, its transferee was under the same obligation to administer said fund. The evidence shows, however, that the total amount of this fund, except the sum of $64.63, has been paid out by the appellant for labor and materials used in the completion of said building, and if appellant is obliged to pay the three orders given against this fund and accepted by the Pacific American Association, as we have held that it is under legal obligation so to do, then said fund will be more than exhausted, and there is nothing in the hands of the appellant to which plaintiff's claim can attach. It is true that there are decisions which hold that the plaintiff had an equitable lien against said fund, and ordinarily equitable claims against a common fund, which is insufficient to pay all claims in full, share pro rata in said fund. Under the facts in this case, however, we are unable to perceive how the plaintiff is entitled to the protection of this rule of equity. While it did furnish materials for said building prior to the appellant's purchase of the assets of the Pacific American Association on August 11, 1930, yet it failed to notify either the Pacific American Association or the appellant of its claim of $572.31 until December 15, 1930. In the meantime the building had been practically completed, and appellant had expended, or had obligated itself to expend, substantially the whole fund. Under these circumstances, we think it would be inequitable to permit the plaintiff to share pro rata in said fund. Accordingly, there is no evidence in our opinion to support the finding of the trial court that the appellant became indebted to plaintiff for money had and received in the sum of $1,891.06, or in any greater sum than the difference between said sum of $1,891.06 and said sum of $572.31, which would be $1,318.75. The judgment in the second action should be reduced by deducting from the amount thereof the sum of $572.31.

[7] The assumption by the plaintiff that, by this agreement of sale above referred to, there was a merger of these two corporations and, therefore, the surviving corporation became liable for all the obligations of either of the original corporations, does not, in our opinion, help plaintiff's cause. We have shown that the Pacific American Association never became liable for the payment of plaintiff's claim of $572.31. Therefore, even under the theory of merger, appellant did not become liable for its payment. At most plaintiff had an equitable lien for this amount against the funds created by said $6,000 loan, whether such fund was in the hands of the appellant or the Pacific American Association, and by failing to give notice to either of said associations of its claim until the appellant had virtually expended said fund in the erection of said building, it lost its right to participate in said fund.

[8] Neither do we think that the notice served December 15, 1930, by plaintiff upon appellant, could be construed as a notice to withhold under section 1184, Code of Civil Procedure, and thereby create an equitable garnishment of that part of said fund then in the hands of appellant. The notice provided for in said section applies only to the owner of a building, and since its amendment in 1911 this section has no mandatory effect. Hubbard v. Jurian, 35 Cal. App. 757, 761, 170 P. 1093; Hornlein v. Bohlig, 37 Cal. App. 646, 648, 174 P. 697.

[9] The remaining ground relied upon by appellant for the reversal of both judgments relates to the rejection by the trial court of evidence tending to show that the claims of the plaintiff represented by said four accepted orders were not included in the financial statement prepared by Thomas & Moore. The court rejected this evidence on the ground that it was immaterial. We agree with this ruling. We have already given some consideration to this financial statement. The assumption of the obligations of the Pacific American Association by the appellant was not made in reference to, nor was it limited by, the terms of this financial statement. The only purpose of this financial statement, as

we understand the agreement of sale, was to determine the amount which appellant should pay to the Pacific American Association for the assets of the latter company transferred to appellant.

[10, 11] A further point is made by appellant that the court erred in refusing to reopen the case some three weeks after the trial and before its decision by the trial court. The granting or denial of such a motion is largely within the discretion of the trial court. Mowry v. Starbuck, 4 Cal. 274. The evidence upon which the appellant based its motion to reopen the case pertained entirely to matters and events which took place between the appellant and the Pacific American Association before the building and loan commissioner at or about the date the agreement of sale was executed. This evidence must necessarily have been known to the officers of the appellant before the case was closed. It was not error, therefore, to deny the motion. Loftus v. Fischer, 113 Cal. 286, 45 P. 328. Besides, we think that this evidence did not relate to any material issue in the case.

It follows from the views hereinbefore expressed that the judgment in the second action should be modified by striking therefrom that portion thereof which permits a recovery by the plaintiff of said sum of $572.31, and interest thereon.

It is therefore hereby ordered that the judgment in the action entitled San Mateo Planing Mill Company v. Davenport Realty Company, Inc., et al., be and it is hereby affirmed, and the judgment in the action entitled San Mateo Planing Mill Company v. Peninsula Properties Company et al. is hereby modified by striking therefrom the last paragraph thereof, and by inserting in lieu thereof the following: It is ordered, adjudged, and decreed that plaintiff have and recover judgment from and against the defendants Pacific American Building-Loan Association, a corporation, and North American Building-Loan Association, a corporation, in the sum of $1,318.75, together with interest at the rate of 7 per cent. per annum on $1,144.19 from May 22, 1930, and on $174.56 from June 10, 1930, and costs of suit in the sum of $23.95. The judgment as so modified is affirmed.

As the appeals are from two separate judgments, one of which was affirmed and the other affirmed after modification, we think that the proper order to make herein regarding costs on appeal would be that the appellant recover one-half only of its costs, and it is so ordered.

We concur: WASTE, C. J.; LANGDON, J.; SEAWELL, J.; SHENK, J.

218 Cal. 696

## REUSCHE v. MILHORN.

Sac. 4688.

Supreme Court of California.

Aug. 23, 1933.

**1. Appeal and error ⚿38.**

Action to recover part of cost of division fence "involved title to real property," and Supreme Court had jurisdiction of appeal, though judgment was for only $91.33 (St. 1859, p. 280; Pol.Code, § 19).

[Ed. Note.—For other definitions of "Involve," see Words & Phrases.]

**2. Appeal and error ⚿634.**

Judgment will be affirmed where record is confused and findings of trial court support the judgment.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by August Reusche against Pearl Milhorn. From a judgment for plaintiff, defendant appeals.

Affirmed.

M. J. Cheatham, of Red Bluff, for appellant.

L. C. Smith, of Redding, for respondent.

WASTE, Chief Justice.

[1] Plaintiff obtained judgment in the court below for the sum of $91.33, together with interest and costs of suit; that amount being found by the trial court to be one-fourth of the cost of the construction of a division fence between the lands of the respective parties located in Shasta county. Although the amount is far below the jurisdictional amount warranting an appeal to this court, actions of this kind involve the title to real property. Jurisdiction to try the cause was in the superior court, and an appeal, therefore, lies to this court.

[2] The defendant, Pearl Milhorn, who appeals, is the wife of A. J. Milhorn, and it appears from the transcript of the testimony that this is the second suit brought by the respondent to recover one-half the cost of the building of the fence, which amount he is entitled to recover under the provisions of the act concerning lawful fences. Stats. 1859, p. 280, continued in force by the provisions of section 19 of the Political Code. In the first action the court allowed a recovery against A. J. Milhorn for but one-quarter of the cost, on the ground that the wife, defendant in this action, had an interest in the property which was subject to its proportion of the cost of the fence. It appears that the

former case was tried by the same judge who presided in the present case. He and the parties were, of course, very familiar with the lay of the land comprising the holdings of the parties, and their respective locations. A diagram of the property was drawn upon the blackboard of the courtroom, and testimony as to plots, direction of roads, and location of fences was given with reference to that diagram, copy of which has not been brought here in the record. Much of the testimony is of that indefinite character frequently given by witnesses when referring to maps and diagrams in court, such as "beginning here," "running there." Discrepancies occur in the record in the description of sections, and in one instance two parcels of the plaintiff's land appear to be located some miles apart.

At the outset of the trial in the court below, appellant's counsel announced that he expected "to make a technical defense" to the case, and his attack on the judgment here is of the same nature. The necessity for the construction of the fence appears to lie in the fact that, without it, cattle belonging to each of the parties overrun and graze on the lands of the other. The cost of the fence is small, and the amount does not appear to be challenged. The claim should be paid.

While the record is not lengthy, we have found it well-nigh impossible, because of the manner in which the testimony was introduced in the court below, to determine all of the points urged by the appellant. We therefore accept the findings of the trial court as sufficiently determinative of all the necessary issues tried in the cause, and, as the findings support the judgment, the judgment is affirmed.

We concur: LANGDON, J.; IRA F. THOMPSON, J.; SEAWELL, J.; SHENK, J.

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218 Cal. 655

## PEOPLE v. MacMULLEN.

Cr. 3635.

Supreme Court of California.

Aug. 1, 1933.

**1. Criminal law** ⇨200(6).

Dismissal, after jury's impanelment, of charge of conspiracy to commit grand theft, alleging theft of $500 as overt act, did not bar subsequent prosecution for grand theft committed by taking such $500.

**2. Criminal law** ⇨1159(3).

Verdict on conflicting evidence could not be disturbed on appeal.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Florence B. MacMullen was convicted of grand theft by means of false pretenses, and she appeals.

Affirmed.

Prior opinion, 17 P.(2d) 763.

William F. Herron, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., W. R. Augustine, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and August L. Fourtner, Asst. Dist. Atty., both of San Francisco, for the People.

CURTIS, Justice.

[1] Defendant and three other persons were charged in an indictment presented by the grand jury of the city and county of San Francisco with the crime of conspiring to commit the crime of grand theft of a certain $500, and also as the overt act it was alleged that sum was actually stolen. The defendant pleaded not guilty. The case was set for trial and a jury impaneled to try the case. Thereafter the court, upon motion of the district attorney and without the consent of the defendant, dismissed said charge, and the jury was discharged. Subsequently, a second indictment was filed against the defendant alone, charging her simply with the crime of grand theft in taking the identical $500, which in the prior indictment she was charged with taking as the overt act in furtherance of the conspiracy. To this second indictment the defendant pleaded not guilty, once in jeopardy, and former acquittal. Upon the trial under the second indictment, the jury found her guilty, and, upon her pleas of once in jeopardy and former acquittal, the verdict of the jury was for the people and against the defendant. The defendant has appealed from the judgment and the order denying a new trial.

Defendant contends that, since the theft of the sum of $500 was an essential element of the crime of conspiracy, it having been alleged in the first indictment as the overt act committed in furtherance of the conspiracy, the dismissal of said indictment after the impaneling of the jury, under the circumstances detailed above, operated as an acquittal of defendant of the overt act as the substantive offense in the second indictment. It is admitted that the proceedings taken at the first trial, in legal effect, amounted to an acquittal of defendant of the crime of conspiracy. While there is some diversity of opinion upon the question presented, the overwhelming weight of authority is that the acquittal of a defendant of the crime of

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⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes conspiracy to commit a crime is not a bar to a subsequent prosecution of said defendant for the commission of said crime, even though said crime is alleged in the conspiracy indictment as the sole overt act committed in furtherance of the conspiracy. 16 Cor. Jur. 280; Burton v. United States, 202 U. S. 344, 26 S. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; Bens v. United States (C. C. A.) 266 F. 152; Bell v. United States (C. C. A.) 2 F.(2d) 543; Lewis v. United States (C. C. A.) 6 F.(2d) 222; Chew v. United States (C. C. A.) 9 F.(2d) 348; Mitchell v. United States (C. C. A.) 23 F.(2d) 260; Fall v. United States, 60 App. D. C. 124, 49 F.(2d) 506. In the Bens and Fall Cases the Supreme Court of the United States denied a petition for a writ of certiorari for the purpose of reviewing the decision therein. Bens v. Power, 254 U. S. 634, 41 S. Ct. 8, 65 L. Ed. 449; Fall v. U. S., 283 U. S. 867, 51 S. Ct. 657, 75 L. Ed. 1471. We feel that these authorities are decisive of the questions. There are two decisions of the District Court of the United States (United States v. Rachmil et al., 270 F. 869, and United States v. Clavin, 272 F. 985) expressing a contrary rule. They are out of line with the vast majority of decisions upon the subject. There is also language in a number of the decisions of this state expressing approval of the majority rule. People v. Clensey, 97 Cal. App. 71, 274 P. 1018; People v. Eiseman, 78 Cal. App. 223, 248 P. 716; People v. Martin, 114 Cal. App. 392, 300 P. 130. Appellant relies with some assurance upon the case of Oliver v. Superior Court, 92 Cal. App. 94, 267 P. 764. In that case the court held that the acquittal of defendants of the crime charged as the overt act in the conspiracy charge was a bar to any further prosecution on the conspiracy charge. But the reverse of that rule is not true. (See authorities above cited.) The cases of People v. Keyes, 103 Cal. App. 624, 284 P. 1096; In re Getzoff, 104 Cal. App. 261, 286 P. 1044, and In re Berman, 104 Cal. App. 259, 286 P. 1043, are in no way helpful to appellant.

The above conclusion is the same as that reached by the District Court of Appeal when the case was before that court for decision, but we have deemed it advisable to rewrite the decision, for the reason that on reargument before us the parties presented many additional authorities not cited in their former briefs, nor referred to by the District Court of Appeal in its opinion.

[2] We are also in accord with the opinion of the District Court of Appeal in its disposition of a further contention of appellant regarding the insufficiency of the evidence to support the verdict. That court disposed of that point in the following language: "The defendant further contends that the evidence was insufficient to justify the verdict of the jury which found appellant guilty of grand theft by means of false pretenses, because it affirmatively appears that the persons who parted with their money did not rely upon any statements made by the defendant. The defendant quotes evidence which sustains her contention. The Attorney General quotes evidence which sustains the judgment. In other words, there was a conflict in the evidence on the subject. That conflict was for the jury's solution. This court may not disturb the verdict."

The order and judgment appealed from are hereby affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.

134 Cal.App. 81

## PEOPLE v. MacMULLEN et al.

**Cr. 1680.**

District Court of Appeal, First District, Division 1, California.

Aug. 29, 1933.

Hearing Denied by Supreme Court Sept. 28, 1933.

**1. Conspiracy 🔑43(2).**

Indictment for conspiracy to commit crime, though only one person is indicted, must show that two or more persons, even if unknown, conspired together (Pen. Code, § 182).

**2. Conspiracy 🔑47.**

In prosecution for conspiracy, evidence must show that at least two of persons charged committed offense, because gist thereof is conspiracy (Pen. Code, § 182).

**3. Courts 🔑91(1).**

Court of Appeal *held* bound by Supreme Court's decision that husband and wife, being legally one person, cannot alone be guilty of conspiracy (Pen. Code, §§ 26, 182).

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Florence B. MacMullen and husband were convicted of conspiracy to commit grand theft, and they appeal.

Reversed and remanded.

Hearing denied by Supreme Court; SEAWELL and CURTIS, JJ., dissenting.

William F. Herron and Edward McDonald, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for the People.

BURROUGHS, Justice pro tem.

The appellants, Florence B. MacMullen and Thomas D. MacMullen, are husband and wife. They were jointly indicted by the grand jury of the city and county of San Francisco with Pansy B. Connor and Herschel M. Connor, who are also husband and wife, and accused of the crime of conspiracy to commit grand theft. Each one of the four defendants entered a plea of not guilty to the charge. They were tried together, and, acting on the advice of the court, the jury returned a verdict of not guilty as to Mr. and Mrs. Connor. After deliberation the jury found the other two defendants guilty. From the order denying their motion for a new trial and the judgment of the court sentencing them to the state prison, they have appealed to this court.

It is contended by the appellants that, as a husband and wife are in law regarded as one person, and two persons are necessary to commit the crime of conspiracy, the acquittal of Mr. and Mrs. Connor also entitled them to an acquittal.

[1, 2] That the question thus presented may be better understood, it is undisputed that it is the law that on a charge of conspiracy, even though but one person is indicted, the statement of the offense in the indictment must show that two or more persons, even though the other person or persons are unknown, did in fact conspire together to commit the crime. Upon a trial for the offense, the evidence must show that at least two of the persons named in the charging part of the indictment committed the offense because the gist of the offense is the conspiracy. If these elements are not present, then a conviction cannot be had. Section 182 of the Penal Code provides that, if two or more persons conspire to commit any crime (and the crime here charged is grand theft), they are guilty of a felony.

[3] In People v. Richards, 67 Cal. 412, 413, 7 P. 828, 829, 56 Am. Rep. 716, it is said: "No one can dispute, or has ever disputed, that the offense cannot be committed by one alone, and it would seem that the husband and wife were one, in the sense that they could not conspire without the co-operation of another, at least." It is further said in this case, citing from Wharton's Criminal Pleading and Practice: "In an indictment for conspiracy less than two cannot possibly be joined; a wife and husband together not being sufficient. * * *"

In People v. Miller, 82 Cal. 107, 22 P. 934, 935, a man and wife were charged with criminal conspiracy and convicted by the jury. On appeal to the Supreme Court, the sole contention was made that the information did not accuse the appellant of any crime because, a man and his wife being in law but one person, no prosecution for a conspiracy can be maintained against them. It was held: "That such was the rule of the common law we cannot doubt, and we find nothing in the Code or statute of this state to indicate an intention of the legislature to change it."

In the case of Dawson v. United States, 10 F.(2d) 106, 107, decided by the United States Circuit Court of Appeals, Ninth Circuit, on January 18, 1926, in a case arising in the state of Idaho, a man and a woman, claiming to be husband and wife, were charged with conspiracy to violate the White Slave Act (18 USCA § 397 et seq.). On a trial of the charge, evidence was admitted from which the jury could have found as a fact that the parties charged were husband and wife, and an instruction was offered on their behalf in the following language: " 'That if you find from the evidence that the defendants were man and wife during the period covered by the first count or charged in the indictment, and the evidence herein, you should find both defendants not guilty on that count. The charge is one of conspiracy to commit crime, and it is not legally possible for a wife so to conspire with her husband, nor a husband with his wife.' An exception was reserved, and error is assigned on the refusal of this request. * * * In 12 C. J. 543, it is said: 'It has been uniformly held that, as husband and wife are considered one in law, they cannot be guilty of a conspiracy.' In 2 Bishop on Criminal Law (9th Ed.) § 187, the law is thus stated: 'Husband and wife, being regarded in the law as one person, cannot without other combination commit this offense. But, where there is another conspirator, a wife may be joined with her husband in the indictment.' The same rule is announced in a note in 4 A. L. R. 282. The language of these text-writers is supported by the following decisions: People v. Miller, 82 Cal. 107, 22 P. 934; Merrill v. Marshall, 113 Ill. App. 447, 456; Worthy v. Birk, 224 Ill. App. 574, 583; Commonwealth v. Allen, 24 Pa. Co. Ct. R. 65, 66; State v. Clark, 9 Houst. (Del.) 536, 540, 33 A. 310. The law is held to be otherwise in Smith v. State, 48 Tex. Cr. R. 233, 89 S. W. 817, 820, 821, and Dalton v. People, 68 Colo. 44, 189 P. 37. The common-law rule unquestionably supports defendants' contention; a rule so well established and so generally recognized by the modern authorities should not be judicially repealed. We think the requested instruction should have been given. The government relies on Wilson v. U. S., 232 U. S.

563, 34 S. Ct. 347, 58 L. Ed. 728. This was not a conspiracy case. The court affirmed the conviction of a man and wife charged with violation of the White Slave Act."

In People v. Eppstein, 108 Cal. App. 72, 80, 290 P. 1054, 1058, while the point in issue was not directly involved, the court says: "It is true that it was flatly held in People v. Miller that a prosecution will not lie for the specific crime of conspiracy where the only parties charged with participating in it are husband and wife. No conspiracy, as such, has in the present case been charged in the information."

The people concede that by force of the decision in the case of People v. Miller, supra, the appellants would be entitled to an acquittal, except that since the rendition of that decision the status of married women has undergone a great change; and, although at common law the wife was little more than a chattel, at the present time she occupies before the law practically the same status as the male. In support of this contention, certain changes in the law relating to the civil rights and duties of women are cited, but these do not purport to affect the criminal responsibility of women.

In the cases of Smith v. State, 48 Tex. Cr. R. 233, 89 S. W. 817, and Dalton v. People, 68 Colo. 44, 189 P. 37, relied upon by the people, it was held that the common-law rule has been abrogated by statute. But in People v. Miller, supra, after referring to the common-law doctrine, it is said: "We find nothing in the Code or statute of this state to indicate an intention of the legislature to change it."

It is worthy of remark that section 26 of the Penal Code makes all persons capable of committing crime with certain exceptions, one being married women who, acting under the threats, command, or coercion of their husbands, commit acts declared by the Code to be misdemeanors; and that section 182 of the same code, defining conspiracy, adds no exceptions to those contained in the above section.

In People v. Graff, 59 Cal. App. 706, 211 P. 829, a similar question was considered; namely, whether a married woman could commit the crime of embezzlement if her alleged criminal acts concerned the property of her husband. It was held that she might be guilty of the offense under such circumstances, and a hearing was denied by the Supreme Court. However, People v. Miller, supra, has never been overruled, and until this is done we are bound to follow that decision. Canadian Bank of Commerce v. Leale, 14 Cal. App. 307, 111 P. 759; Eddlemon v. Southern Pacific Co., 41 Cal. App. 340, 182 P. 811; Blair v. Williams, 86 Cal. App. 676, 261 P. 539; Capron v. West, 114 Cal. App. 633, 300 P. 149. Nevertheless, it appears to us that the question merits further consideration by that court or by the Legislature.

For the reasons stated, the order and judgment appealed from are reversed and the caused remanded.

We concur: TYLER, P. J.; CASHIN, J.

218 Cal. 716

## BULGER v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

S. F. 14838.

Supreme Court of California.

Aug. 29, 1933.

**1. Master and servant** ⚷398.

Limitations for bringing action under Compensation Act *held* tolled on ground that employee was lulled into believing that employer assumed responsibility for any compensable injury employee suffered (St. 1917, p. 841, § 11, subd. b(1), and subd. c).

Evidence disclosed that employee was injured on July 28, 1931, and continued to work until August 7, 1931, when he was compelled to lay off by reason of increasing pain; on August 9, he was placed in a hospital where he remained four weeks, and he remained bedridden after returning from hospital; that, on August 17, employer's doctor assured employee that employer would take care of everything, and that employee was sent check for half pay until February 6, 1932, and claim for compensation was filed on July 25, 1932.

**2. Master and servant** ⚷398.

Employee's claim for compensation brought more than six months after injury *held* not barred by limitation, where claim was brought within six months after last payment by employer to employee (St. 1917, p. 841, § 11, subd. b(1), and subd. c).

In Bank.

Original application for certiorari by James P. Bulger to review an order of the Industrial Accident Commission denying compensation to petitioner for injuries sustained while in employ of the Shredded Wheat Company.

Order annulled and remanded, with directions.

Grove J. Fink and John B. Connolly, both of San Francisco, for petitioner.

Arthur I. Townsend, of San Francisco, for respondents.

SEAWELL, Justice.

Petition by James P. Bulger, after order denying a rehearing, praying for a review of an order made by the Industrial Accident Commission denying petitioner compensation rating for an injury alleged to have been suffered by him arising out of and in the course of his employment, while engaged as assistant engineer and watchman at the Shredded Wheat Company's plant located in the city of Oakland, this state, on July 28, 1931. Respondent Shredded Wheat Company, a corporation, which is an adjunct of the National Biscuit Company, is self-insured. The commission held that petitioner's claim for compensation was barred, inasmuch as no claim was filed within a period of six months following the day of alleged injury, and no medicinal treatment was furnished or compensation paid, or other act done by the employer during or after the expiration of said six months' period which could be said to be sufficient to toll the statute. No other issue was decided.

Petitioner at the time of said injury was forty-six years of age, and apparently in sound health. He had been in the employ of the company continuously for a period of nine years and admittedly was a very trustworthy employee. His stipend was $43 per week. Prior to July 28, 1931, the duty of watchman was consolidated with his duty as assistant engineer, and he was working in such dual capacity at the time he claims to have received injuries which have resulted in total permanent disability. Permanent disability, rapidly following the incident which will hereafter be related, is admitted by respondent Shredded Wheat Company, and it was solely for this reason that his employment came to an end by order of said company. Petitioner's hours on the Sunday night in question were from 12 o'clock midnight to 8 o'clock the following morning.

The building in which petitioner was working is a four-story building proper. The roof also serves as a floor. The smokestacks are visible from the roof. A steel staircase leads from the basement in which the steam engines are located to the roof. These stairways, which have iron railings, are somewhat precipitous. At about 2 o'clock a. m., petitioner made his way to the roof of the building on his rounds, punching the time clocks which were placed on each floor. This took his attention from the boilers from fifteen to twenty-five minutes. No claim is made that petitioner was not at all times acting within the scope of his employment. While on the roof in the performance of duty, he observed that the smoke coming from the stacks appeared white, resembling steam. This indicated that the fires were out and quick action was necessary in reaching the boiler room, as the danger was great that the engine would back fire and blow the front out and cause serious damage. Such a casualty had occurred once before. With the seriousness of the situation in his mind, petitioner describes the hurried descent he made to the basement down a dimly lighted stairway. He was saved from falling headlong several times by grabbing the railing on his way to the engine rooms. Petitioner claims that his arms and body were badly wrenched and jarred by catching the railing to break the momentum of his descent. He also claims that he experienced severe pain through his shoulders and arms, especially in the left arm, before he reached the engine room. He testified that he related his experience to two fellow employees on the morning of the incident, but made no formal report to the company, as he did not then regard it as serious. Petitioner, though suffering pain, continued to work until August 7, a period of ten days from the day of injury, when he was compelled to lay off by reason of increasing pain and go under the care of a physician. On August 9 he was placed in a hospital, where he remained for a week under treatment. He testified that, immediately after making the violent descent described down the stairway, his troubles started and grew progressively worse until halted somewhat by hospital treatment which he received. He suffered severe pain in his arms, shoulders, and chest. His left hand and fingers also became seriously involved. Dr. Frank R. Makinson, the company's physician, who saw the petitioner twice, testified that he did not regard the case as a proper charge on industry. He diagnosed it as rheumatic endocarditis bearing no causal relation to the injuries which petitioner claimed to have suffered. When asked if a severe strain such as petitioner described could have been the proximate cause of the development of rheumatism or arthritis, his answer was that such things were debatable, and possibly within the realm of possibility, but not probability. When pressed further he said: "I say that it is within the realm of very remote possibility, but not probability. To say no, I think would be unfair. The picture is that of acute rheumatism. There is nothing unusual about this acute attack of rheumatism, as I see it."

Dr. H. L. Parish, the physician who had charge of the case from August 7, 1931, and made fifty-eight visits, ending August 27, 1932, in a very full report described the pain centers in the left shoulder, anterior chest wall, and right shoulder, all of which were swollen on his visit of August 9. The knees, ankles, wrists, and joints of the fingers were also badly swollen. The character of the approach, involving one joint after another, indicated to him the beginning of articular rheumatism. He felt positive that the original muscular strain furnished the evidence of an accidental etiology.

No other physician testified in the proceeding. What relation the mental and physical shocks may have had to the ills, if any, which have permanently afflicted petitioner, was not found by the commission, as compensation was denied on the ground that the proceeding was barred by the statute of limitation.

The question presented is whether as a matter of law petitioner's claim was barred, as held by the Industrial Accident Commission, by the provisions of section 11, subdivision (b) (1) and (c), of the Workmen's Compensation, Insurance, and Safety Act of this state. The issue was decided by the commission upon the interpretation it placed upon certain letters and certain acts of the parties about which there is no dispute.

Subdivision (b) (1) of section 11 of the Workmen's Compensation Act (St. 1917, p. 841) provides that proceedings for the collection of the benefit provided by the act for the collection of disability payment must be commenced within six months from the date of the injury. Subdivision (c) provides that the payment of compensation, or any part thereof, or agreement therefor, shall have the effect of extending the period, within which proceedings for its collection may be commenced, six months from the date of agreement or last payment of such compensation, or any part thereof, or the expiration of the period covered by any such payment. The concluding language of said subdivision (c), however, excepts, from the bar of the six months' period, persons suffering from the following physical disabilities: "Provided, further, that the provisions of this section shall not apply to an employee who is totally disabled and bedridden as a result of his injury, during the continuance of such condition or until the expiration of six months thereafter." It is admitted that petitioner was totally and permanently disabled immediately following the alleged injury, as that was made the specific ground of discharge by the employer in February, 1932, after awaiting his recovery for several months. That he was bedridden at least for a long period and suffered severe pain following his return from the hospital on August 16, 1931, the testimony of the medical witnesses and the evidence obtained from other sources abundantly establishes. The evidence also would seem to justify without conflict a finding that petitioner was actually bedridden for a sufficient period of time immediately following July 28, 1931, the date of the alleged injury, to have tolled the running of the six months' statute, as provided by section 11, subdivision (c), of said act. This important question was not called to the attention of the commission, and consequently it was not considered by it in ruling that petitioner was barred by said statute of limitations. Unquestionably the matter is sufficiently important to require a ruling as to whether petitioner's condition, provided it be shown that he sustained a compensable injury, brought him within the bedridden exception provided in said section. As the case now stands, this important factor in the case, which bears directly upon the question whether or not the petitioner's claim is barred by the general six months' provision, has not been considered or adjudicated.

We now turn to the effect of the undisputed testimony and facts upon which the decision turned. It may be noted at the outset that the commission, as mildly suggested by its counsel, seemed to have entertained doubts as to whether the difficulty in the engine room, which gave reason for petitioner's alarm and caused him to descend the steep stairway in the manner related by him, actually occurred. And, if so, whether his rapid descent was the cause, or in any way contributed to the sudden and serious illness which immediately followed the day on which he claims the incident occurred. This, of course, goes to the merits of the proceeding and has no bearing on the ruling as to the bar of the statute. Without any purpose of prejudging the case upon its merits, we may state that we have read the record, and it cannot be said that petitioner's claim has not the color of merit.

We now direct attention to the consideration of the facts from which the commission drew its deduction to the effect that petitioner's claim was barred.

The morning of July 28, after having finished his night's assignment, petitioner told his fellow workmen, Bill Wharf and George Utley, the latter being in charge of the steam plant, of his hurried and stumbling descent from the fourth to the ground floor, and of the pains which he felt in his arm and chest immediately thereafter. He had never suffered similar pains before and they grew gradually more severe. Ten days later he was sent to the hospital by his physician, where he remained for a week. He was thereafter confined to his bed at intervals of various duration, and the prognosis as to returning health was not encouraging. On August 17, the day after petitioner had returned from the hospital, Dr. Frank R. Makinson, physician in charge of the compensation cases for the Shredded Wheat Company, called upon petitioner at the request of Mr. Campbell, manager of said company. The doctor made no physical examination of petitioner. He testified that his visit was limited to the sole purpose of ascertaining the cause of the accident, and the manner of its occurrence. Petitioner had previously testified as to Dr. Makinson's visit. In his testimony petitioner stated that Dr. Makinson, in concluding his investigation as to the cause of the injury, said: "I think you are just a faithful employee tending to the line of your duties. The employer will take care of everything; look out for all this."

It is the claim of petitioner that he was led to believe that the company, which was self-insured, was taking a paternal interest in his welfare and that his interests would not be allowed to suffer. There is testimony in the record to the effect that petitioner was told by the manager not to ask for compensation, as it would "hurt him on the job." Petitioner testified that his wife, who visited the manager in petitioner's behalf, reported to him the above advice as coming from said manager. No direct denial was made of this testimony. The time at which it was spoken is left in a state of uncertainty.

Dr. Makinson's attention being called to the testimony of petitioner to the effect that he (Dr. Makinson) assured petitioner on his visit of August 17 "that the employer would take care of everything," etc., gave the following testimony: "I don't exactly recall the line of questioning which would be peculiar to me in my questioning as to this. I probably asked him if it were not the fact of a faithful employee carrying out his duties, yes, but at no time did I tell him that the Shredded Wheat would accept responsibility. That I want specifically understood, both from your point of view and the viewpoint of the Shredded Wheat Company. I do not accept any responsibility financially. Mine is purely a medical opinion."

It will be observed that the doctor denied emphatically that his visit was for the purpose of examining petitioner or for the purpose of gaining any information as to petitioner's physical condition, but it was made solely as an investigator of the facts of the alleged injury as related by petitioner.

The physician was next asked: "Q. Did you say any such thing as this, that you imagined from the circumstances that he [petitioner] would be taken care of? A. *I told him this would be properly disposed of*, and he assumed, I presume, that that meant the company would assume responsibility. *Properly taken care of may mean anything.* From my point of view, the proper disposition of this case, that is what I meant." (Italics supplied.) We are of the view that petitioner was justified in inferring from the foregoing language that the company would see to it that he would lose no legal rights by intrusting himself to his employer's care. There is nothing in the doctor's evidence elsewhere which tends to qualify or refute the testimony above quoted.

Petitioner's application for adjustment was filed July 25, 1932. The accident is alleged to have occurred on July 28, 1931. Consequently, if the six months' period of limitation has not been tolled, the claim is barred. Petitioner performed no service after August 7, 1931. It seems, however, that two fellow employees put in extra time and performed petitioner's duties for a period of two weeks immediately following August 7, and that the compensation for said two weeks was paid by the company to petitioner, although he did no work. On December 22, 1931, approximately five months after said injury, said company sent to petitioner the following letter, inclosing a check in the sum of $86, the amount being one-half of his regular salary:

"December 22, 1931.

"Mr. James Bulger, 2215 62d Avenue, Oakland, California.

"Dear Jim: I am happy to enclose our check No. 8982 in the amount of $86.00 in payment of one-half of your regular salary for the month of December.

"This was made possible through the kindness of Dr. E. T. Oakes, manager at Niagara Falls, from whom we just received a wire of authorization.

"All the gang join me in wishing you and your family a Merry Christmas and a Happy New Year.

"Cordially,
"Shredded Wheat Bakery
"National Biscuit Company
"BLC:B Manager."

In January, 1932, petitioner was sent two checks in the sum of $21.50 each. That sum equaled half pay for two weeks, and on February 6, 1932, he was given a check representing the sum of $86, which was half pay for the preceding four weeks. A short time after said last payment was made the company's physician made a physical examination of petitioner and pronounced him permanently disabled and unfit for future service, of which he was notified. He received no further assistance from said company thereafter. This was in February, 1932, a short time after the last payment of one month's half pay was made by the company, to wit, February 6, 1932, and also a short time after the six months' period of limitation, reckoning from July 28, 1931, had expired.

From a communication of Dr. H. L. Parish, dated September 9, 1932, addressed to the commission as explanatory of his bill for medical services rendered petitioner over a long period of his illness, and which is of record in the proceedings, we take the following excerpt: "This [bill for medical attention] included reports and long and frequent telephone communications with the authorities of the Shredded Wheat Biscuit Company, who, up to the time of merging into the National Biscuit Company, manifested the greatest interest in this employee, urging me to expedite his recovery and return to duty."

[1] Pyramiding the foregoing facts and

other evidence which at least inferentially tended to create a belief in the mind of petitioner that he would be cared for by his employer, can it be said as a matter of law that either or both combined are sufficient to toll the statute on the ground that the employee was thereby lulled into believing that the employer had assumed responsibility for any compensable injury he may have suffered? We are of the view that they are.

[2] The Industrial Accident Commission has, from its very early decisions until the present case, held "that whenever compensation is due as a matter of fact * * * then payments for the benefit of the injured employee shall be treated as disability indemnity, whatever the motive may have been in paying them, and whether or not there was any acknowledgment of liability to pay compensation or of payment as compensation." Howell v. Lanfair, 5 I. A. C. Rep. 176. In the instant case the commission did not consider the question as to whether or not the illness which afflicted petitioner was the result of a compensable injury. If, as a matter of fact, it should prove to be such, the statute of limitations would not, under the decisions of the commission and the decisions of the reviewing courts of this state, bar petitioner's claim, as the application for the adjustment of his claim was filed within six months after said last payment.

We think the rule as stated in London Guarantee & Accident Company v. Industrial Acc. Comm., 92 Cal. App. 298, 268 P. 670, 672, which finds support in numerous decisions of the Industrial Accident Commission, is sound and should govern this case. We therefore adopt the following portion of said decision as applicable to and decisive of the instant proceedings:

"Under the provisions of section 11 (c) of the Workmen's Compensation Act the payment of compensation shall have the effect of extending the period within which proceedings for its collection may be commenced, six months from the date of the last payment, and, as stated, the evidence here shows without dispute that, while Read was totally disabled in the hospital, his wages were being constantly paid by his employer. We are of the opinion that the payment of such wages, under the circumstances above related, constituted the payment of compensation for the injury, and that therefore, since Read's application was filed within six months after the last payment of such compensation, his claim was not barred by the statute of limitations.

"There appears to be no case adjudicated by the courts upon this particular point, but it has long been the rule of the commission that where, as here, an employee is totally disabled. and his employer continues to pay him full wages during the period of his disability, such payments do not constitute wages or gratuities, but are payments of compensation which operate to toll the statute during their continuance (27 Cal. Jur. p. 458; Oders v. Great Western Electro Chemical Co., 6 I. A. C. Rep. 95); and we find nothing unreasonable in the construction thus placed upon the terms of the act."

There is no merit in the point made by respondents that the case above cited is not authority for a like ruling upon the facts of the instant case on the ground that petitioner in said cited case was paid full compensation, while in the instant case the employee was paid on a half-wage basis. In each case the employee performed no services. One received full compensation, and the other half compensation. We are unable to see any reason why one should receive the benefits of the provisions of the act and the other should be excluded therefrom. It would seem that the one receiving half compensation would have greater reason for believing that he had been put upon a compensation basis than the one receiving full compensation. The former's compensation would more nearly agree with industrial compensation in amount than would the other's. In both cases there was nothing said by the employer to indicate that said employer repudiated responsibility. In fact, in the instant case, it carried the employee along on half pay during all of the latter six months' period to and past the limit fixed by the act as a bar.

We are of the view that petitioner's claim for compensation is not barred by the statute of limitations, for the reasons set forth herein. We express no opinion as to the merits of the claim, as that is a matter which must be determined solely by the commission.

The order of the commission denying compensation on the ground of the bar of the statute is annulled, and the cause is remanded to the commission, with directions to hear and determine the matter upon its merits.

It is so ordered.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; IRA F. THOMPSON, J.

## CRUM et ux. v. MT. SHASTA POWER CORPORATION.*

## ALBAUGH v. SAME.

Sac. 4752.

Supreme Court of California.
Aug. 28, 1933.

Rehearing Granted Sept. 25, 1933.

**1. Waters and water courses 🔑39.**

Lands beside pool above mouth of river flowing into it *held* riparian to such river during low water times, when bulk of water therefrom remained in pool, though there was no current therein, but not during flood water season.

**2. Appeal and error 🔑1099(3).**

Appellate court's opinion on appeal from judgment awarding damages for diversion of water of river that plaintiffs' lands were riparian thereto in summer months *held* law of case on subsequent appeal.

**3. Waters and water courses 🔑46.**

Riparian owner may use water to propel machinery, subject to lower riparians' domestic uses, but cannot divert water entirely around land of opposite riparian owner, if resulting in substantial damage to latter.

**4. Waters and water courses 🔑78.**

Owners of lands beside pool above mouth of river flowing into it could recover damages for power company's diversion of waters of river during low water times when they remained impounded in pool.

**5. Waters and water courses 🔑84.**

Riparian owner may recover damages for opposite riparian owner's diversion of waters of stream around former's land, though he has all water he needs, where quality thereof is materially impaired.

**6. Waters and water courses 🔑84.**

Riparian owner cannot recover damages for diversion of water of stream even as against appropriator without showing substantial, actual, or prospective damage; mere interference with his usufructuary title to water being insufficient (Const. art. 14, § 3).

**7. Waters and water courses 🔑86.**

Power company, diverting water of river flowing into pool, was entitled to minimize resulting damages to owners of lands beside pool by guaranteeing them water supply.

**8. Waters and water courses 🔑87.**

Stipulation that power company, diverting water of river flowing into pool, would maintain natural level of pool, should have been admitted in evidence in action by owners of lands beside pool for damages.

**9. Waters and water courses 🔑84.**

Owners of lands beside pool could not recover damages for diminution in quantity of water therein because of power company's diversion of water of river flowing into pool, where it restored natural level thereof by constructing dam.

**10. Waters and water courses 🔑64.**

Riparian owner is entitled, even as against another riparian, to substantially unpolluted stream, as well as undiminished flow of water.

**11. Waters and water courses 🔑87.**

Evidence *held* to show that quality of water in pool was materially impaired by power company's diversion of water of river flowing into it, so as to entitle riparian owners to recover damages.

**12. Appeal and error 🔑1099(7).**

Appellate court's statement in opinion on appeal from judgments awarding damages for diversion of water of river flowing into pool that there was no substantial evidence of pollution of pool thereby *held* not law of case, in view of substantially stronger evidence of pollution on subsequent trial.

**13. Appeal and error 🔑1178(6).**

Causes of action for diversion of water of river flowing into pool must be remanded for retrial on issue of damages, where evidence did not show amounts awarded for unproved diminution of quantity of water in pool and proved impairment of quality thereof.

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In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Consolidated actions by Merton Crum and wife and by William J. Albaugh against the Mt. Shasta Power Corporation. Judgments for plaintiffs, and defendant appeals.

Affirmed in part, reversed in part, and remanded for a new trial on the issue of damages.

See, also, 124 Cal. App. 90, 779, 12 P.(2d) 134, 137.

William B. Bosley, Thomas J. Straub, Athearn, Chandler & Farmer, and Frank R. Devlin, all of San Francisco, and Chenoweth & Leininger, of Redding, for appellant.

Jesse W. Carter, of Redding, and Arthur C. Huston, of Woodland (Annette Abbott Adams, of San Francisco, of counsel), for respondents.

PER CURIAM.

These two cases are now before the appellate courts for the second time. On the first appeals, the District Court of Appeal reversed judgments in favor of the respective plaintiffs. Crum v. Mt. Shasta Power Corp., 117 Cal.

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*For subsequent opinion see 30 P.2d.

App. 586, 4 P.(2d) 564; Albaugh v. Mt. Shasta Power Corp., 117 Cal. App. 612, 4 P.(2d) 574. Petitions for hearing in this court were denied. After the reversals, the two above cases were consolidated for trial, and were retried before the court sitting with a jury. The jury brought in a verdict in favor of Crum in the sum of $32,100, and in favor of Albaugh in the sum of $96,300. Defendant has separately appealed from each judgment.

The controversy between these parties is of long standing, and grows out of the diversion by the defendant for power purposes of substantially all of the waters of Fall river above the confluence of that river with the Pit river. The Fall river empties into the Pit river in the northeastern section of Shasta county. The two streams come together at approximately right angles. The quantity of water flowing in Fall river in the summer time is much larger than the quantity flowing in the Pit river in those months. Pit river is a flashy stream with a maximum flow of 10,000 second feet in the winter months, and a minimum flow at Young's Falls of as little as 3 second feet in the summer months. The flow of Fall River, on the other hand, is much more uniform. It has a maximum flow of about 1,800 second feet, with a minimum of about 1,000 second feet.

[1] Plaintiffs' lands are located on opposite sides of the Pit river on what is referred to as Pitville pool, about 5 miles up stream from the confluence of the two rivers. Crum owns about 116 acres and Albaugh owns about 400 acres; both areas being adjacent to the pool on opposite sides thereof.

It is because of the physical characteristics of the Pitville pool that this action has arisen. About 500 feet downstream from the confluence of the two rivers, there is a natural rock reef or barrier extending nearly across the bed of the Pit river. This rock reef acted as a partial natural dam, and caused the waters of the two streams to back up, creating Pitville pool. About 8½ miles upstream from the rock reef, on the Pit river, is to be found Young's Falls, located at the town of Pittville. The stream from Young's Falls down to the rock reef is known as the Pitville pool. Paintiffs' civil engineer, Mr. Mau, testified as to making a survey of the pool. He made a profile of the pool, which was introduced into evidence as Plaintiffs' Exhibit 3. From this exhibit and from the testimony of Mau interpreting it, it appears that the maximum depth of this pool opposite Albaugh's lands is over 27 feet lower than the top of the rock reef, and that the maximum depth of the pool opposite Crum's lands is over 19 feet lower than the top of the rock reef. This profile map demonstrates that the bed of the Pitville pool from the rock reef to Young's Falls is below the level of the top of the rock reef and runs slightly downhill from the reef. Stated another way, the bed of the pool from Young's Falls to the rock barrier runs slightly uphill, and at no place appears to be within about 7 feet of the height of the rock reef. This witness and others testified that the surface of the pool is practically level. Several of plaintiffs' witnesses testified that there was no noticeable current, and, in fact, no current in the pool in the summer months; that, in the absence of a wind, objects thrown into the pool would remain approximately stationary for many hours.

This physical condition, according to plaintiffs' theory, makes their lands riparian to Fall river in the summer months, although their lands are located more than 5 miles from where the Fall river empties into the Pit river. We agree with plaintiffs that the evidence introduced on this trial, as well as the law of the case, as established on the prior appeals, fully establishes that Pitville pool is a natural reservoir, which is filled with water in the summer months from both the Pit and Fall rivers, and that in those months plaintiffs' lands are riparian to both streams. We are of the opinion that the evidence establishes that Fall river, in the summer months, in a state of nature, contributed a large quantity of water to this pool, which water mingled with and became an inseparable part of the corpus of the water in the pool. In other words, Pitville pool is a miniature lake in the summer months, its waters in that period consisting of Pit and Fall river waters, mingled indiscriminately. We cannot add to what the District Court of Appeal said on this point on the prior appeal in the Crum Case. We adopt as a part of this opinion the following portions of the appellate court's decision [117 Cal. App. at page 596, 4 P.(2d) 564, 567]:

"It may seem like fiction to say that land which is located on a pond formed by a dam in the bed of one stream may still be riparian to another stream which is 5 miles distant from this land. While Fall river contributes a substantial quantity of water which mingles with and remains in Pitville pool, this pond may be deemed to be an inlet or arm of Fall river, in spite of the fact that there is no current in the pool by means of which the water of the last-mentioned stream may be actually traced to the locality of the land. It is not essential there shall be a current of the stream which actually washes the shores of plaintiff's land. It is sufficient if the waters of the respective streams mingle in the same reservoir to form the corpus of the same pool. The pond then becomes a basin which is tributary to both streams. This situation may then make plaintiff's land riparian to both rivers. The case of Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 17 Ann. Cas. 823, 22 L. R. A. (N. S.) 401, 99 P. 520, 522, is authority for this exact conclusion. It is there said:

" 'The right of a riparian owner to the use of water bordering upon his land does not, as plaintiffs contend, arise from the fact that the water is flowing, and that any part thereof taken from the stream is immediately replaced by water from the current above it. It comes from the situation of the land with respect to the water, the opportunity afforded thereby to divert and use the water upon the land, the natural advantages and benefits resulting from the relative positions, and the presumption that the owner of the land acquired it with a view to the use and enjoyment of these opportunities, advantages, and benefits. Duckworth v. Watsonville, etc., Co., 150 Cal. 526, 89 P. 338. Out of regard to the equal rights of others whose lands may abut upon the same water, the law has declared, as will hereafter be more fully shown, that the use of the water for irrigation, so far as it affects the right of others similarly situated, must be reasonable, and must be confined to a reasonable share thereof; but, with this common limitation, the right to use water upon adjoining land applies as well to the water of a lake, pond, slough, or any natural body of water, by whatever name it may be called, as to a running stream. * * * We have never heard that riparian rights depended upon the character of the current in the water upon which these rights extend. They exist if the water be an artificial pond made by a dam in a water course, as well as when it is an unobstructed running stream.'

"So long as the bulk of water from Fall river remains impounded in Pitville pool, we may assume, upon the reasoning of the last-mentioned case, that plaintiff's land is riparian to Fall river.

"It must be conceded, however, that the same situation does not prevail in times of flood water during which these two rivers rush down over the dam with mighty velocity at a depth of many feet. It is apparent that under such conditions very little of the water of Fall river remains impounded in the pool. During the season when the flood water and current of Pit river carry Fall river water down over the dam, the plaintiff's land is not riparian to Fall river. It follows that, while the plaintiff's land may be riparian to Fall river during times of low water in the summer, it is not riparian to that stream during the season of flood water in the winter months.

"The appellant suggests upon rehearing that this court has misconstrued the application of the case of Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 17 Ann. Cas. 823, 22 L. R. A. (N. S.) 401, 99 P. 520, 524, by holding that, because the Pit and Fall rivers both contribute to the supply of water in the Pitville pool, the land of plaintiff would become riparian to Fall river during the season when its water became an inseparable part of the corpus of that pond. It is pointed out that the Supreme Court held that the Fresno slough was an arm or inlet of the San Joaquin river only when the water from Kings river was not flowing into the slough; that the court did not hold that the land which was situated on the slough was riparian to both rivers at the same time. It is therefore argued that this court erred in holding that the plaintiff's land was riparian to both Fall and Pit rivers at the same time. We have re-examined that case with great care, and have concluded there is nothing therein contained which is in conflict with what was said in our former opinion [299 P. 822] *and which is herein adopted as the law of this case respecting that subject.*" (Italics ours.)

[2] Under the above reasoning, which has become the law of the case, we take it to be settled that plaintiffs' lands, in the summer months, are riparian to both Pit and Fall rivers.

The defendant is a hydroelectric power company. It owns all the land on both sides of and riparian to Fall river, from where it empties into the Pit river, to a point about 2 miles up stream. It also owns all the land on both sides of Pit river and riparian thereto from a point about 600 feet above the juncture of that stream with the Fall river, down the Pit river for about 7 miles. At this lower point on Pit river is located defendant's power plant. In 1920, defendant started construction of a dam, penstock, and tunnel on the Fall river about one mile above its juncture with the Pit, for the purpose of diverting for power purposes substantially the entire flow of Fall river to the power plant on Pit river. By means of these diversion works, the entire flow of Fall river, with the exception of a small quantity allowed to remain for the use of certain lower claimants other than the plaintiffs, was diverted from a point above the confluence of the two streams to a point about 7 miles below. Thus the waters of Fall river were wholly and entirely diverted away from Pitville pool.

The diversion works and power plant were completed on September 30, 1922. The entire flow of Fall river was diverted on that day for a trial run. Immediately the level of the water in Pitville pool was lowered about 5 feet. The next day the water of Fall river was turned back by defendant into its natural channel, and the pool immediately was filled to its normal depth. To give an idea of the relative amounts of water contributed by each stream to the waters of the pool, plaintiffs' engineer Mau testified that in the summer months, if the pool were empty, it would take about 100 days for the flow of Pit river to fill the pool, while the normal flow of Fall river would fill the pool in one day.

As already mentioned, a short distance

down stream from the confluence of the two rivers is located a natural rock reef, which serves as a natural dam and holds a portion of the waters of the two rivers in Pitville pool. This rock reef is on land owned by defendant. On the western end of this rock barrier was a large crevice some 8 feet in depth, which permitted a considerable quantity of water from the pool to escape down the Pit river. Some time between September, 1922, and January, 1923, the defendant constructed a concrete dam across the crevice in the natural rock dam; thus connecting the rock barrier with the western shore of Pit river. In January of 1923 defendant again diverted all of the waters of Fall river away from Pitville pool. The natural dam, as supplemented by the artificial dam, served to impound effectually the waters of Pit river, so that the level of Pitville pool was maintained at the same height as before the diversion. Sufficient water has always come down Pit river and its tributaries to keep the pool full, and to keep the water running over the dam. It is a conceded fact that, from the date of the diversion to the date of the last trial in 1932, the level of Pitville pool has thus been maintained as it was before the diversion. In other words, plaintiffs at all times since the diversion have had access to the same *quantity* of water as existed before the diversion.

Plaintiffs commenced the present actions in 1923; two causes of action being alleged. Plaintiffs alleged their ownership of lands on Pitville pool; that said lands were riparian to Fall river; that defendant had wrongfully diverted the entire flow of Fall river; that by reason thereof plaintiffs have been deprived of their riparian rights in and to the waters of Fall river. The first count of the complaint prayed for an injunction; the second count for damages. Defendant answered, denying that plaintiffs' lands were riparian to Fall river. This issue has been determined adversely to defendant. Defendant also alleged that it was diverting the water in the exercise of its riparian right; that it had constructed the dam at the rock reef; and that since its construction the level of the water had been maintained. As a separate defense, defendant set forth that it was using the waters of Fall river for the development of electric energy for the purpose of sale to the public; that plaintiffs knew of the construction of the power plant and permitted its construction without objection; that plaintiffs are estopped from preventing the diversion by reason of the fact that a public use had attached to the waters diverted. On the issues thus formed, the cases went to trial, resulting, as already stated, in judgments in favor of plaintiffs. While the appeals were still pending in the district court, plaintiffs abandoned their claim for an injunction. The appellate court reversed the judgments and sent the cases back for retrial. On the retrial, the pleadings were not amended, except as to the prayer of the answer. The original prayer was stricken, and, in lieu thereof, there was inserted a prayer asking for (1) a determination of the respective rights of the parties in and to the water, and (2) a determination that defendant's diversion and use of the waters was in the exercise of its riparian rights.

One other occurrence preceding the present trials must be referred to. After the first appeals had become final and the remittitur filed in the lower court, it was discovered that defendant as the successful party on appeal had been awarded its costs. Plaintiffs thereupon moved in the appellate court to recall and modify the remittitur to allow plaintiffs their costs, on the theory that the suits were inverse condemnation suits, and that therefore the condemnees were entitled to costs. The appellate court held the actions were not actions in eminent domain and that therefore plaintiffs were not entitled to costs. Crum v. Mt. Shasta Power Corp., 124 Cal. App. 90, 12 P.(2d) 134; Albaugh v. Mt. Shasta Power Corp., 124 Cal. App. 779, 12 P.(2d) 137. These last decisions were not rendered until the day after the jury brought in its verdict on the retrial of these cases, so that the trial court did not have the benefit thereof on the retrial.

[3, 4] One of the most perplexing problems presented on the present appeal is to determine just what the appellate court decided on the prior appeals, and to determine just what was there determined to be the law of the cases. From the quotation above, it appears that the appellate court clearly held that plaintiffs' lands were riparian to Fall river in the summer time. It was also held that defendant's use of the water of Fall river would not ripen into a right by adverse possession, evidently because defendant disclaimed any intent to appropriate the water and claimed to be diverting it in the exercise of its riparian right. The effect of the public use having attached to the water diverted was not discussed. The appellate court also pointed out that the action was not one for an apportionment of the waters between riparian owners, but an action by one riparian owner against the other for injury to the former's usufructuary title to the waters of Fall river. After pointing out that a riparian owner has the right to have the water flow past his land in its usual course, the court stated [117 Cal. App. 603, 4 P.(2d) 564, 570]: "It follows that a diversion of that river [Fall river] destroys the natural condition which makes the land bordering on Pitville pool riparian to that stream. If the contribution of Fall river water to Pitville pool is beneficial to the land of plaintiff, then he is afforded a remedy for its withdrawal, by means of a suit for damages or for injunctive relief. He has seen fit to rely upon a suit for

damages. * * * Assuming the evidence does adequately show the water which is normally contributed to Pitville pool is beneficial to the land of the plaintiff which is located thereon, the plaintiff would be entitled under the pleadings in this case to whatever actual damages he has suffered from the diversion of the stream."

It is true that the appellate court also stated [117 Cal. App. at page 599, 4 P.(2d) 564, 569]: "The appellant, however, specifically disclaims title to this diverted water by adverse possession. It asserts the right to divert and use this water as a riparian owner thereof for the beneficial purpose of manufacturing hydroelectric power only to the extent that other riparian owners are not in need of the water. It has been specifically determined by the Supreme Court in the case of Fall River Valley Irrigation Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 56 A. L. R. 264, 269, 259 P. 444, that the appellant's use of the water of Fall river was for proper riparian and beneficial purposes."

Appellant strenuously contends that this language necessarily means that defendant's entire diversion of the waters of Fall river away from Pitville pool is a proper riparian use, and that plaintiffs' remedy, if any, is an action to apportion. In view of the direct and unequivocal holding of the appellate court that plaintiffs herein are entitled to damages caused by the diversion, we cannot interpret the last-quoted statement to mean that defendant's diversion of the entire stream constitutes a proper reasonable riparian use, and that therefore plaintiffs are precluded from recovering any damages caused by the diversion. Not only would such an interpretation be contrary to, and inconsistent with, the holding that plaintiffs are entitled to damages, but, if the appellate court had so intended, it would have directed judgment to be entered for defendant; there being no further issues to be determined. But this it did not do. A fair reading of the entire opinion clearly indicates that the appellate court reversed the trial court on the issue of damages alone, and intended a retrial on that issue. As we interpret the last-quoted statement, all that was intended thereby was that the use of water for power purposes under a proper state of facts is a proper riparian use. With that doctrine we have no quarrel. The courts of this state have long recognized that a riparian owner in the proper exercise of his riparian right may use the water as a motive power to propel machinery subject only to the domestic uses of lower riparians. However, this does not mean that the use of such waters for power purposes gives any riparian owner any greater right than any other riparian use would give him. The language above referred to does not mean that one riparian in the exercise of his riparian right can divert the water entirely around an opposite riparian owner when and if such diversion results in substantial damage to the opposite owner. We are clearly of the opinion that under the issues presented in this case, and under the law of this case as enunciated by the appellate court, plaintiffs are entitled to damages, if any substantial damage or diminution in the value of their lands has resulted from the diversion, to which a public use has attached.

[5] Defendant further contends that, assuming plaintiffs' lands are riparian to Fall river in the summertime (which we have already held they are), plaintiffs, so far as defendant is concerned, are in the position of opposite riparian owners, and therefore under the decision in Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 7 P.(2d) 706, plaintiffs cannot complain of the diversion of the entire stream by an opposite riparian owner when the evidence shows that plaintiffs have all the water they need. Defendant correctly points out that the evidence shows that Crum has had all the water he has desired to use since the diversion, and that Albaugh never has used Pitville pool water for irrigation. Albaugh secures his water for irrigation purposes by a ditch from the Pit river above Young's Falls. It is defendant's contention that, under the theory of the Joerger Case, one riparian can entirely divert the water around an opposite riparian, and return and use the water far below the lower boundary of the opposite riparian's lands, and that the opposite riparian's only remedy is an action to apportion the waters, or, at least, that the opposite riparian cannot complain where he has all the water he needs. This contention is incorrect, for two reasons: In the first place, it is predicated upon a basic misconception of the holding in the Joerger Case; and, secondly, as we shall later show, in the present cases, although the evidence shows that plaintiffs have all the water they need or can reasonably use *as to quantity*, the evidence likewise shows that the *quality* of the water has been materially impaired by the diversion and the construction of the dam, resulting in material and substantial damage to plaintiffs. In the Joerger Case, plaintiff owned 40 acres of land riparian to Hat creek, designated on the diagram accompanying the opinion as parcel D. The defendant Red River Lumber Company, a private corporation, owned the opposite 40 acres, designated as parcel A. The defendant also owned all of the riparian land *above* parcels A and D, on both sides of Hat creek, for a considerable distance. These lands are designated as parcel E. The defendant diverted Hat creek from a point on its riparian lands in parcel E located far above parcel D, and used and returned the diverted water to the stream at a point in parcel A opposite to parcel D. In other words, the water was returned to the stream at a point above the lower bound-

ary of the opposite riparian owners' lands. This was the vital point in the case. In the first opinion in the Joerger Case (Cal. Sup.) 3 P.(2d) 936, this court held that the diversion was unlawful *because the water was returned below the boundary of Joerger's opposite riparian lands.* A rehearing was granted, largely because counsel for defendant in that case (one of whom is counsel for defendant in the present case) pointed out that the point of return and use was on opposite riparian lands and above Joerger's lower boundary. As was said by this court on rehearing [214 Cal. at page 636, 7 P.(2d) 706, 708]: "With the foregoing rules in mind [i. e., between opposite riparian owners, one can use all the water unless the other has some use for it, and the only remedy for excessive use by one is an action to apportion] we have a situation where the defendants are making a riparian use of the waters of the stream, to wit, the generation of electricity by water power. [Citing cases.] This use is made on the *opposite riparian lands of the defendants. The water is returned to the stream above the lower boundary of the plaintiff's riparian tract.* As between these opposite riparian tracts, the rights of the owners are correlative and reciprocal with the rights in each to use all of the water so long as the other has no use for it."

From that quotation, and a reading of the opinion on rehearing, it is quite obvious that the determining factor in the decision is that in that case defendant returned the water *above Joerger's lower boundary.* But in the instant cases, treating plaintiffs as opposite riparian owners, and treating Pitville pool as an indentation of the bank of the stream, the factual situation is fundamentally different. Here the water is diverted far above plaintiffs' lands, and used and returned to the stream some 12 miles below the lower boundary of plaintiffs' riparian lands. This distinction is vital. When the water is used and returned on opposite riparian lands, above the lower boundary of the complaining party's lands, then a situation is presented properly involving the rule of law enunciated in the Joerger Case. But, when the water is diverted above and returned below the opposite owner's lands, the rule of the Joerger Case has no application. In such a case, the use cannot be said to be in the proper exercise of the riparian right.

[6] However, even though it is thus apparent that defendant's use of the water is not in the proper exercise of its riparian right, that does not entitle plaintiffs to damages in the absence of a showing of actual damage. Under the theory enunciated by this court in the recent case of Gin S. Chow v. City of Santa Barbara (Cal. Sup.) 22 P.(2d) 5, in interpreting article 14, section 3, of the state Constitution, a riparian is not entitled to damages, even as against an appropriator, simply because his usufructuary title to the water has been interfered with. It is incumbent upon him to show substantial actual or prospective damage therefrom.

We now turn to a discussion of the question as to whether the evidence here shows any substantial damage to or diminution in the value of plaintiffs' lands, caused by the diversion and the construction of the dam. Under the facts of this case, such damages could have arisen in one of two ways: First, the diversion might have *diminished the quantity* of water in Pitville pool to a level where plaintiffs' actual or prospective needs were interfered with; or, secondly, the diversion and construction of the dam might have *affected the quality of the water* in Pitville pool to such an extent that the value of plaintiffs' lands was adversely affected to a material degree.

We turn first to a discussion of the effect of the diversion on the quantity of water in the pool. The evidence shows that, when the waters of Fall river were first diverted on September 30, 1922, the level of Pitville pool was lowered from 4 to 5 feet. However, the level was restored by the construction of the dam at the rock reef below plaintiffs' lands. There is no dispute but that since the construction of the dam there has been exactly the same quantity of water in the pool as was there before the diversion. It must be remembered that under the facts and law of this case Pitville pool is in legal effect a lake or reservoir with two sources of supply—Pit river above the pool, and Fall river. The pool has one outlet—Pit river below the pool. One source of supply has been taken away by the diversion and by the public use attaching thereto. But, due to the construction of the dam, the level of the pool has been maintained exactly as it was before the diversion. The only difference is that now the pool is filled solely with Pit river water instead of a mixture of Pit and Fall river waters. This water, which is supplied in lieu of Fall river water, is not foreign water, but water from one of the natural sources of Pitville pool; namely, the Pit river.

[7, 8] During the course of the trial, defendant offered to stipulate as follows:

"Mt. Shasta Power Corporation, defendant herein, in view of the decision of the District Court of Appeal in the above entitled cause, hereby admits that said plaintiff, by virtue of his ownership of the lands described in his complaint and riparian to that part of Pit river known and designated as the Pitville pool, is entitled to the maintenance of the water in that pool, at all times, substantially at its natural level as such level would be if the waters of Fall river should continually flow into it at the natural confluence of said rivers.

"This defendant asserts that, by virtue of its ownership of the riparian rights and the riparian lands described in its answer, it has the right to continue to divert and use at all times the waters of Fall river as it is now doing for the operation of its Pit No. 1 Power Plant, provided only that its diversion and use of such water shall not actually result in substantially lowering the level of the water in said Pitville pool below its aforesaid natural level.

"This defendant declares that it does not now intend and never has intended or purposed to infringe or violate the right of said plaintiff to the maintenance of the aforesaid natural level of the water in said pool; and does hereby undertake and promise to maintain and operate the dam which it has heretofore constructed at the rock reef in the channel of said Pit river, a short distance below the natural confluence therewith of Fall river, and to maintain the level of the water in said Pitville pool substantially at its aforesaid natural level and not lower than the top of the aforesaid dam by means of its maintenance and operation of said dam and by discharging or causing to be discharged into said Pitville pool so much of the water naturally flowing in said Fall river and its tributary, Tule river, as may be required for that purpose from time to time, so long as this defendant shall continue to divert water from Fall river above its natural confluence with Pit river; and does hereby irrevocably consent that the judgment to be entered herein shall require this defendant to maintain and operate said dam and to maintain the natural level of the water in said Pitville pool as it has herein undertaken and promised to do.

"In witness whereof said Mt. Shasta Power Corporation has caused its corporate seal to be hereunto affixed and has caused its corporate name to be hereunto subscribed by its officers thereunto duly authorized on this 27th day of May, 1932."

During the course of the argument over this stipulation, counsel for defendant further agreed that, if the waters of Pitville pool ever became insufficient to maintain the level of the pool, defendant would agree that Fall river waters should be released sufficient to keep the level of the pool at the height existing before the diversion. The trial court refused to admit this stipulation into evidence, or to instruct the jury in reference thereto. The trial court's refusal was based on the theory that the stipulation was ineffectual for any purpose, unless the plaintiffs agreed thereto. This was clearly error of a most serious nature. Assuming that the plaintiffs were materially damaged by the lowering of the level of the pool, defendant was entitled to minimize those damages by guaranteeing a water supply. Under the theory enunciated in Collier v. Merced Irr. Dist., 213 Cal. 554, 2 P.(2d) 790, and in Colorado Power Company v. Pacific Gas & Electric Co. (Cal. Sup.) 24 P.(2d) 495, recently decided, defendants who were clearly appropriating the water were held entitled to minimize damages by agreeing to furnish the lower riparians a guaranteed water supply. Certainly the theory of those cases is applicable to the factual situation here presented. We are of the opinion that this stipulation should have been admitted into evidence. We think that the jury should have been instructed that, in considering the damage, if any, caused by the diversion, they were not to consider that the diversion had diminished the quantity of water in the pool, but were to conclusively assume that, under the stipulation, which would become part of the judgments in these cases, defendant had agreed, whatever the future needs of the riparian owners on Pitville pool, to maintain the level of the pool as it was before the diversion. The jury should have been instructed that, as far as the law of the land was able to do so, plaintiffs under this stipulation were assured of the same quantity of water as they had access to before the diversion.

The far-reaching effect of the trial court's error in refusing to admit the stipulation into evidence is illustrated by the testimony of each of the witnesses called by plaintiffs to testify as to the value of plaintiffs' lands before and after the diversion. After each of these witnesses had testified as to the value of plaintiffs' lands before the diversion, they were asked a hypothetical question, substantially in the following form:

"Mr. Loosley, assuming that prior to the 30th day of September, 1922, that during the summer season approximately 1,200 cubic feet of water per second from Fall river flowed into Pit river in a state of nature above the point referred to in the testimony as the rock reef, and that the waters of Fall river, with other waters, maintained the level of the Pit river pool adjacent to the lands of the plaintiffs in these actions, and refreshed and replenished the water in said pool; and that the lands of plaintiffs were riparian to the Pit river pool and to the waters of Fall river flowing therein during the period from May to October of each year, and that on the 30th of September, 1922, the defendant Mt. Shasta Power Corporation diverted and since that time has continued to divert, and will in the future divert all of the flow of Fall river water from the Pit river pool, not exceeding 1,800 cubic feet per second; and that when the water was first diverted the level of the pool was reduced between four and five feet; and that defendant constructed a concrete dam and works at the point known as the rock reef, and that thereafter the Pit river pool was restored to its former level and that said level has since been maintained, and that the defendant, as a riparian owner, has used and is using the waters of Fall river so diverted for the generation of power for sale, rental and distribution to the public and that a public use to said water has attached to the water so diverted; and assuming that the defendant claims the right to divert for a public use all of the available flow of Fall river from the Pit river pool, not exceeding 1,800 cubic feet per second, except some five or six hundred inches used by Fred and Dee Knoch and the water served to the Fall River Mills Water Works, to-wit: for the generation and sale of power under a franchise from the California railroad commission; and that all of the water so diverted has been devoted to such public use and that all of the said water of Fall river that formerly flowed into the Pit river pool, not exceeding 1,800 cubic feet per second, will be required in the future for such public use; and that the defendant claims the right to make such diversion as a riparian owner and to use it for generating power, unless it shall be determined that the plaintiffs or others have a right to some of such water; and that prior to the diversion of Fall river, the Pit river pool was fresh and that there was no considerable growth of weeds therein and that after the diversion of Fall river and as a result thereof, the water in the Pit river pool became dark and stagnant; and that livestock refused to drink the same and that offensive and disagreeable odors arise from said pool; and that said pool is filled with a growth of weeds and covered with moss and slime; assuming that prior to the diversion of Fall river, the inflow into the pool from natural sources amounted to approximately 1,200 cubic feet per second and that since the diversion of Fall river, the natural inflow into the pool during the dry season of the year varies from five to thirty cubic feet per second, what in your opinion is the market value of the lands of plaintiff Crum in view of the conditions narrated above, taking into consideration the uses to which the land has been or may reasonably be adapted in the future, and I will ask you to give your opinion as to the two tracts separately?"

By this question it is true the witness was told the facts according to plaintiffs' theory as sustained by the trial court. But the question failed to include any reference to the stipulation of defendant, a factor we have already held indispensable in arriving at the damage suffered by plaintiffs. Nowhere in the question is the witness told that as to quantity of water the diversion would in no way injure plaintiffs, nor was the witness told that the defendant had offered to guarantee that the level of the pool would always be maintained. Moreover, all of the value witnesses assumed that plaintiffs' rights as to the quantity of water were in a state of uncertainty. This was clearly illustrated by the testimony of the various value witnesses on cross-examination as to their understanding of the question. They were all asked if the value they fixed upon plaintiffs' lands after the diversion, based on the hypothetical question, was arrived at by assuming that plaintiffs' water rights, as to quantity, had been taken away. Witness Joerger testified:

> "I assumed they have been taken away and they are disputed, but it is a disputed right. * * * Well, they have been taken away. He hasn't the water as it was in 1922 * * * the water has been taken away.
>
> "Q. Permanently or otherwise? A. That is disputed. * * * Well, I don't like to assume something that is in dispute and he has his riparian rights according to the decision of the court but he hasn't the water."

This last part of the answer was subsequently stricken as not responsive. He further testified that in fixing the value of plaintiff Crum's lands after the diversion he considered the lands "were by reason of the diversion dry lands or grain lands." Except for the water Albaugh secured by ditch from above Young's Falls, he made the same assumption as to his lands. All of the value witnesses testified substantially as did Joerger, and all of them emphasized that in fixing the depreciated value after the diversion they had given considerable weight to the uncertainty of plaintiffs' water rights as to the quantity of water in the pool. Although the hypothetical question told the witnesses that a dam had been constructed, and that the level of the pool had thus been maintained, it did not tell them that defendant had agreed that the judgments in the case should compel defendant to maintain the level of the pool as it was before the diversion. A reading of the testimony of each value witness clearly illustrates that in fixing the depreciated value they did on plaintiffs' lands, a material factor was the uncertainty of the maintenance of the pool at its present level. It is obvious, therefore, that the testimony of these witnesses was based on a misconception of the factual situation.

[9-11] However, although it is true that under the facts of this case plaintiffs have not or will not be damaged as to the quantity of water in the pool, it does not necessarily follow that they have not been damaged in other respects. Under the California authorities, and under the law of these cases as enunciated on the former appeals, a riparian owner, even as against another riparian, is entitled, not only to an undiminished flow of water, except as reduced by the reasonable use of other riparians and prior appropriators, but also to a substantially unpolluted stream. The riparian owner is entitled, not only to the same quantity of water, but also to the same quality of water, provided by nature in the stream. Crum v. Mt. Shasta Power Corp., 117 Cal. App. at page 606, 4 P. (2d) 564. We are of the opinion that the evidence in the present case offered on behalf of

plaintiffs clearly shows that the quality of the water in Pitville pool has been materially impaired by the diversion and by the construction of the dam. The evidence shows, without conflict, that the waters of Fall river have always been clear and pure, while the waters of Pit river have always been dark and murky. The evidence likewise shows that before the diversion the waters of Fall river rushed down into Pitville pool with a minimum flow of 1,000 second feet. The Fall river waters, as we have already held, mingled with the dark murky waters of Pit river to form the pool. The jury could have reasonably inferred that the Fall river waters freshened the water in the pool. Since the diversion, the freshening effect of the Fall river waters has been lost. Moreover, by the construction of the dam, obviously the flow of water through the crevice in the rock reef has been stopped, resulting in the Pit river water backing up. There was ample evidence introduced on behalf of plaintiffs to show that since the diversion the waters of Pitville pool have become stagnant; that the pool in the summer months is now covered with weeds, slime, and moss; and that a very undesirable odor now emanates from the pool, which is obnoxious to the senses for a distance of one-half mile from the water. There is also some evidence that since the diversion cattle will not drink the polluted water. There is ample evidence from which the jury could have found that these conditions did not exist before the diversion, and from which the jury could have inferred that the changed conditions were caused by the diversion and by the construction of the dam. It hardly need be added that, if such changed conditions resulted in a material impairment of the value of plaintiffs' lands, plaintiffs may recover therefor.

[12] Appellant contends that the question of pollution cannot be considered, for the reason that the former appeals established as the law of the case that there was no pollution. We do not so interpret the appellate court opinion. All that the appellate court directly held was that there was no finding that the changed conditions were the result of the diversion. It is true that by way of dicta the court held that, even if a certain finding could be so construed, "there is no substantial evidence to support a judgment of damages based upon pollution of the water of Pitville pool caused by the diversion of Fall river." It is obvious that the above statement had reference to the facts as shown on the prior trial. On this trial the evidence was not the same as on the prior trials. On the present trial, additional witnesses on the question of pollution were called, and their testimony, and the testimony of the witnesses called on both trials, was substantially stronger than was produced on the former trials. It is obvious, therefore, that the rule of the law of the case has no application.

[13] No useful purpose would be served in retrying all the issues in this case. The judgments are affirmed except as to the issue of damages, and, as to that issue, the causes are remanded for a retrial. This is necessary because of the fact that under the evidence introduced herein there is no way to determine what portion of the award in favor of each plaintiff was for diminution of quantity of water in the pool and uncertainty as to amount, and what portion of the award was for impairment of the quality of the water. For the purposes of the retrial on the issue of damages, we hold that it is the law of these cases that during the summer months plaintiffs' lands are riparian to both Fall and Pit rivers; that defendant is entitled to introduce in evidence its stipulation above referred to; that the guaranties in said stipulation shall become part of the judgments ultimately entered in these cases; that, under the facts of these cases, considering the guaranties in the stipulation, the plaintiffs are not entitled to any damages for the diminution in quantity of the water in the pool caused by the diversion; that plaintiffs are not entitled to any damages for any alleged uncertainty in their rights to the water in the pool; that under the stipulation their rights are and will be as certain as the law of the land can make them. On the retrial, plaintiffs are to be limited to whatever damages they may have suffered by reason of the impairment of the quality of the water in the pool and by the changed conditions in the pool caused by the diversion and the construction of the dam.

For the foregoing reasons, the judgments appealed from are, and each is hereby, reversed, and the cases remanded for a new trial on the issue of damages alone, and in accordance with the views herein expressed. Both sides are to bear their own costs on this appeal.

Mr. Justice PRESTON and Mr. Justice LANGDON, deeming themselves disqualified, do not participate herein.

## AMERICAN SECURITIES CO. v. FORWARD et al.*

S. F. 14958.

Supreme Court of California.
Aug. 25, 1933.

Rehearing Granted Sept. 22, 1933.

**1. Municipal corporations 🔑451.**

City council rather than county board of supervisors *held* proper body to levy assessment tax to pay bonds of improvement district where city council initiated proceedings (St. 1925, p. 849, as amended; p. 850, § 2).

**2. Mandamus 🔑97.**

Where assessment for one year to pay bonds of improvement district was not all paid, city council will not be compelled by mandamus to cumulate assessment taxes by including unpaid portion in next year's levy, though cumulated taxes are not unauthorized in discretion of the legislative body (St. 1925, p. 850, § 2; p. 855, § 5, as amended by St. 1927, p. 1359; p. 870, § 22; p. 876, § 28; p. 883, § 36; p. 887, § 39, as amended by St. 1927, p. 1372; p. 890, § 41, as amended by St. 1927, p. 1375).

**3. Mandamus 🔑12.**

Mandamus is not authorized unless there is a clear case to compel performance of act which law specially enjoins as duty resulting from office, trust, or station.

**4. Mandamus 🔑10.**

To invoke mandamus, there must be specific legal right, and parties sought to be coerced must be bound to act, and if existence of right is doubtful, writ will be denied.

**5. Mandamus 🔑7.**

Even when technical rules authorize mandamus, issuance of writ is largely discretionary with court.

In Bank.

Application by American Securities Company for a writ of mandate prayed to be directed to John F. Forward, Jr., and others, as the City Council of the City of San Diego, or as members of the Board of Supervisors of the County of San Diego, to compel them to levy a special assessment tax to pay the principal and interest on certain bonds.

Writ granted.

Orrick, Palmer & Dahlquist, of San Francisco, for petitioner.

C. L. Byers, City Atty., and Gilmore Tillman, Asst. City Atty., both of San Diego, for respondents John F. Forward, Jr., et al., as constituting City Council of City of San Diego.

Thomas Whelan, Dist. Atty., and Frank T. Dunn, E. I. Kendall, and J. B. Abbey, Deputy Dist. Attys., all of San Diego, for respondents Edgar F. Hastings, T. Le Roy Richards, Ray Hurley, as and constituting Board of Supervisors of County of San Diego.

PER CURIAM.

Mandate to compel either the respondent city council of the city of San Diego or the respondent board of supervisors of the county of San Diego to levy, at the time of the next general tax levy for municipal or county purposes, upon all of the lands within municipal improvement district No. 1 in said city, a special assessment tax in an amount clearly sufficient to pay all of the principal and interest which has become due or will become payable on bonds of the district heretofore issued, before another tax levy for municipal or county purposes can be made available for the payment of principal and interest on said bonds.

Municipal improvement district No. 1 was organized under the Acquisition and Improvement Act of 1925 (St. 1925, p. 849 as amended), and pursuant to a resolution of intention adopted by the city council of the city of San Diego on August 20, 1928. The purpose of the proceedings was to acquire rights of way and to construct two bridges and a causeway over Mission bay with street improvements at the approaches of said bridges. The estimated cost of the improvement was $725,000 and upwards. The proceedings were carried forward by the city council of said city, the contract was let, and the contractors entered upon the performance of the work. Certain property owners affected commenced an action to enjoin the performance of the contract. After trial on the merits the court found for the defendants and entered judgment accordingly. On appeal by the plaintiffs the judgment was affirmed on February 25, 1931. Southlands Co. v. City of San Diego, 211 Cal. 646, 297 P. 521. Bonds were issued by the city treasurer as provided in the act in the principal sum of $737,418.34, all dated January 21, 1931. The first principal amount of $46,000 will accrue on January 21, 1936, and the last on June 21, 1951. On July 2, 1932, the first semiannual interest coupons attached to said bonds matured and there became due and payable on account of said interest thereon the sum of $64,030.01. On September 1, 1931, the board of supervisors of said county, for the purpose of raising funds for the payment of said interest when it should become payable, levied against the property in the district a special assessment tax at a rate calculated to raise the sum of $71,835.95, or 11.2 per cent. more than required if collected in full.

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 32 P.2d 343.

On January 2, 1933, there became due and payable on account of interest coupons then maturing the sum of $22,122.55 and a like sum on July 2, 1933, or a total for this year of $44,245.10. On September 1, 1932, the board of supervisors for the purpose of paying interest coupons maturing in 1933 levied a special assessment on lands in the district sufficient to raise, if collected in full, the sum of $49,288.34, or approximately 11.2 per cent. more than the amount required to pay the 1933 interest coupons. Of said levies made in 1931 and 1932 there remain unpaid and delinquent at this time certain individual assessments totaling approximately $31,259.18, or about 25.8 per cent. of the total levies made for the two years. The petitioner is the owner of said bonds in the principal amount of $74,000, and it is alleged in the petition that the total now unpaid on account of the interest coupons on all of the bonds of the district, including its own, is $28,660.

The petitioner prays that the court determine which legislative body, the city council of the city or the board of supervisors of the county, is the legislative body required by law to levy assessment taxes to satisfy the principal and interest on said bonds, also that when the proper legislative body is determined upon, the court compel said legislative body to levy a tax for the year 1933–1934 sufficient to pay not only the interest coupons maturing on January 2 and July 2 in the year 1934, but also to pay the amount unpaid on the interest coupons for the years 1932 and 1933.

[1] The question as to which legislative body is the proper one to levy the assessment tax is not difficult of solution. The city council of the city initiated the proceedings and all of the steps taken thereafter in carrying the improvement to completion were taken by it or under its direction or by officers of the city, including the establishment of the extent of the assessment district and the several assessment zones therein, the hearing and passing upon protests on behalf of numerous property owners in the district, the letting of the contract and supervision of the work as it progressed, the acceptance of the work, the issuance of the bonds to represent the cost of acquiring property and of the improvement. The board of supervisors had nothing to do with the proceeding until, for some unaccountable reason, that board assumed the power to levy the assessment taxes in 1931 and again in 1932. Section 2 of the act of 1925 provides "that the legislative body initiating the proceeding and adopting the resolution of intention therefor, as hereinafter provided, shall thereafter have exclusive jurisdiction of the proceeding." That the levy and collection of the assessment taxes to satisfy the coupons for interest and principal on the bonds issued to represent the cost of the improvement are part and parcel of "the proceeding" as contemplated by the act can admit of no doubt. A reading of the statute demonstrates that the legislative body which initiates the proceeding is the only one having jurisdiction to complete it and the provisions of the act with reference to the issuance of bonds for the cost of the work and the levy of assessment taxes to satisfy the same are inseparably a part of the plan for the accomplishment of which the statute was created.

Of course "the legislative body initiating the proceeding" must be the legislative body duly constituted under the terms of the act in order that the proceeding be regular. Whether the city council of the city of San Diego was authorized under the act to initiate and carry forward this particular proceeding was one of the main issues determined in Southlands Co. v. City of San Diego, supra. It was contended by the city in that case that its legislative body was the proper one to initiate and conduct the proceeding. This contention was upheld. A holding to the contrary would have required a reversal of the judgment in that case. The city is in no position to relitigate that question. It has become definitely settled. Price v. Sixth District, 201 Cal. 502, 258 P. 387. It therefore appears beyond question that the respondent city council is the legislative body having exclusive jurisdiction to levy said assessment taxes.

[2] The question of whether the assessments may be cumulated or pyramided under the statute is more difficult of solution. In section 2 of the act the legislative body is granted authority "to levy and collect special assessment taxes upon districts as in this act hereafter provided." In section 5 (as amended by St. 1927, p. 1359) it is provided that the resolution of intention shall contain a statement "that a special fund for the payment of said bonds will be constituted by the levy of special assessment taxes upon the lands within the assessment district, in accordance with the provisions of this act, according to the assessed value of said lands, exclusive of the improvements thereon." Section 22 prescribes the form for the notice of final hearing in the matter of whether the work and improvement have been completed and should be accepted. In that notice is the statement: "A special fund for the payment of said bonds will be constituted by the levy of special assessment taxes upon the lands within said district as provided in the resolution of intention and in the above mentioned act." Under section 28 an identical provision is required to be inserted in the notice of hearing upon issuance of bonds to obtain immediate possession. Likewise section 36 requires an identical provision to be incorporated in the notice of hearing upon issuance of bonds for an acquisition.

Section 39 (as amended by St. 1927, p. 1372) provides the form of each bond, wherein it is recited that the bond is payable out of the district interest and sinking fund, and further declares that "in accordance with the provisions of said act a special assessment tax will be levied and collected upon the lands in said district in an amount clearly sufficient to pay the principal and interest of said bonds *as the same shall become payable.*"

Section 41 provides that an appropriate interest and sinking fund shall be constituted by the legislative body as follows: "There shall each year, at the time of the general tax levy for state and county taxes, or at the time of levying taxes to be collected for general municipal purposes, as the case may be, be levied against and upon all the lands within said district * * * according to the assessed valuation of said lands, exclusive of any improvements thereon, a special assessment tax in an amount clearly sufficient, together with any moneys which are or may be in said fund, to pay all the principal which has become or will become due and all interest which has become or will become payable on the bonds issued under the proceeding before the proceeds of another tax levy * * * can be made available for the payment of said principal and interest. * * * Such special assessment taxes shall be in addition to all other taxes levied for state and county purposes, or for municipal purposes (as the case may be), and shall be levied, computed, entered, collected and enforced in the same manner and by the same persons and at the same time and with the same penalties and interest as are other taxes for state and county purposes, or for municipal purposes (as the case may be), and all laws applicable to the levy, collection and enforcement of taxes for state and county purposes or for municipal purposes (as the case may be), are hereby made applicable to said special assessment taxes."

The petitioner grounds its case on the language appearing in the foregoing quotations in two separate connections.

First, it is contended that the form of the bond which recites that a special assessment tax will be "levied and collected" imposes upon the city the legal duty not only to levy but also to collect a sufficient assessment tax to pay all bond charges; that the duty is not discharged by a levy only but that the collection is also mandatory. It is obvious that the levy is exclusively within the power of the legislative body to make and must be made at the time appointed by the statute. The collection, however, is made by other officials. The duty to "collect" as provided in the form of the bond must be considered in connection with the law vesting power to collect and providing the means of collection. That law as incorporated in the proceeding by reference is found generally in the Political Code, which provides for the enforcement of payment of the tax by sale of the property after the period of redemption has expired. No duty to "collect" is imposed on the legislative body. Enforced collection prior to delinquency is nowhere provided for. When the legislative body has set the law in motion by the levy of the assessment tax, it has done all that the law then requires.

Secondly, the petitioner contends that the duty is imposed upon the legislative body to include in the levy of the special assessment tax an amount sufficient to cover the deficiency in the special fund arising from delinquencies in tax payments, in accordance with the foregoing quoted language of section 41 to the effect that a special assessment tax shall be levied each year "clearly sufficient, together with any moneys which are or may be in said fund, to pay * * * all interest which has become or will become payable on the bonds." Taken alone, and dissociated from other provisions of the act, the quoted language lends support to the petitioner's contention, and in cases where a legislative body has included in the levy for one year an amount which, if collected prior to delinquency in tax payments, would pay principal or interest coupons maturing during prior tax years and unpaid because of insufficient money in the special fund, we are not prepared to say that such levy would be unauthorized. But we are here confronted with the problem of whether it is the legal duty of the legislative body to do so and, if such be the case, whether the discretionary writ of mandamus should issue under the facts and conditions presented.

As to the legal duty to cumulate the assessment taxes the language of the act, when taken as a whole, is not as clear and explicit as it should be to justify a definite declaration on the subject. The very language relied upon by the petitioner does not appear to contemplate the feeding by subsequent levies, of the fund depleted by reason of delinquencies in payment by property owners. On the contrary, it is susceptible of the construction that it contemplates a fund with moneys on hand therein or which, if insufficient, may be supplemented by contributions thereto as authorized by other provisions of the act hereinafter referred to. As noted, the form of the bond prescribed by section 39 declares that the special assessment tax will be levied but only sufficient to pay the principal and interest of said bonds "*as the same shall become payable.*" No reference is made in the bond to a levy to make up deficiencies in the special fund arising from delinquent tax payments or otherwise. True, the bond form provides that the levy will be made in accordance with the provisions of the act in question, but when we examine the act with reference to the duty specially imposed upon the legislative body, we find also in section 41 thereof the following language: "In any event it shall be the duty of said legislative body to levy a special assessment tax upon all of the said lands within such district, sufficient to pay the principal and interest of said bonds *as the same shall become payable.*" This is the only portion of the act which specially lays the *duty* upon the legislative body in the premises, and that duty is to make the levy sufficient to satisfy the bond requirements *as the same shall become payable.*

Furthermore, when the act deals with the specific question of nonpayment of principal and interest on said bonds by reason of insufficient money in the fund to pay the same, provision is made that in such case the legislative body may from time to time make a loan from the general funds of the county or municipality, as the case may be, to the special fund, the same to be repaid from money coming into the special fund thereafter; for example, by redemptions and from sales of the property for delinquent assessment taxes. While the power thus conferred to make such a loan is discretionary, it is the only provision of the act dealing with a depleted special fund, and since this is so, more doubt is thrown upon the question of the alleged mandatory meaning of the language relied upon by the petitioner.

When the purpose and effect of the act is contemplated from an historical standpoint, it is plain that the act was intended as an alternative for the plan provided by other and earlier street improvement laws imposing special assessments for benefits. The other statutes generally provided for special assessments to be imposed on each separate parcel of land in the assessment district with provision for the issuance of a bond to represent each assessment. The means provided for the payment of the bond, in the event of delinquency in payment of the principal or interest thereon, was and is to have the particular parcel sold to satisfy the obligation. The act of 1925 substituted the ad valorem assessment plan for the individual and separate assessment plan, but it still maintained the essential characteristic of charges imposed as special assessments for local benefits to lands in the district. It could justify its existence on no other theory. The plan under this statute as well as under the other street improvement laws is, and from the beginning has been, that each lot or parcel of land in the assessment district shall bear its proportion of the cost of the work or improvement in proportion to the benefits accruing therefrom. As applied in the act of 1925 this plan cannot be carried out if cumulated or pyramided assessments are indulged. If they be indulged the fundamental theory of the act would thereby be thwarted. It is represented in this case that there are now in San Diego county twenty-eight or more special assessment districts established under the Acquisition and Improvement Act of 1925 wherein delinquencies in the payment of special assessment taxes are numerous and abnormal, running in some cases as high as 90 per cent. of the total sought to be collected. If the 90 per cent. deficiency in the special fund is to be added to subsequent levies, it is readily seen that the property owners who have paid their assessment taxes may be required to pay an amount entirely out of proportion to the benefits received. The constitutionality of a statute authorizing cumulative assessments need not be questioned. It was assumed in Municipal Improvement Co. v. Thompson, 201 Cal. 629, 258 P. 955, and was declared to be authorized in O. T. Johnson Corp. v. County of Los Angeles (Cal. App.) 17 P.(2d) 792, and is apparently settled by the Supreme Court of the United States in Roberts v. Richland Irr. Dist., 289 U. S. 71, 53 S. Ct. 519, 77 L. Ed. 1038, in so far as due process is concerned.

Again, it is pointed out by the respondents that inasmuch as the special assessment tax is payable at the same time and not separately from general county, municipal, and school taxes, the delinquencies on taxes for general purposes are increased by reason of the inclusion of the special assessment taxes, thus making it impossible for the county, city or school district to obtain funds to enable the government thereof to function. Such difficulties are apparent and perplexing, but they are inherent in the plan provided in the act, and cumulating the assessments for special benefits merely accentuate the problem confronting the taxing body required by law to provide money for governmental purposes.

It is also contended by the respondents that to permit such cumulative assessment tax levies would result in ultimately building up a fund far in excess of the amount necessary to satisfy the principal and interest on said bonds. The argument assumes, and not without reason, that all delinquent special assessment taxes will be paid finally either by redemptions or by sale of the property as provided by law. It is pointed out that if the delinquent taxes be paid thus in due course of time they must under the act be paid into the special fund, with the result that finally a fund will be built up which will far exceed the bond requirements if cumulated levies are made. It was said in Municipal Improvement Co. v. Thompson, 201 Cal., at page 637, 258 P. 955, 958, with reference to similar proceedings under the Road District Improvement Act of 1907 (St.

1907, p. 806 as amended): "If some of the special assessment payments become delinquent from year to year, it would not follow that the lands of the delinquent owners would be relieved from paying the charge. It would be merely postponed." Likewise, if cumulative assessments are not made it would not follow that bondholders would lose their investment. Payment would be merely delayed and would be made from the fund fed by redemptions and sales for delinquent assessment taxes, in which event the lands benefited, and they only, would bear the burden originally intended, and the injustice of building up a surplus fund by cumulative assessments and the reversion thereof to the general fund under the act, after the bonds have been retired, would be avoided.

The foregoing discussion has been indulged for the purpose of indicating that, although the fundamental theory of the act of 1925, taken as a whole, is contrary to the idea that cumulative assessments were thereby contemplated, nevertheless it cannot be said that they are unauthorized, in the discretion of the legislative body. Also, that the provisions of the act relied upon by the petitioner are not so definite and specific as to entitle the petitioner to the issuance of the peremptory writ for that purpose as a matter of right.

**[3-5]** The writ of mandamus is not always a writ of right. "When it is applied for, there must be a clear case to 'compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.'" Perrin v. Honeycutt, 144 Cal. 87, 77 P. 776, 777; section 1085 Code Civ. Proc. In order to invoke it there must be a specific legal right. The party sought to be coerced must be bound to act. If the existence of the right is doubtful, the writ will be denied. 16 Cal. Jur. p. 768, and cases there cited. Furthermore, even when the technical rules of law authorize it, the issuance of the writ is, in large measure, discretionary with the court. Fawkes v. City of Burbank, 188 Cal. 399, 205 P. 675, 676. In the case just cited it is said (quoting with special approval from Wiedwald v. Dodson, 95 Cal. 453, 30 P. 580): "We think that the correct doctrine is expressed in High on Extraordinary Legal Remedies, § 9, where, speaking of *mandamus*, it is said that, 'The exercise of the jurisdiction rests, to a considerable extent, in the sound discretion of the court'; and that 'cases may therefore arise where the applicant for relief has an undoubted legal right, for which *mandamus* is the appropriate remedy, but where the court may, in the exercise of a wise discretion, still refuse the relief.'" Numerous cases in this court are cited announcing the same principle. Since the Fawkes Case the same rule has been approved by this court. California Highway Com. v. Riley, 192 Cal. 97, 112, 218 P. 579.

Notwithstanding anything that has been said with reference to the uncertainty in the provisions of the act on the question of the mandatory duty of the legislative body to include in the levy an amount sufficient to pay past due and unpaid maturities on said bonds, it is recognized that the problem is a difficult one, and we do not deem it necessary to make a final pronouncement on that subject for the purposes of this proceeding. If it be left an open question, which we are willing to do for the purposes of subsequent proceedings, should they arise, nevertheless the court may now look to the consequences which would probably flow from an order requiring said assessments to be pyramided at this time, as influencing the exercise of our discretion in the premises. It is fair to assume that if the landowners in the district have been unable to meet their obligations under prior levies when cumulated assessments were not made, a pyramiding of said assessment taxes at this time would not result in producing greater revenue, but on the contrary would produce greater delinquencies. In the face of the fact that special assessment taxes are collected as a part of and not separately from general taxes for counties, cities, and schools, the requirement for a cumulative levy to represent past due delinquencies as well as currently accruing maturities on the bonds would in all probability result in benefit to no one, not even to the bondholders. On the other hand, such a requirement would serve to prevent the collection of current revenues for general governmental purposes and would tend to build up a fund as time goes on to the great detriment of those owners of land in the district who have been and are able to pay, and to the governmental agencies affected.

Cases in this state and in other jurisdictions cited by counsel have been examined. The conclusions herein expressed are not out of harmony with the law of this state, and cases in other jurisdictions as to the power to pyramid special assessments and to enforce the same under similar statutes are conflicting and do not require further comment at this time.

We conclude that the petitioner is entitled to the issuance forthwith of a peremptory writ of mandamus compelling the respondent city council of the city of San Diego to levy a special assessment tax on the lands in acquisition and improvement district No. 1 of the city of San Diego in an amount sufficient at least to pay the interest coupons on the bonds issued against said district and maturing before another tax levy for municipal purposes can be made available for payments on said bonds.

It is so ordered.

218 Cal. 685

## HART v. KANAYE NAGASAWA

Sac. 4647.

Supreme Court of California.
Aug. 22, 1933.
As Amended Sept. 28, 1933.

1. **Deeds** 🔑136.

Deed *held* to convey fee in joint tenancy rather than joint life estates with contingent remainder to survivor and heirs.

Granting clause of deed purported to convey the fee simple title to five grantees without limitation, and the habendum clause simply defined the estate granted as a joint tenancy with right of survivorship. The language of the granting and habendum clauses, "with full and absolute title to his or her, the last survivor of said parties of the second part, and to the longest liver of the said parties of the second part, and to his or her heirs, administrators or assigns forever," is merely descriptive of one of the chief incidents of joint tenancy, namely, the right of survivorship.

2. **Deeds** 🔑97.

Purpose of habendum clause in deed is to limit, enlarge, and define estate indicated in granting clause.

3. **Joint tenancy** 🔑10.

Evidence *held* to show that quitclaim deed given by one joint tenant to another was not secured by duress or undue influence.

The grantor in such deed claimed an interest in the property, contending that deed was invalid as unsupported by consideration and was secured by undue influence and duress, but evidence showed deed was given under mutual agreement entirely satisfactory to grantor under which grantee assumed all liabilities connected with property, and released all claim to trust fund managed by grantor.

4. **Contracts** 🔑68.

Compromise of even doubtful claim maintained in good faith constitutes valid and legal consideration.

5. **Aliens** 🔑6(2).

State is only party who can challenge conveyance as in violation of Alien Property Act, and in no event would property involved in such a conveyance revert to grantor (St. 1913, p. 206).

In Bank.

Appeal from Superior Court, Sonoma County; Benjamin C. Jones, Judge.

Action to determine ownership of joint life estates in certain real property, brought by Robert Morris Hart against Kanaye Nagasawa. From an adverse judgment, plaintiff appeals.

Affirmed.

John L. Schaefer, of Los Angeles, and J. Harold McAlpine, of Santa Rosa, for appellant.

Wallace L. Ware and George W. Murphy, both of Santa Rosa, for respondent.

PER CURIAM.

This action was brought by plaintiff to have it determined that he is the owner of a joint life estate in certain real property in Sonoma county, and to quiet his title thereto. The answer of defendant denies the existence of any interest in plaintiff, alleges the entire fee is in defendant, and, in addition, sets up as an additional defense the statute of limitations, and alleges that plaintiff conveyed all his interest in the property to defendant in 1919.

The real property involved is a ranch called by the parties and hereinafter referred to as Fountain Grove. Both appellant and respondent claim through a deed from Thomas L. Harris and Jane L. Waring Harris. This deed was executed and delivered to the grantees therein named in the year 1900. The main controversy in this case is over the proper interpretation of that deed, and over the nature of the estate conveyed to the grantees thereby.

The granting and habendum clauses of the deed read as follows: "The said parties of the first part [Mr. and Mrs. Harris] for and in consideration of the sum of forty thousand dollars ($40,000.00) * * * have granted, bargained, and sold, conveyed and confirmed, and by these presents do grant, bargain and sell, convey and confirm unto the said parties of the second part [Kanaye Nagasawa, Miss Eusardia Nicholas, Miss Margaret Edith Parting, Robert Morris Hart, appellant, and Mary Elizabeth Hart, his wife] and to their heirs and assigns forever [here follows a legal description of the lands included within Fountain Grove] * * * To have and to hold, all and singular, the said lands and premises * * * unto the said parties of the second part, in joint tenancy, with full and absolute title to his or her, the last survivor of the said parties of the second part, and to the longest liver of the said parties of the second part, and to his or her heirs, administrators or assigns forever."

Although it is admitted that the $40,000 consideration named in the Harris deed never actually passed, it is likewise admitted that the deed was amply supported by other consideration, and was legally sufficient to convey to the grantees the estate therein mentioned.

In 1903, Miss Nicholas, one of the grantees, died. In 1911, Miss Parting, another of the grantees, executed and delivered to respondent a grant, bargain, and sale deed conveying to respondent all of her right, title, and interest in the premises affected by this action. Miss Parting has since died. In 1919, appellant and his wife executed and delivered a quitclaim deed to respondent of all of their right, title, and interest in and to Fountain Grove. Mrs. Hart has since died, so that appellant and respondent are the only living grantees named in the Harris deed.

Appellant contends that the 1919 quitclaim deed executed by him was not supported by consideration, and was secured from him by undue influence and duress exercised by respondent. The main contention of appellant is that the Harris deed did not convey the fee-simple title to Fountain Grove to the grantees in joint tenancy, but conveyed a joint life estate with contingent remainder to the survivor and his or her heirs. It is therefore contended that, if appellant is correct in his interpretation of the Harris deed, even if the quitclaim deed of 1919 was valid, all that was conveyed thereby was the life interest of the Harts. If these contentions were correct, appellant would still have an interest in the property in the nature of a contingent remainder. Respondent contends that the Harris deed conveyed the fee title in joint tenancy to the five grantees, and that, since all of the other grantees have either died or deeded their respective interests to him, he is now the sole owner in fee simple. The trial court interpreted the Harris deed as does respondent, and determined the issues of consideration, undue influence, and duress in his favor.

[1, 2] We have no hesitancy in holding that the Harris deed conveyed the fee in joint tenancy. The granting clause purports to convey the fee-simple title to the five grantees without limitation. The habendum clause simply defines the estate granted as a joint tenancy, with right of survivorship. The language, "with full and absolute title to his or her, the last survivor of said parties of the second part, and to the longest liver of the said parties of the second part, and to his or her heirs, administrators or assigns forever," is merely descriptive of one of the chief incidents of a joint tenancy, i. e., the right of survivorship. We can read nothing in that language, but a rather inapt and unhappy statement that the grantees are to hold as joint tenants, with fee to the survivor. Out of an abundance of caution the scrivener then described the survivor as the "longest liver of the said parties of the second part." Everything that follows the words "in joint tenancy" in the habendum clause simply is an express provision for what would otherwise be implied from the use of the words "joint tenancy," that is, the right of survivorship.

It is true, of course, that the purpose of the habendum clause in a deed is to limit, enlarge, and define the estate indicated in the granting clause, and that, if the granting clause refers to a fee and the habendum to a lesser estate, only the latter will be conveyed. Barnett v. Barnett, 104 Cal. 298, 37 P. 1049; Anderson v. Yoakum, 94 Cal. 227, 29 P. 500, 28 Am. St. Rep. 121. Applying that rule to the present case, the granting clause purports to grant the property to the five grantees in fee, and the habendum simply describes their estate as one in joint tenancy. Giving the words used their ordinary and usual meaning, they can be interpreted but one way—that is, they create a joint tenancy, with the right of survivorship expressly provided for. The estate contended for by appellant—a joint life estate with contingent remainder to the survivor—is of such an unusual nature that before a court would be justified in holding such an estate had been created, clear and unambiguous language to that effect would have to be used. Here there is no ambiguity or uncertainty in the words used. Nowhere in the deed did the grantors purport to be retaining or reserving any estate in themselves; nowhere in the deed is there any reference directly or indirectly to an estate in remainder; nowhere in the deed is there any reference at all to a life estate. Although not perhaps conclusive, these factors are of some importance in construing the words used. Another factor should be mentioned. Section 1105 of the Civil Code provides: "A fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended." Nowhere in the deed her involved is there any reference to any such lesser estate, and so we must presume a fee was intended to pass.

The trial court admitted considerable evidence as to the relationship between the grantors and grantees, and the circumstances under which the deed was executed. Nothing appears therefrom which directly or indirectly discloses any intent on the part of the grantors to create other than a fee simple in joint tenancy.

Authorities are not lacking to the effect that the language used in the present deed creates a joint tenancy in the fee. In Swan v. Walden, 156 Cal. 195, 103 P. 931, 932, 134 Am. St. Rep. 118, 20 Ann. Cas. 194, the interpretation of two deeds was involved. The first of these read: "To Edward Walden and Louella Walden * * * *as joint tenants with fee to the survivor.*" The second deed read to the same parties "during their joint lives, *as joint tenants, and afterwards to the survivor in fee simple absolute.* * * * The intention of this grant being to constitute a joint tenancy in said land. * * *" It is to be noted that the language of both deeds is as capable of the interpretation that a joint life estate with remainder to the survivor was intended as is the deed in the instant case, and yet the court properly held a joint tenancy in the fee was created. In Hilborn v. Soale, 44 Cal. App. 115, 185 P. 982, the grantors conveyed to two grantees "as joint tenants *with the right of survivorship* * * * to have and to hold to the said grantees *and to the survivor or (of) them forever.*" It was contended that this deed created a joint life estate with remainder to the survivor. The language used by the District Court of Appeal in discussing this point is quite appropriate to the case at bar. At page 116 of 44 Cal. App., 185 P. 982, it is stated:

> "Appellants' contention is based upon the theory that the words in the deed, italicized herein for the purposes of this case, are effective to prevent the severance of the joint tenancy by execution sale, or voluntary act of either of the parties to the title, and preserve the right of survivorship by creating an independent title in the survivor upon this life estate. Without discussing the question as to whether or not such an estate can be created under the limitations of the California Civil Code, we are satisfied that the language of the instrument, as relied upon by appellants, is not calculated and was not intended to limit or modify the apt language for the creation of a joint tenancy. We see nothing in the words 'with the right of survivorship,' following the grant to 'Carl B. Soale and Wilson H. Soale, her husband, as joint tenants,' other than the expressed declaration of the implied incident of right of survivorship which characterizes a joint tenancy; and the italicized words in the habendum clause, 'To have and to hold to the said grantees *and to the survivor of them forever,*' is in nowise inconsistent with the granting clause. Of course, no question of tenancy by entireties, as between husband and wife, is involved in this case under our statutes; and it is apparent under the granting clause, independent of the language in controversy, that it was the intention of the grantor to create a joint estate. It is not disputed that the habendum clause, where such intent is made clear, can be resorted to to restrict, limit, or enlarge the estate indicated in the grant; but no such purpose is indicated here. In Barnett v. Barnett, 104 Cal. 298, 37 P. 1049, and Jacobs v. All Persons, etc., 12 Cal. App. 163, 106 P. 896, cited by appellants, the habendum clause under consideration in each instance in expressed terms limited the estate vested in the grantee named to a life interest.
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> "Without reviewing appellants' citations from the courts of other states, we find them all distinguishable from the case at issue here, and for the most part concerned with the construction of deeds in which the habendum clause is in irreconcilable conflict with the granting clause. Such is not the condition here. In Swan v. Walden, 156 Cal. 195, 134 Am. St. Rep. 118, 20 Ann. Cas. 194, 103 P. 931, in which case the deeds in question more nearly correspond to the deed under consideration here than in any of the foreign cases cited, our Supreme Court held that a conveyance to grantees, husband and wife, 'as joint tenants, with fee to the survivor,' and another to grantees as husband and wife 'during their joint lives,' and afterwards to the survivor in fee simple absolute, vested the estate in these grantees in joint tenancy. We reach the same conclusion in this case."

We find nothing contrary to these views in Montgomery v. Sturdivant, 41 Cal. 290. There the deed expressly provided for a life estate and remainder to the heirs of the bodies of the grantees. The court properly held that giving the words used full effect "it is a conveyance to the grantees for their joint lives * * * with remainder to the issue and heirs of their two bodies." In the instant case, giving the words used their full effect a joint tenancy with right of survivorship was provided for.

Nothing more need be said on this phase of the case. We therefore hold that the Harris deed was intended to and did vest in the five grantees as joint tenants the fee-simple title to Fountain Grove. Upon the death of Miss Nicholas in 1903 the fee was then vested in the four survivors. In 1911, Miss Parting conveyed to respondent her interest in the property.

Then in 1919 appellant and his wife quitclaimed their interest in the property to respondent. Obviously, if this last-mentioned deed was valid, respondent then became the owner in fee of Fountain Grove. Appellant contends, however, that the 1919 deed was invalid, for the reason that it was unsupported by consideration and was secured by respondent by the use of undue influence and duress. In order to discuss this contention, the background of the relationship between the various parties must be briefly referred to.

[3] Respondent, Nagasawa, first met Mr. Harris in 1867 in London. He came to the United States in that year and renewed his friendship with Mr. Harris, who had preceded him to this country. In 1875 he accompanied Mr. and Mrs. Harris to California. Harris purchased the property which is the subject of this suit, and from that time on Nagasawa managed and supervised it. Harris was widely known for his religious and philosophical teaching and writings. He organized a group, of which the five grantees in the Harris deed were the nucleus, who were interested in living according to the precepts taught by Harris. Miss Nicholas and Miss Parting came to live at Fountain Grove

in 1885 or 1886, and contributed various sums of money to Harris in order that he could carry on his teachings. Evidently the profits from the sale of the products of Fountain Grove were largely used for the same purpose. Mrs. Hart, then unmarried, came to live at Fountain Grove in 1886, and Mr. Hart came shortly thereafter. The Harts were married at the ranch in 1887. The Harts left Fountain Grove in 1892 and went to New York to work for Harris at a depot from which the products of the ranch were sold and distributed. Under the personality and leadership of Harris the five grantees were very friendly to each other, and all contributed either money or services to the enterprise. Harris went to New York in 1900 and left Nagasawa in charge of Fountain Grove. He then caused his attorney, A. B. Ware, to prepare and deliver the deed granting the land to his five faithful workers. After this deed had been delivered, Harris still remained closely in touch with Fountain Grove, and continued his religious and philosophical teaching and writing. Through 58 Vesey street, New York, the distributing depot for the products of Fountain Grove, he continued to receive large sums of money for living expenses and for carrying on his life work. The evidence shows that between 1892 and 1906, when he died, Harris received about $110,000 from Vesey street, over $30,000 of which was advanced after 1900. The money so received, together with contributions from other sources, was kept by Harris as a so-called trust fund. Upon the death of Mr. Harris the residue of this fund passed to his wife, who thereafter made her home with the Harts. The Harts and Mrs. Harris came to Fountain Grove in 1909. Apparently the Harts and Nagasawa could not agree as to the proper management of Fountain Grove, and so the Harts and Mrs. Harris moved to San Diego, where Mrs. Harris died in 1916. It should also be mentioned that, since 1909, Nagasawa has paid all taxes and expenses; and has assumed all obligations connected with Fountain Grove.

At the time the action was commenced, the defendant had resided upon the premises for a period of more than fifty-five years, and it was almost solely through his management and supervision that the vineyards were planted and the products of the vineyards were manufactured into wines, tonics, and grape juice beverages. His interest antedates the passage of the Alien Land Act (St. 1913, p. 206) by many years. He had been in the sole and absolute possession of said premises for many years before the passage of the Alien Land Act. In fact his right of possession has never been questioned by plaintiff or by any one else. A bonded winery upon the premises has been in operation for a number of years. Since 1919 defendant has procured from the United States government various permits authorizing him to sell wines and wine tonics under his name. He has made leases of portions of the said premises for gas station and airport purposes, sold a portion to the state for highway purposes, and in 1927 or 1928 executed to the Bank of Italy of Santa Rosa a mortgage as security for a considerable sum of money which he borrowed from said bank. His right of occupancy or dominion had never been questioned until the filing of this belated action.

Upon the death of Mrs. Harris in 1916, the Harts took over the management of the so-called trust fund. In 1919, Nagasawa had some discussion with the Harts about the trust fund. He finally wrote to the Harts pointing out that possibly he had some claim to the trust funds and suggested an accounting. He stated that, unless such an accounting was had, he would see an attorney and be advised. As already pointed out, a large portion of the money in the trust fund had originally come from the sale of the products of Fountain Grove. The Harts were evidently perturbed over the possibility of having to account for the so-called trust fund, and over the possibility that they or the fund might be called upon to meet some of the obligations of Fountain Grove. They agreed to negotiate. Nagasawa appointed one George F. King his attorney in fact, and gave him written power to negotiate for him. Eugene Daney, an attorney in San Diego, acted as attorney for both parties. He had been Hart's attorney since 1916. The evidence shows that appellant disclosed the whole situation to Daney and told him that he feared Fountain Grove was in a failing financial condition and might call on the trust fund for assistance. Every one was apparently quite friendly and satisfied with the deal that was ultimately worked out. The Harts wanted to be relieved of any past or future claims of Fountain Grove on the trust fund. They evidently felt that, with the advent of prohibition, Fountain Grove, with its large vineyards, which were its principal support, would go bankrupt. Under these circumstances Mr. and Mrs. Hart signed the quitclaim deed by which they conveyed to Nagasawa all of their right, title, and interest in and to Fountain Grove. Nagasawa, as part of the same transaction, and as consideration therefor, on his own behalf and on behalf of the Fountain Grove Vineyard Company, agreed "never to disturb, molest, interfere with, call for an accounting of, or make any claim upon that certain trust fund." The agreement embodied a mutual release of all claims of Nagasawa, past, present, and future, to the trust fund, and of all claims of the Harts, past, present, and future, to Fountain Grove. The Harts were released from any liability for past claims growing out of the operation of Fountain Grove. The evidence shows that Hart, after this agreement had been consummated, was very happy in having settled the matter in a way he considered to his advantage. Daney testified that the agreement was the result of the mutual understanding and desire of all concerned. The evidence shows that in 1921 Hart told Freeman, a partner of Nagasawa, in New York, that he (Hart) was "entirely satisfied with the deal I drove with Kanaye Nagasawa, and I am relieved to know that from now on I won't be called upon to contribute to the support and maintenance of Fountain Grove. * * * I realize if I had remained a partner, the money in my hands would have been subjected to withdrawal for Fountain Grove liabilities * * * with the incoming of prohibition I consider that Fountain Grove will fail and go bankrupt." Freeman testified positively to this conversation, and, although Hart refused to admit that he had so stated, he would not deny that the conversation had taken place. There is some evidence that Hart was so satisfied with the 1919 deal that shortly thereafter he paid King, attorney in fact for Nagasawa, some money for "past succor."

[4] From the above facts it sufficiently appears that the contention of appellant that the quitclaim deed was secured by respondent by duress or undue influence is utterly without merit. The record clearly shows that the 1919 agreement was the result of a mutual understanding, and entirely satisfactory to appellant when it was entered into. The evidence further shows that Hart entered into the agreement gladly and of his own free will. It might be added that, with the exception of some information contained in a purported copy of a telegram, which was properly excluded from evidence because no proper foundation was laid for its introduction, Hart admitted that in 1919 he knew every fact concerning the transaction which he knew in February, 1931, at the time of the trial. Appellant's good faith in making the contention at this late date that the agreement was secured by undue influence and duress is open to some doubt. The evidence likewise shows a legal and adequate consideration. The assumption by Nagasawa of all liabilities connected with Fountain Grove, of itself, would be sufficient consideration. The release of all claims to the trust fund was clearly the result of a valid compromise. It is, of course, well settled that the compromise of even a doubtful claim maintained in good faith constitutes a valid and legal consideration. Bank of Commerce v. Scofield, 126 Cal. 156, 58 P. 451; Rohrbacher v. Aitken, 145 Cal. 485, 78 P. 1054.

[5] Appellant, without any allegation of ineligibility in the pleadings, rather vaguely points out that the evidence shows that Nagasawa was born in Japan, and inferentially is of Japanese blood, and that under the Alien Property Act it is unlawful for an ineligible alien to own agricultural property in this state. Assuming, but not deciding, that the conveyance by the Harts to Nagasawa in 1919 was in violation of the act, that fact would in no way invalidate the conveyance. The conveyance was fully executed. Title vested in the grantee, and the grantor cannot complain. If the conveyance was in violation of the act, the state of California is the only one who can challenge it. In no event would it revert to appellant. Shiba v. Chikuda, 214 Cal. 786, 7 P.(2d) 1011; Mott v. Cline, 200 Cal. 434, 253 P. 718; Suwa v. Johnson, 54 Cal. App. 119, 203 P. 414. Surely defendant will not be deprived of his property in violation of the due process of law.

The other points raised by appellant are so unsubstantial as not to require discussion.

We are of the view that the trial court's interpretation of the language of the deed should not be disturbed.

Judgment affirmed.

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218 Cal. 672

## LE CLERG et al. v. CITY OF SAN DIEGO et al.

S. F. 14961.

Supreme Court of California.
Aug. 21, 1933.

**1. Mandamus 🔑163(4).**

In mandamus to compel issuance of warrants in satisfaction of judgments, record *held* not to show final action by city constituting binding obligation to pay in three installments.

**2. Municipal corporations 🔑968(2).**

Where necessary steps to require city to levy tax under statute were not completed until July 19, statute required levy for "next fiscal year" and fiscal year ended June 30, levy need not be made until following year (St. 1901, p. 794, as amended by St. 1925, p. 300).

**3. Mandamus 🔑176.**

In mandamus proceeding to compel issuance of city warrants in satisfaction of judgments, appropriate relief will be granted under prayer for general relief, although petitioners did not show right to specific relief prayed for.

In Bank.

Application for writ of mandate.

Application for writ of mandate by Vernon Charles Le Clerg and others, prayed to be directed to G. F. Waterbury, as Auditor and Comptroller of the City of San Diego, and others, to compel the issuance of warrants in satisfaction of judgments.

Writ granted.

See, also, 24 P.(2d) 156.

Sanders & Jacques, of San Diego, for petitioners.

C. L. Byers, City Atty., and Gilmore Tillman and H. B. Daniel, Asst. City Attys., all of San Diego, for respondents.

PER CURIAM.

This is a second petition for a writ of mandamus wherein the same petitioners seek to compel the same respondents to issue warrants in satisfaction of judgments held by the petitioners against the city of San Diego. In the first proceeding the petitioners sought the issuance of warrants for the payment of said judgments in full or the levy of a tax to satisfy the same in full. It was determined therein that the city had the right to elect to proceed in accordance with the act of 1901 (St. 1901, p. 794, as amended by St. 1925, p. 300), by levying a tax for at least one-tenth of the amounts of said judgments each year, and that it would not be presumed that the city would refuse to levy a tax for that purpose for the fiscal year 1933–34, as provided in said act. The peremptory writ in the prior proceeding was therefore denied without prejudice. Le Clerg v. City of San Diego (Cal. Sup.) 24 P.(2d) 156. After the opinion was filed in that proceeding, on July 13, 1933, the petitioners made a demand on the common council of the respondent city to levy a tax for the present fiscal year sufficient to pay said judgments in full, or to levy a tax this year sufficient to pay two-thirds of said amounts and to provide for a tax for the remaining one-third in the fiscal year 1934–35, or to levy a tax for one-third for the present fiscal year and one-third each for the two years following, or to levy a tax for two-tenths for the fiscal year 1933–34 and the remainder in eight equal annual installments. The demand was refused.

The present proceeding was commenced on July 22, 1933. A hearing on the return to the alternative writ was had on August 8th, and the matter was then submitted. On the latter date a petition for a rehearing and modification of the judgment in the former proceeding was pending and undetermined. With full appreciation of the fact that, if the judgment in the former proceeding should become final most of the questions involved in the present proceeding would become settled and the adjudication be binding upon the parties hereto, the petition for a rehearing and modification of said judgment was denied.

The finality of the judgment in the former proceeding has foreclosed the petitioners from insisting that they now have the right to compel a tax levy for the ensuing fiscal year sufficient to pay said judgment in full.

[1] The claim for payment of two-thirds this year and one-third next year or for payment in three equal annual installments is based upon an alleged agreement between the petitioners and the city for payment on those terms. It appears that in June, 1932, the common council appointed a special budget committee to confer with the petitioners with reference to the terms of payment of their claims. This committee, with the consent of the petitioners recommended to the council that such payment be made in three equal annual installments. The city attorney, by resolution of the council, was directed to draft an agreement between the petitioners and the city as recommended by the committee. Such an agreement, however, was not finally executed. A preliminary budget for the fiscal year 1932–33, including an item of $25,000 payable to the petitioners, was prepared by the special committee and submitted to the council. This budget was rejected and a new budget finally approved by the council eliminating such or any item for the benefit of the petitioners. The record therefore discloses that no final action was taken by the city which would constitute a binding obligation to pay in three installments.

[2] The petitioners further contend that the respondents should be compelled to levy a tax for the fiscal year 1933–34 sufficient to pay at least two-tenths of the judgment claims. The contention is based on the claim that it was the duty of the city to levy a tax for at least one-tenth for the fiscal year 1932–33, and, since it did not do so, at least two-tenths should be levied for the present fiscal year. The city resists this claim and asserts that under the terms of the act of 1901 no duty was imposed on the city to levy a tax for said purposes for the fiscal year 1932–33. It is pointed out that, when the necessary steps have been taken under said act to require the city to levy the tax, then and then only it becomes the duty of the city under section 3 of the act to levy the tax for the next fiscal year for at least one-tenth of the judgment claims. It is also pointed out that under the city charter the fiscal year commences on July 1 and ends on June 30 of the following year. It appears without question that the steps necessary to put the act of 1901 in motion were not completed until July 19, 1932, which was after the commencement of the new fiscal year. Under the strict wording of the statute the next fiscal year would be the fiscal year 1933–34.

[3] Although the petitioners have not shown their right to the specific relief prayed for, the facts disclose that they are entitled, under their prayer for general relief, to the levy of a tax for the present year

of at least one-tenth of the amount of said judgment claims, and we think that the respondents are foreclosed by the former proceeding from contending that the petitioners are not entitled to such relief.

A peremptory writ should therefore issue forthwith, directing the respondents to levy a tax for the fiscal year 1933–34 sufficient to pay at least one-tenth of the amount of said judgment claims and to pay the amount of money so derived to the petitioners. It is so ordered.

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218 Cal. 747

## RING v. STATE BAR OF CALIFORNIA.

L. A. 14006.

Supreme Court of California.

Aug. 30, 1933.

**1. Attorney and client 🔑52.**

Complaint in disbarment proceeding *held* not insufficient because verification was made by officer of bar association, and on information and belief, though allegations of complaint were based on complainant's knowledge (Code Civ. Proc. § 287, subds. 4, 5).

**2. Attorney and client 🔑53(1).**

Disbarment proceedings are not criminal as respects right of attorney to presumption of innocence, and board of governors are qualified judges to pass upon truth of charges (Code Civ. Proc. § 287, subds. 4, 5).

**3. Attorney and client 🔑53(1).**

In disbarment proceeding, acceptance of oral testimony concerning fee-splitting *held* not to violate parol evidence rule, where documents were introduced (Code Civ. Proc. § 287, subds. 4, 5; §§ 1856, 1962 (2).

**4. Attorney and client 🔑53(2).**

Evidence *held* to sustain finding that attorney violated rules of professional conduct in splitting fees and commingling clients' funds justifying suspension for 2½ years (Code Civ. Proc. § 287, subds. 4, 5; Rules of Professional Conduct, rules 3, 9).

**5. Attorney and client 🔑53(1).**

That Supreme Court weighs evidence in disbarment proceeding does not free petitioner from burden to show that decision of board of governors was erroneous.

**6. Attorney and client 🔑46.**

Attorney could not claim as extenuating circumstance that he paid back clients' money, where he delayed payment until clients took matter to district attorney and State Bar (Code Civ. Proc. § 287, subds. 4, 5; Rules of Professional Conduct, rules 3, 9).

In Bank.

Application by William C. Ring to review an order of the Board of Governors of the State Bar recommending that petitioner be suspended from practice of law within the state for a period of two and a half years.

Petitioner ordered suspended for two and a half years.

William C. Ring, in pro. per.

Philbrick McCoy and William C. Mathes, both of Los Angeles, and A. B. Bianchi, of San Francisco, for respondent.

PER CURIAM.

This is a proceeding to review the recommendation of the board of governors of the State Bar that the petitioner be suspended from practice as an attorney at law for a period of two and one-half years.

The recommendation of the board was based on evidence adduced before the local administrative committee bearing upon five consolidated charges initiated by four complaints filed by, and verified by an officer of, the Los Angeles Bar Association, and by an order to show cause based on a fifth complaint filed and verified by former clients of the petitioner. These complaints involved charges of violations of rules 3 and 9 of the Rules of Professional Conduct and subdivisions 4 and 5 of section 287 of the Code of Civil Procedure. The local committee recommended disbarment, which the board reduced to suspension for the period stated.

[1] The petitioner contends that the complaints were insufficiently verified, first because the verification was made by an officer of the complainant Los Angeles Bar Association, and, second, because the verifications were made on information and belief, although the allegations of the complaint are based on the complainant's knowledge. These contentions are answered contrary to the petitioner's contentions by the cases of In re Collins, 147 Cal. 8, 10, 81 P. 220, and Lantz v. State Bar, 212 Cal. 213, 221, 222, 298 P. 497. See, also, Herron v. State Bar, 212 Cal. 196, 298 P. 474.

The only other matter for consideration is the petitioner's contention that the evidence is insufficient to sustain the findings of the board of governors. The petitioner does not in every instance dispute that the events occurred or the acts were committed from which the board has drawn inferences and deductions unfavorable to the petitioner. What the petitioner does contend is that the board should have believed only the testimony of the petitioner on the conflicting evidence and adopted the petitioner's view of the correct deductions to be drawn from undisputed facts; also that the board should have accepted the extenuating circumstances offered by the petitioner in complete exoneration of his conduct.

[2] The petitioner makes the oft-reiterated claim that the proceedings before the board are criminal in nature, and that the attorney is entitled to the same rights as a defendant in a criminal action to have all intendments in favor of his innocence. The special nature of these proceedings has many times been mentioned (Fish v. State Bar, 214 Cal. 215, 4 P.(2d) 937, 78 A. L. R. 585, and cases cited), and with respect to the presumption of innocence "the answer is that the qualified judges who are by law charged with the duty of passing upon the truth of the charges against petitioner have resolved all questions against him" (Aydelotte v. State Bar of California, 209 Cal. 737, 740, 290 P. 41, 42).

[3] The petitioner apparently seriously contends that as a matter of law the board should have accepted at their face value certain documents introduced in evidence which the unlicensed persons, found to have been the associates of the petitioner, testified were a "blind" or "cover" for fee-splitting transactions had between them and the petitioner. The petitioner asserts that for the board to accept the testimony of the unlicensed persons is to violate the rule that parol evidence may not be introduced to vary the terms of a written instrument. We feel constrained to answer the argument because it is not the first time that it has been used by petitioners in similar review proceedings. A sufficient answer is that the proceeding herein is not one between the parties to the instrument, and the provisions of sections 1856 and 1962 (2) of the Code of Civil Procedure do not apply. No rights of recovery upon the instrument are sought. The purpose of the contradictory testimony is not to vary the terms, but is to impeach the representations on the written documents. The truth of the matter must be resolved by the fact-finding body. In the specific instance two receipts were signed by one of the unlicensed persons for sums received from the petitioner purporting to be in payment of services rendered for investigating and procuring statements of witnesses in two cases unconnected with any of the matters before the board. It was testified that the money was in fact received by the unlicensed persons as part of the fee received by the petitioner in the Conger matter which was under investigation in these proceedings. At the same time that the receipts were prepared and signed, at the request of the petitioner, both the unlicensed persons signed a letter addressed to the petitioner in which the following paragraphs appear:

"We have never at any time received directly or indirectly, nor do we expect to receive any compensation, reward or thing of value from you on account of any case or litigation of any kind which you may have handled and in which we at any time ever had any interest.

"That to the best of our knowledge you became the attorney for C. E. Conger in the action of Conger v. Knowles et al., before you knew that we had ever had any connection with said case and that we have never received nor do we expect to receive any remuneration from you on account of any connection which we have ever had with said matter."

[4] The obvious inferences to be drawn from this entire transaction on its face, together with the testimony of witnesses and the inability of the petitioner to sustain the representations incorporated in the receipts by any evidence, abundantly support the findings of the board in respect to the real nature and purpose thereof.

[5] The petitioner insists that this court can and does weigh the evidence in these proceedings. This fact does not free the petitioner from the burden devolving upon him to show that the decision of the board is erroneous or unlawful. Aydelotte v. State Bar of California, supra, 209 Cal. page 740, 290 P. 41.

The petitioner has likewise failed to show that the evidence does not support the findings of the board with respect to the petitioner's association with the unlicensed persons in two additional personal injury cases.

[6] The documentary evidence bearing on the remaining charges involving the commingling of funds and the petitioner's use of client's funds for his own purposes and to settle demands against him of other clients cannot be disputed on the record presented. As to the two charges involving this evidence, the petitioner offers the extenuating circumstance that the record also shows that the parties involved have received every cent to which they were entitled, although there was some considerable delay in the petitioner's ability to meet the demands in full, and compliance therewith was not attempted until the matters had been taken to the district attorney's office or the State Bar. Domestic or other private embarrassments of the attorney in such matters cannot be accepted as extenuating circumstances, at least to the extent of absolving the petitioner from discipline on the record here presented.

The petitioner received a full and fair trial on the part of the local administrative committee and by the board of governors. The record supports the findings and recommendation.

It is therefore ordered that the petitioner be suspended from practice as an attorney at law of this state for the period of two and one-half years from and after the filing of this order.

218 Cal. 680

## PEOPLE v. BORDERLAND EXPRESS et al.

Sac. 4753.

Supreme Court of California.
Aug. 22, 1933.

Rehearing Denied Sept. 21, 1933.

**Automobiles** ⚷74.

Operator of motor vehicle for hire *held* liable for license fee for last quarter of 1926 under 1925 statute, as against contention constitutional amendment providing different rate went into effect during such quarter (St. 1925, p. 833; Const. art. 13, §§ 1, 15).

Under Const. art. 13, § 15, tax was not levied or assessed until first Monday in March, 1927, so that taxpayers would escape all state taxes for part of last quarter of 1926 unless payment was made under St. 1925, p. 833. Furthermore, at time of adoption of constitutional amendment, tax under previous law had been legally "levied," even though administrative and procedural details of assessment and collection were to come later, and constitutional amendment provided that nothing therein should affect any tax levied or assessed prior to adoption thereof.

[Ed. Note.—For other definitions of "Levy," see Words & Phrases.]

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In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by the People against the Borderland Express, W. J. Gibson, to recover license fees under St. 1925, c. 412. From an adverse judgment, defendants appeal.

Affirmed.

H. J. Bischoff, of San Diego, for appellants.

U. S. Webb, Atty. Gen., and R. L. Chamberlain, Deputy Atty. Gen., for the People.

PER CURIAM.

The state of California brought this action against defendant to recover license fees assessed under Statutes 1925, c. 412, p. 833. After trial below, all questions were eliminated save the right of the state to collect the tax for the last quarter of 1926. The lower court held that the tax was proper.

Prior to November 2, 1926, the Statutes of 1925 imposed a license tax of 4 per cent. of the gross receipts (with deductions for local licenses and taxes) on those operating motor vehicles over the public highways for hire, fixed on a quarterly basis. On November 2, 1926, the people adopted an amendment to article 13, § 15, of the Constitution, changing the taxing rate to 4¼ per cent. on carriage of passengers and 5 per cent. on transportation of property, and relieving the carrier of municipal licenses and taxes. The new tax was annual, becoming a lien on the property on the first Monday in March of each year, the tax being computed for the previous year. The amendment contained the provision that "such taxes shall be in lieu of all other taxes and licenses" upon the property of such companies. Defendant contends that the amendment is self-executing, and that it is not bound to pay the tax under the 1925 statute for the last two months of the last quarter of 1926, because the amendment went into effect during the quarter. Plaintiff's position is that defendant must pay the tax for this quarter under the language of the amendment reading: "Nothing herein contained shall affect any tax levied or assessed prior to the adoption of this section."

In our opinion the trial court correctly determined that the tax was proper. Defendant did business, under a license given in accordance with the act of 1925, during the last quarter of 1926; and the tax was imposed upon it by said act. At the time of the adoption of the constitutional amendment, the tax under the previous law had been legally "levied", even though the administrative and procedural details of assessment and collection were to come later. Under the constitutional amendment, the tax was not levied or assessed until the first Monday in March, 1927. Consequently, if defendant is correct in its contention that the constitutional provision superseded the statute upon its adoption, the result will be an escape from all state taxes for about two months of the quarter in question. This would be contrary to the express terms of the constitutional amendment, quoted above, as well as the general declaration in article 13, § 1, that all property should be taxed in proportion to its value. We are satisfied that the amendment neither in spirit nor in terms purports to relieve defendant of the tax for the period in question.

The judgment is affirmed.

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

## ASHLEY v. PINNEY et al.*

Civ. 7675.

District Court of Appeal, Second District, Division 1, California.

Aug. 21, 1933.

Rehearing Denied Sept. 13, 1933.

Hearing Granted by Supreme Court Oct. 19, 1933.

**Appeal and error ⚷1050(1).**

In action for injuries from automobile accident, admitting evidence of compromise and settlement offer by defendant's insurance carrier, introduced in connection with statement of facts, *held* prejudicial error, where circumstances of statement of facts could have been presented without showing attempted compromise.

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Appeal from Superior Court, Los Angeles County; W. A. Anderson, Judge.

Action by Gwendolyn Ashley against A. J. Pinney and others. From a judgment for plaintiff, named defendant appeals.

Reversed.

Paul Nourse, of Los Angeles (Forrest A. Betts, of Los Angeles, of counsel), for appellant.

Charles Dell Rubin and Stuart McHaffie, both of Los Angeles, for respondent.

CONREY, Presiding Justice.

In this action to recover damages for personal injuries alleged to have been caused by negligence of the defendants, the following facts appear: The plaintiff, as a guest of appellant, on June 11, 1929, was riding in an automobile driven by appellant. While they were driving in a westerly direction on Seventh street in the city of Los Angeles, and at the intersection of that street with Lake street, appellant made a left-hand turn, intending to travel southerly on Lake street. At the same time defendant Rivera was driving a city sprinkling truck easterly on Seventh street. Before the turn was completed appellant's automobile was hit by the truck. From that collision the plaintiff's injuries resulted. She brought her action against both Pinney and Rivera, as well as other defendants, but the action came to trial between plaintiff and only the defendants Pinney and Rivera. Pursuant to the verdict of a jury, judgment was entered in favor of defendant Rivera, and in favor of plaintiff against defendant Pinney in the sum of $5,000. From this judgment the said Pinney appeals.

There is no contention on the part of appellant that there is not sufficient evidence to justify the verdict against him. His discussion of the evidence is for the apparent purpose of showing that the evidence was so much in conflict that the errors of which he complains were prejudicial and should entitle him to a reversal of the judgment.

The stated grounds of appeal are: First, that the court erred in admitting testimony to prove an alleged offer of compromise and settlement on behalf of appellant; second, that the court erred in admitting evidence to show the poverty of the plaintiff; and, third, that counsel for plaintiff committed irreparable prejudicial injury in arguing plaintiff's poverty to the jury. The second point and the third are not shown to have sufficient support in the record, to justify a reversal on those grounds.

The first point is one of substantial importance and merit.

In the face of timely objections of appellant, respondent was permitted to inject into the evidence, before the jury, not only the fact that an attempt had been made to induce the plaintiff to accept a sum of money in settlement of her right or claim to compensation for her injuries, but also that this offer had been made by an insurance company which was interested as insurer of appellant. In substance, the attempted justification for these rulings is that appellant had introduced in evidence a written statement of facts of the accident, and had endeavored to prove that the contents of said statement had been given orally by the plaintiff to one Frazar, and that the last sentence thereof was in the plaintiff's handwriting. It was under color of an investigation into the circumstances about said statement of facts that the plaintiff succeeded in bringing before the jury the fact that an attempt to compromise the case had been made by appellant's insurance carrier. After reading those parts of the record which are pertinent to this issue, we are convinced that the actual matter then under investigation, with reference to said statement of facts, could have been fully presented, without developing the facts of the attempted compromise. That the defendant in such an action as this is entitled to protection against prejudicial testimony of this kind is well established by more decisions than should have been necessary to settle the question. Citti v. Bava, 204 Cal. 136, 266 P. 954; Squires v. Riffe, 211 Cal. 370, 374, 295 P. 517.

The judgment is reversed.

We concur: YORK, J.; HOUSER, J.

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 29 P.2d 199.

133 Cal.App. 550

## LOSLEBEN v. CALIFORNIA STATE LIFE INS. CO.

Civ. 687.

District Court of Appeal, Fourth District, California.

July 31, 1933.

Hearing Denied by Supreme Court Sept. 28, 1933.

**1. Insurance** ⇨455.

Where act is done in manner intended, ensuing injury does not result from "accidental means," notwithstanding result may have been unexpected and be such as to constitute accidental injury, since "accidental means" involves element of unexpectedness in act leading to injury.

[Ed. Note.—For other definitions of "Accidental Means," see Words & Phrases.]

**2. Insurance** ⇨668(13).

Whether death of insured resulted from "accidental means" within double indemnity provision of policy *held* for jury, where injury probably resulted from voluntary jump from work bench.

> While injury to insured may result in greater or less degree from original voluntary act on his part, if there is some evidence which justifies inference that means which produced injury contained something of unexpected or unforeseen character involving other acts not intentionally done, resulting injury is caused through "accidental means."

**3. Trial** ⇨296(2).

Instruction *held* not erroneous when considered with other instructions as justifying recovery under policy for death by accidental means, if result of insured's voluntary act was unexpected, irrespective whether means which produced injury were unexpected.

> Instruction stated that, if evidence showed insured did voluntary act, the natural, usual, and to-be-expected result of which was not to produce injury to himself, but that there flowed from such act an unforeseen and unexpected means through which injury was sustained or death produced, jury should find that death was caused by accidental means.

**4. Trial** ⇨296(2).

Instruction that doing of intentional act from which injury resulted would not bar recovery under policy for death by accidental means if circumstances pointed to "possibility" of involuntary consequence *held* not error, in view of other instructions as permitting jury to decide question on mere possibility and not preponderance of evidence.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Ida Losleben against the California State Life Insurance Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

See, also, 17 P.(2d) 155.

West & McKinney, of Santa Ana, for appellant.

William J. M. Heinz and McFadden & Holden, all of Anaheim, for respondent.

BARNARD, Presiding Justice.

On a former appeal in this case (119 Cal. App. 556, 6 P.(2d) 1012), this court in reversing a judgment of nonsuit summarized the facts as follows:

"The plaintiff is the widow of George Phillip Losleben, who held an insurance policy issued by the defendant. This policy provided for the payment of $2,500 in the event of death resulting from natural causes and for an additional $2,500 'in the event that the death of the insured is caused by bodily injuries effected exclusively and wholly by external, violent and accidental means, said death occurring within ninety days after the happening of such accident.' The insured was employed as a mechanic in a packing house, and on November 21, 1929, was directed by his employer to build a shelf over a workbench, which bench was about three feet high. The employer left the building about 3 o'clock on the afternoon of that day, leaving the insured engaged in this work. When the employer returned about two hours later, he found the insured in great pain and sent him home. Doctors were immediately called, an operation was performed, and on November 25, 1929, the insured died. The defendant paid the $2,500 contemplated by the policy for death from a natural cause, but refused to pay the additional $2,500. * * *

"The deceased had been working in this packing house for about ten years. His employer testified that when he left him on the afternoon in question he appeared to be in perfectly good health and was whistling at his work; that in doing his work it was necessary for him to climb upon this bench, and in getting down to jump from the same; that when he returned he found the deceased suffering extreme pain and 'doubled up'; that he sent him home and shortly thereafter went over to see him; that at that time the insured could not stand up straight; and that when he was put to bed he 'drew himself up.' The physician who was immediately called testified that he examined the insured and found his abdomen very much distended and very painful to the touch; that from his examination of the patient he could determine how the injury was caused within a certain range of possibilities; and that on the same day, November 21, he performed an operation. As to what he found, he testified as follows: 'I found a condition of peritonitis of the abdominal cavity; fluid in the abdomen, and fecal matter; I found a perforation of the small intestine in the center, or twist of the bowel, what we call a volvulus—that is the technical name for a twist of that character. The circulation had been cut off by this twist and that segment of the bowel was blue and black, colored in the process of decay.'

"This physician testified that in his opinion this condition was caused by an injury. Another physician testified that he saw the insured on November 21; that the insured told him that the pain in his abdomen came on acutely that afternoon, compelling him to quit work, and that he almost collapsed; that when he saw the patient he was in such pain he could not say very much; that he held his stomach and complained of the terrible pain; and that he was lying down and rolling in pain. This physician testified that in his opinion the death of the decedent was caused by acute peritonitis, which was brought on by 'the volvulus or twist of the bowel,' and that this condition of the patient could be caused by 'a sudden jolt, or a strain of the bowel wall, probably a sudden jerk or jump.' Asked as to what kind of a condition volvulus is, he replied: 'It is a twist in the bowel, usually occurring in the small bowel, and as soon as that takes place you have your circulation cut off in the bowel adjoining, and that bowel immediately becomes weakened, the blood supply is shut off, and, of course, immediately we have gas accumulate because the bowel is obstructed and the gas accumulates in all the bowel, and the weakened condition in the bowel which had been deprived of the circulation is liable to burst or perforate.'

"He then testified that this patient had a volvulus and a perforation of the bowel, and that this could be caused either by chronic constipation, by tuberculosis, or by a sudden jolt or strain. He then testified that he found no indications that this patient suffered from the ailments referred to, and that his bowel and all of his abdominal organs were in a healthy condition. Based upon the conditions he found, he testified that in his opinion this particular volvulus was caused by a strain."

A second trial resulted in a judgment for the plaintiff, from which the defendant has taken this appeal. In addition to the facts above outlined, the record shows that the two doctors who operated upon the insured, and later assisted in an autopsy, after stating what they found, testified as to the several things which could have caused such a condition, each naming trauma, or injury, as one of such causes. Each then testified that he could find no indication of the presence of any of the causes named except trauma, and that in his opinion the volvulus in the decedent was caused by trauma.

[1, 2] The appellant's first contention is that the evidence is entirely insufficient to support the verdict, in that it fails to show death from accidental means as distinguished from an accidental death. The appellant concedes that the evidence for the respondent is essentially the same as that received at the first trial, with one exception. During the second trial, the respondent introduced in evidence the "proofs of death" which had been furnished upon blanks provided for that purpose by the insurance company. These contained, in answer to appropriate questions, a statement made by the respondent including the following: "The insured jumped off a work bench at packinghouse where he was employed about 3 p. m. November 21" and another statement made by the attending physician as follows: "Volvulus of small intestine caused by jumping from work bench." While the appellant also relies upon certain expert evidence introduced in its behalf, this merely creates a conflict, and need not be here considered. It is argued that the evidence discloses that the deceased died as the result of a jump, that the act of jumping was voluntary upon his part, and that, since the entire operation of the deceased in getting down from the bench was carried out in precisely the manner he intended, this case comes within the rule of such cases as Rock v. Travelers' Ins. Co., 172 Cal. 462, 156 P. 1029, 1031, L. R. A. 1916E, 1196; Ogilvie v. Aetna Life Ins. Co., 189 Cal. 406, 209 P. 26, 26 A. L. R. 116; Kellner v. Travelers' Ins. Co., 180 Cal. 326, 181 P. 61; Olinsky v. Railway Mail Ass'n, 182 Cal. 669, 189 P. 835, 14 A. L. R. 784.

It is well established that, where an act is done in precisely the manner intended, it cannot be said that an ensuing injury results from accidental means, although the result itself may have been unexpected and be such as to constitute accidental injury. While this distinction is somewhat technical, it has some reasonable basis in cases where the result is to be naturally expected or foreseen from the act done, or where, from existing disease or otherwise, the strain of an intended act is too great for a particular individual. Under our decisions, accidental means involves an element of unexpectedness in the act or occurrence which leads to the injury. In Rock v. Travelers' Ins. Co., supra, the court pointed out this distinction, and observed that in most cases where injury by accidental means was held to be established "there was some evidence which justified the inference that the means through which the injury was sustained contained something of an unexpected or unforeseen character." In Davilla v. Liberty Life Ins. Co., 114 Cal. App. 308, 299 P. 831, 833, the general rules are thus gathered together from a number of cases:

> "The term 'accidental means' has been frequently defined in this state, but it seems not applied to similar facts. 'The policy, it will be observed, does not insure against accidental death or injuries, but against injuries effected by accidental means. A differentiation is made, therefore, between the result to the insured and the means which is the operative cause in producing this result. It is not enough that death or injury should be unexpected or unforeseen, but there must be some element of unexpectedness in the preceding act or occurrence which leads to the injury or death.' Rock v. Travelers' Ins. Co., 172 Cal. 462, 465, L. R. A. 1916E, 1196, 156 P. 1029, 1030. 'Where the death is the result of some act, but was not designed and not anticipated by the deceased, though it be in consequence of some act voluntarily done by him, it is accidental death. Where death is caused by some act of the deceased not designed by him, or not intentionally done by him, it is death by accidental means. In other words, accidental death is an unintended and undesigned result, arising from acts done; death by accidental means is where the result arises from acts unintentionally done.' Pledger v. Business Men's Acc. Ass'n of Texas (Tex. Civ. App.) 197 S. W. 889, quoted with approval in Olinsky v. Railway Mail Ass'n, 182 Cal. 669, 672, 14 A. L. R. 784, 189 P. 835, followed in Ogilvie v. Ætna Life Ins. Co., supra. 'An effect which is the natural and probable consequence of an act or course of action cannot be said to be produced by accidental means.' Harloe v. California State Life Ins. Co., 206 Cal. 141, 142, 273 P. 560. 'Without doubt, there can be no recovery if the insured does a voluntary act the natural, usual, and to-be-expected result of which is to bring injury upon himself. An injury or death so occurring is not produced by "accidental means" in any sense of the word, legal or colloquial. Lickleider v. Iowa State Traveling Men's Ass'n, 184 Iowa, 423, 3 A. L. R. 1295, 166 N. W. 363, 168 N. W. 884. * * * In Western Com. Travelers' Ass'n v. Smith, 85 F. 401, 40 L. R. A. 653, 29 C. C. A. 223, a leading case, it is said that the term "accidental means" is descriptive of "means which produce effects which are not their natural and probable consequences."' Horton v. Travelers Ins. Co., 45 Cal. App. 462, 466, 187 P. 1070, 1071. 'The term "accidental means" depends for its application upon the facts of each particular case; since what would be an unusual or improbable consequence, an unexpected or unforeseen occurrence in one set of circumstances in which the assured might be placed, would be but the usual, the expected, and in all human probability the foreseen consequence affecting the assured in another set of circumstances.' Moore v. Fidelity & Casualty Co., 203 Cal. 465, 473, 56 A. L. R. 860, 265 P. 207, 210."

In U. S. Mutual Accident Association v. Barry, 131 U. S. 100, 9 S. Ct. 755, 762, 33 L. Ed. 60, where the injury was preceded by a jump from a platform, the court said: "It is further urged that there was no evidence to support the verdict, because no accident was shown. We do not concur in this view. The two companions of the deceased jumped from the same platform, at the same time and place, and alighted safely. It must be presumed, not only that the deceased intended to alight safely, but thought that he would. The jury were, on all the evidence, at liberty to say that it was an accident that he did not."

The mere fact that an act of jumping was voluntarily done does not conclusively show that an ensuing injury was not the result of accidental means. Such an act may be, and frequently is, accompanied or followed by other acts not intentionally done, such as slipping, falling, alighting upon an object not seen, an involuntary movement caused by unexpected developments or any one of a number of things that could be named. While an injury to an insured person may result in greater or less degree from an original voluntary act upon his part, if there is some evidence which justifies the inference that the means which produced the injury contained something of an unexpected or unforeseen character involving other acts not intentionally done, the resulting injury may be said to be caused through accidental means. In the instant case, while the deceased may have intended to jump from the bench, he may have slipped, fallen, alighted upon something, involuntarily given his body a violent jerk or twist, or a number of other things may have occurred which were not naturally or necessarily to be expected in connection with the ordinary act of jumping from a height of three feet. The condition of the deceased immediately or shortly after his act of jumping, if he jumped, was not such as usually or ordinarily follows or is to be expected from a jump of that nature. There was evidence that the insured was in good health until suddenly stricken; that the condition in which he was found could have been caused by a sudden jolt or jerk; and that the only other things which could be expected to have caused such a condition were entirely absent. In ordinary human experience a jump of three feet, in itself, does not produce a jolt or jerk of such violence as to disrupt the internal organs of a healthy man, especially a mechanic who may be presumed to customarily engage in manual labor and more or less frequent climbing about. These facts, taken in connection with the place and circumstances, together with the natural inferences and presumptions that may be drawn from the evidence, justify the implied finding that this injury was not caused by any ordinary jump but by something quite out of the ordinary, and of an unexpected and unforeseen character. It cannot be said, as a matter of law, that the result flowed from any voluntary act done, and that the only means through which the injury occurred were those which the insured intended to employ. In our opinion, a question of fact was presented which was for the jury.

[3, 4] The only other point raised is that the court erred in giving certain instructions. In the main, this attack is directed to two instructions reading as follows:

"You are instructed that, if you find from the evidence that the insured did a voluntary act, the natural, usual and to-be-expected result of which was not to produce injury to himself, but that there flowed from said act an unforeseen and unexpected means through which the injury was sustained, or the death produced, then you will find that the death was caused by accidental means."

"I instruct you that the doing of an intentional act, such as jumping from a bench, by decedent, from which the injury resulted, if you find that he did such intentional act and did jump from such bench, does not bar a recovery if the circumstances surrounding the doing of such act point to the possibility of an involuntary consequence, such as slipping or falling whilst jumping from a bench."

As to the first of these, it is urged that it does not clearly state the law, and that the jury may have taken it as justifying a recovery if the result was unexpected whether or not the means which produced the injury were unforeseen and unexpected. The instruction does not justify such an interpretation, and it is not to be assumed that the jury took it as meaning the opposite of what it says. It is also urged that there was no evidence justifying the giving of such an instruction. This is covered by what we have already said in regard to the evidence. Taken in connection with the other instructions, we think this instruction was not erroneous. Horton v. Travelers Ins. Co., 45 Cal. App. 462, 187 P. 1070. With respect to the second instruction referred to, the objection is to the use of the word "possibility"; it being urged that this permitted the jury to decide the question at issue upon a mere possibility and not upon the preponderance of the evidence. Had the jury been told that a recovery might be had if the surrounding circumstances pointed to the possibility of an involuntary consequence, error would appear. However, the instruction is negative in form, and merely told the jury that the doing of an intentional act would not, in itself, bar a recovery under certain circumstances. In the first instruction quoted and in many other instructions given the jury were plainly and repeatedly told that the burden of proof was upon the plaintiff, that they must decide only upon a preponderance of the evidence, and they were told what it was necessary for them to find in order to permit a recovery.

Among the instructions given at the request of the appellant were the following: One defining the difference between accidental death and death through accidental means, although the same was in fact much too favorable to appellant; one telling the jury that, if it believed from a preponderance of the evidence that the death of the insured was the sole result of his act in jumping, their verdict must be for the defendant; one to the effect that, before the jury could find for the plaintiff, it must find that the injuries were caused through external, violent, and accidental means independent of all other causes; one that, unless the death of the insured was caused by bodily injuries effected exclusively and solely by violent and accidental means, their verdict must be for the defendant; one that, if the death of the insured was caused partly by accidental means and partly by a pre-existing diseased condition, there could be no recovery; one that the burden was upon the plaintiff to prove by a preponderance of the evidence that the death of the insured resulted from bodily injuries caused exclusively by external, violent, and accidental means, and that, unless this was shown by a preponderance of the evidence, the verdict must be for the defendant; and another to the effect that, if the injury was caused solely as the result of jumping, the plaintiff could not recover. In another instruction offered by the respondent, the jury was told that under the terms of the policy it was not enough that the death or injury should be unexpected or unforeseen, but that there must be something of an unexpected or unforeseen character in the means through which the injury was sustained. We think the instructions, as a whole, fully and fairly presented the issue to the jury.

The judgment appealed from is affirmed.

We concur: MARKS, J.; TURRENTINE, Justice pro tem.

133 Cal.App. 632

## BYERS v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA.

Civ. 1044.

District Court of Appeal, Fourth District, California.

Aug. 8, 1933.

Hearing Denied by Supreme Court Oct. 6, 1933.

**1. Insurance 🔑646(7).**

Courts favor presumption that death by external and violent means was effected through accidental means rather than suicide (Code Civ. Proc. § 1963, subd. 1).

**2. Insurance 🔑668(12).**

In action on accident policy, whether death of insured resulted from "accidental means" by fall from hospital window *held* for jury as against claim insured committed suicide.

Evidence disclosed that insured had undergone an operation, was due to return home the next day, that he sent nurse from his room, and on her return his body was found lying on the pavement 45 feet below the window of his room, that the screen on the window had been unhooked, that bottles on the windowsill had been placed on dresser, and that the body of insured was found lying on the pavement in his bathrobe, belt of which was fastened.

**3. Insurance 🔑291(1).**

Applicant for insurance *held* not required to disclose visit to physician to secure information as to general health, where nothing was found wrong with him.

**4. New trial 🔑102(1).**

Denying new trial for newly discovered evidence *held* not error, where there was no sufficient showing of diligence to secure testimony at trial.

The trial of the case was commenced July 8, and by consent of parties was continued to and concluded on July 11. Defendant caused a subpœna to be issued for witness on July 9 which was served on July 11, when witness was too ill either to attend court or have deposition taken. No request was made for postponement or continuance of trial, so that witness' testimony might have been made available.

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Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Lillie W. Byers, also known as Lilly W. Byers, against the Pacific Mutual Life Insurance Company of California. Judgment for plaintiff, and defendant appeals.

Affirmed.

Wright & McKee and C. M. Monroe, all of San Diego, for appellant.

Hamilton, Lindley & Higgins and Glen H. Munkelt, all of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment rendered in favor of respondent permitting her to recover upon three policies of accident insurance upon the life of her husband, James C. Byers, a former sheriff of San Diego county. The first policy was issued August 9, 1921; the second was in the form of a rider to a noncancelable income policy, which rider was dated May 3, 1927; the third was issued August 9, 1928.

The first policy contained a clause whereby it insured "against loss of life resulting directly and independently of all other causes, from bodily injury effected during the term of this policy solely through accidental means." "This insurance does not cover, * * * suicide, sane or insane, or any attempt thereat, sane or insane." The other two policies contained provisions similar in effect. The applications for the two latter policies each contained the following provision which was made a part of the policy: "The falsity of any statement in the application, materially affecting either the acceptance of the risk or the hazard assumed hereunder, or made with intent to deceive, shall bar all right to recovery under this policy." Respondent was named as beneficiary in all of the policies.

James C. Byers came to his death on the 29th day of April, 1929. Ten days prior to that date he had undergone an operation for appendicitis in a hospital in the city of San Diego. During practically all of his stay in the hospital Antonia Hahn acted as his night nurse. On April 28th she came on duty at about 7 o'clock in the evening. Mr. Byers told her he was going home on the following day. She testified that he appeared more cheerful than at any other time during her attendance upon him. During the night she administered to his needs, and at about 5 o'clock in the morning observed he was awake. She took his temperature and pulse, both of which were normal, and he remarked: "I didn't sleep much last night. You better give me a cup of hot malted milk, maybe I can sleep some more." Miss Hahn went to a utility room on the same floor of the hospital where she prepared the hot malted milk, returning in about five or six minutes. She found her patient's bed empty. A search revealed his body lying on the pavement forty-five feet below the window of his room.

Mr. Byers' room was on the fourth floor of the hospital, with its longest dimension running north and south. The door opened through the north wall. The patient's bed projected west from about the center of the east wall. A closet door opened in this wall north of the bed. A dresser which stood against the wall in the southwest corner of the room extended about six inches over a window in the south wall. This window was forty-six inches wide, with its sill thirty-one inches from the floor; the lower sash, when completely raised, made an opening twenty-eight inches high. The sill was three inches wide, with the frame sloping downward to the outside, leaving a space seven inches wide in which were fitted a sash and a wire screen. Outside of the frame there was a sloping stone projection six inches wide. There was a radiator inside of the window, with its outside edge nine and one-fourth inches from the wall. The screen was fitted on the outside of the window, hinged at the top, and held in place by two hooks at the bottom. When Miss Hahn left the room, there was a half-gallon bottle of Vichy water, two other bottles, and a glass of orange juice on the windowsill leaning outward against the screen. The lower sash was raised to within three or four inches of the top. Mr. Byers was lying quietly on his back in bed. The door to the closet was closed. When Miss Hahn returned to the room, the covers of the bed had been turned back to the south which would be the patient's left-hand side of the bed. The closet door was open, and a bathrobe removed therefrom. The bottles and glass of orange juice were standing in a row near the front edge of the dresser, with a napkin covering the orange juice. The lower sash of the window had been fully raised and the screen unhooked at the bottom. Mr. Byers' body was found lying on the pavement clothed in his bathrobe, the belt of which was fastened. He had not left his bed from the time of the operation until the morning of April 29th after Miss Hahn had left the room at his request. There was no eyewitness to the tragedy. It is admitted that his death was caused by the fall. There is no conflict in the evidence.

Appellant urges numerous grounds for reversal which may be summarized as follows: First, that the death of Mr. Byers was not caused by accidental means; second, that the evidence demonstrates that he committed suicide; third, that he had consulted two physicians within five years prior to the dates of the last two accident policies, but did not disclose this in his applications; and, fourth, errors in instructions to the jury. We will consider these contentions in the order stated.

[1, 2] This court has just had occasion to carefully consider and construe the facts of a case under the terms of a policy insuring against death by accidental means. Losleben v. California State Life Insurance Co. (Cal. App.) 24 P.(2d) 825. Under the authorities there cited we have reached the conclusion that the facts in the instant case were such as to enable the jury to draw the conclusion that Mr. Byers came to his death "solely through accidental means."

Appellant frankly admits that "it is true that there is a presumption against suicide based upon the natural love of life. Where, therefore, it is shown that insured came to his death by external and violent means and the surrounding circumstances are equally compatible with accident or suicide, the courts will favor the presumption that death was effected through accidental means." In Wilkinson v. Standard Acc. Ins. Co., 180 Cal. 252, 180 P. 607, it was held that, where an insured is found dead under such circumstances that death may have been caused either by suicide or accident, the presumption is against suicide and in favor of accident, which flows from the statutory presumption that "a person is innocent of crime or wrong." Section 1963, subd. 1, Code Civ. Proc.

In the instant case the jury might well have concluded, as indicated by its verdict, that, as Mr. Byers knew he was going home on the day in question, he arose from his bed, donned his bathrobe, opened his window to its limit and unhooked the screen so that he could observe the character of the day and get a breath of really fresh air from outside the hospital, and that in leaning over the radiator and windowsill he lost his balance and accidentally fell to his death. The very fact that he removed the articles from the windowsill and placed them in an orderly position on the edge of the dresser, with the orange juice covered to protect it from contamination from the air, might well indicate that he expected to use the contents of these containers. A man contemplating suicide would not necessarily think of or prevent the breaking of three glass bottles and a glass of orange juice, nor would he necessarily clothe himself in his bathrobe and fasten the belt. We have concluded that the evidence points with equal, if not greater, force toward accident than toward suicide.

In Smellie v. Southern Pacific Company, 212 Cal. 540, 299 P. 529, it was held that, where a presumption arises in favor of a party which is not overcome by evidence produced and offered by that party, it remains as evidence before the jury until a verdict is reached. In the instant case the presumption against suicide and in favor of death caused solely by accidental means was not overcome by the evidence offered by appellant. It therefore remained with the jury as evidence, and, the jury having returned a verdict in accordance with that presumption, it supports such verdict and the judgment entered upon it. In Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 44, 26 A. L. R. 123, it was said: "This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence. Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 P. 212. In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 519, 520, 153 P. 951; Hassell v. Bunge, 167 Cal. 365, 367, 139 P. 800. 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff (the prevailing party) must be indulged by this court.' Bandle v. Commercial Bank of Los Angeles, 178 Cal. 546, 547, 174 P. 44, 45." See, also, Witherow v. United American Ins. Co., 101 Cal. App. 334, 281 P. 668.

The three cases of Nichols v. Commercial Travelers', etc., Ass'n, 221 Mass. 540, 109 N. E. 449; Bohaker v. Travelers' Insurance Co., 215 Mass. 32, 102 N. E. 342, 46 L. R. A. (N. S.) 543; and United States Fidelity & Guaranty Co. v. Blake (C. C. A.) 285 F. 449, all present facts somewhat similar to those of the instant case where the insured fell to his death through a window. In each of these cases involving the question of death by accidental means the court was of the opinion that a judgment in favor of the beneficiary and against the insurance carrier should be affirmed because of the presumption against suicide and in favor of death through accidental means where there was no evidence rebutting this presumption.

[3] Appellant called Dr. J. W. Sherrill as a witness in its behalf. He testified that Mr. Byers entered the Scripps Metabolic Clinic in La Jolla in November, 1926; that he remained one night; that he came in for "a general checking up," which he received; that "I told him I could not find a thing wrong with him at that time, and he went home promptly." This visit to the doctor and the hospital was not disclosed in either application for insurance. A similar question under another policy on the life of James C. Byers was considered by this court in Travelers' Ins. Co. v. Byers, 123 Cal. App. 473, 11 P.(2d) 444, 447, where it was said: "In construing what 'consulting a physician' as used in the application meant, the court states [Poole v. Grand Circle, W. O. W., 18 Cal. App. 457, 460, 123 P. 349, 350]: 'A reasonable construction of the question implies that it should be interpreted as relating to a consultation as to some disease or illness with which the applicant was or had been afflicted, not to some feeling of trivial discomfort or temporary indisposition, not affecting the general health.' " Under the authority of this case we have concluded it was not necessary for Mr. Byers to disclose his visit to this physician and the night spent in the clinic, where his sole purpose was to secure information as to his general health and nothing was found wrong with him.

[4] It appears in Travelers' Insurance Co. v. Byers, supra, that James C. Byers visited a Dr. Worthington about sixteen times. The purpose of these visits does not there appear. In the instant case each policy contained a waiver of the privilege of a physician attending the insured. The trial of this case was commenced on Friday, July 8th, and by consent of the parties was continued to and concluded on Monday, July 11, 1932. Appellant caused a subpœna to be issued for Dr. Worthington on July 9th. It was served on July 11th. It appears that he was too ill either to attend court or to have his deposition taken. No request was made for a postponement or continuance of the trial so that his testimony might have been made available to appellant. One of the grounds for motion for new trial was newly discovered evidence based upon the failure of appellant to have secured the testimony of Dr. Worthington. In an affidavit in support of this ground of the motion, it is said: "That affiant believes and therefore alleges the fact to be that had said Worthington testified he would have shown the fact to be that said deceased, James C. Byers, consulted said physician during said months of November, 1926, January, February and May, 1927, and January, 1928; that during one of said months said Byers consulted said physician professionally at least sixteen times. Affiant further states that he bases said belief upon the fact that in a cause heretofore pending in this court between this plaintiff and the Travelers' Insurance Company, a corporation, said Worthington testified in substance as hereinbefore set forth."

We have concluded that the trial court did not err in denying the motion for new trial on the ground of newly discovered evidence. There is no sufficient showing of due diligence to secure the testimony of Dr. Worthington at the trial. Dr. Worthington had his residence and his office in San Diego.

We have carefully reviewed the instructions given by the trial court, and are satisfied there is no prejudicial error in any of them.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

133 Cal.App. 738

## Ex parte STRATTON.

Cr. 2415.

District Court of Appeal, Second District, Division 1, California.

Aug. 17, 1933.

**1. Appeal and error 🔑460(2).**

Appeal from order appointing guardian for minor, without stay bond, operates as supersedeas of order (Probate Code, § 1631).

**2. Habeas corpus 🔑117(1).**

In absence of change in condition since denial of first application for writ of habeas corpus to obtain custody of child, adjudication is res adjudicata and binding.

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Application by Elaine Stratton, a minor, by Walter A. Stratton, her guardian, for a writ of habeas corpus to secure the custody of the minor child.

Writ discharged, and minor remanded to custody.

Karl W. Marks, of Los Angeles, for petitioner.

Esli L. Sutton, of Los Angeles, for respondents.

DESMOND, Justice pro tem.

[1] Walter A. Stratton, petitioner here for a writ of habeas corpus, father of the minor Elaine Stratton, whose custody is at issue, is a resident of Seattle, Wash. On August 17, 1932, he was appointed by the superior court of Los Angeles county guardian of the person of his daughter, now in her fourteenth year. This child has been in the personal care and custody of the respondents, Mr. and Mrs. R. A. Derrer, residents of San Pedro, from the time she was approximately four years of age. Shortly after his appointment as guardian, her father, in a habeas corpus proceeding filed in the superior court of Los Angeles county, sought to obtain custody of the child, intending to remove her to Seattle; his petition for guardianship having contained an averment of such purpose on his part. Respondents contested the application for the writ with the result that after several hearings the petition was denied. It appears from the petition before us that respondents have appealed to the Supreme Court from the order appointing this petitioner guardian of his child, but petitioner, in support of his application, argues that an appeal to the Supreme Court from an order granting letters of guardianship of a minor does not stay any of the rights, duties, or powers of the guardian pending such appeal, calling attention to section 1631 of the Probate Code which, allowing for certain exceptions, stays the power of a guardian of an insane or incompetent person and does not by its terms stay the power of a guardian appointed for a minor. From this counsel infers that no stay exists pending an appeal in the case of a minor's guardianship. We are of the opinion, however, that the rule stated in 2 California Jurisprudence, 435, that "an appeal without stay bond operates as a supersedeas of an order appointing a guardian," applies generally to all guardians, and that the guardian of an insane or incompetent person is mentioned in section 1631, Probate Code, merely because under exceptional conditions therein mentioned it is provided that certain powers exercised under the direction of the court during pendency of the appeal shall be held valid. This provision was incorporated originally in section 1765 of the Code of Civil Procedure by an amendment adopted in 1921, (St. 1921, p. 139) very likely to meet a situation such as Justice McFarland commented upon in Matter of Moss, 120 Cal. 695, 53 P. 357, a case involving an appeal by an alleged incompetent from an order appointing a guardian for him: "Some difficulties are suggested by a consideration of the proposition that the appeal stays the execution of the order, and that, if the appellant be really incompetent, his property might be dissipated by designing persons during the pendency of the appeal. There is some force in this suggestion, and apprehended embarrassments might be remedied perhaps by some amendment to the Code." In the case of a minor's guardianship there seems to be no reason for such an exception to a complete stay as has been made in the case of an alleged incompetent.

[2] While the lower court presumably might have postponed its decision on the prior petition for a writ of habeas corpus pending a decision on the appeal, as was done in the Matter of the Application of Mathews, 176 Cal. 156, 167 P. 873, no such action was taken; in fact, a writ of prohibition to prevent consideration of the petition by the lower court, sought by the respondents there, who are also respondents here, was denied. Derrer v. Superior Court (Cal. App.) 18 P. (2d) 371. The learned judge of the superior court clearly indicated by his remarks at the time he announced his decision to discharge the writ, that his action was based upon what he considered on the evidence before him was for the best interests of the child. So far as we know there has been no change in conditions since this denial of the first application, and, under such circumstances, we feel that we are bound to observe the finality of that proceeding. As suggested in the Application of Gille, 65 Cal. App. 617, 620, 224 P. 784, 785, "an adjudication in a habeas corpus proceeding involving

the right to the custody of a minor is res adjudicata and binding upon the parties * * * so long as the facts are the same and the conditions affecting the child's welfare or the parents' rights exist as they were when the hearing was had and the former order was made." See, also, In re Holt, 34 Cal. App. 290, 167 P. 184; In re Frazier, 50 Cal. App. 45, 194 P. 510; In re Gury, 103 Cal. App. 738, 284 P. 944.

The writ is discharged, and the minor remanded to the custody of respondents.

We concur: CONREY, P. J.; YORK, J.

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## LISSE et al. v. LOCAL UNION NO. 31, COOKS, WAITERS, AND WAITRESSES et al.[*]

Civ. 8545.

District Court of Appeal, First District, Division 1, California.

Aug. 15, 1933.

Rehearing Denied Sept. 14, 1933.

Hearing Granted by Supreme Court Oct. 13, 1933.

**1. Injunction 🔑101(3).**

Acts of pickets amounting to physical intimidation of employees and patrons of business should be enjoined.

**2. Injunction 🔑101(3).**

Physical intimidation of employees or patrons of business by pickets, warranting injunction, may be accomplished by obstruction and annoyance or insult and menacing attitude.

**3. Injunction 🔑101(3).**

Proprietors of restaurant *held* entitled to injunction to restrain intimidation of patrons and employees, where court found pickets in front of restaurant made grimaces and insulting gestures and waved newspapers containing headlines derogatory to restaurant.

> The court found that pickets employed by the union danced around on sidewalk in front of the restaurant, pointing at the restaurant and the persons therein, made grimacing and insulting gestures to and at the restaurant employees, and advanced near the door and prominently displayed to patrons in the restaurant newspaper headlines derogatory to the restaurant. The papers were so held that headlines could be plainly read by persons passing along the sidewalk in front of the restaurant or entering or leaving restaurant. The court further found that, by reason of such acts of the pickets, many regular patrons and customers of the restaurant had ceased to patronize it.

**4. Injunction 🔑101(1).**

Trade union can carry on boycott both primary and secondary in connection with strike.

**5. Injunction 🔑190.**

Injunction against picketing of nonunion restaurant should be limited to restraint against intimidating, threatening, molesting, or coercing proprietors, employees, or patrons.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Suit by P. M. Lisse and others against Local Union No. 31, Cooks, Waiters, and Waitresses, and others. Judgment for plaintiffs, and defendants appeal.

Modified and affirmed.

Walter M. Gleason, of Oakland, for appellants.

J. W. O'Neill, of Oakland, for respondents.

PER CURIAM.

Plaintiffs own and operate a business in Oakland known as the Rainbow Café, wherein they manufacture and sell bakery products and serve meals to the public for profit; and as such owners they brought this action and obtained a judgment against the defendant labor union and some of its officers and members to restrain them from an alleged illegal interference with the operation of said business. From said judgment defendants appeal.

The findings upon which the judgment is based follow generally the allegations of the complaint, and the evidence is legally sufficient to support such findings. Among the facts found were the following: "That plaintiffs have conducted said business at said location continuously since 1924. That at all times up to the 8th day of October, 1929, plaintiff, in the conduct of said business, employed as cooks and waitresses, persons who were members of said defendant association. That on October 8, 1929, said defendant association called a strike against plaintiffs and at said time all of said cooks and waitresses, members of defendant association, as aforesaid, left their work at plaintiffs' said place of business and ever since said date defendants have been and are now maintaining a boycott against plaintiffs' said business. That on the 11th day of October, 1929, defendants commenced to maintain and up to the time of the issuance of the temporary restraining order herein on November 27, 1929, did maintain, and, unless restrained by the court from so doing, will continue to main-

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

[*] For subsequent opinion see 41 P.2d 314.

tain, pickets in front of and adjacent to and near plaintiffs' said place of business for the purpose of intimidating and causing the public to cease to patronize the said business of plaintiffs. That since said 11th day of October, 1929, up to the time of the issuance of said restraining order, as aforesaid, said pickets so stationed in front of and adjacent to and near plaintiffs' said place of business, as aforesaid displayed and waved in front of the people passing by or approaching said place of business, papers on which are printed in large type the following statements: 'RAINBOW CAFE NOW NONUNION'; 'IS ON OFFICIAL "WE DON'T PATRONIZE" LIST OF UNION LABOR'; 'IS RAINBOW CAFE VIOLATING LAW?' 'RAINBOW CAFE OWNER CHARGED WITH STATE EIGHT HOUR LAW VIOLATION'; RAINBOW CAFE FIGHT PROGRESSES.' That at the time of the commencement of this action, said pickets were displaying to and waving in front of the people passing by or approaching said place of business, papers on which are printed in large type the following statement: 'RAINBOW CAFE FIGHT PROGRESSES.' * * * That at various times during said period from October 11, 1929, up to the time of the issuance of said temporary restraining order, as aforesaid, said pickets so employed by defendant association, as aforesaid, danced around on the sidewalk in front of plaintiffs' said restaurant, pointed at said restaurant and the persons therein, made grimaces and insulting gestures to and at the employees of plaintiffs, advanced near the door and prominently displayed to patrons in said restaurant said headlines derogatory to said restaurant, wildly waved said papers carrying said headlines against said restaurant, and displayed said papers by holding one spread across the chest of the picket so that said headlines against said restaurant could be plainly read by persons passing along the sidewalk in front of said restaurant or entering or leaving said restaurant and by prominently waving and displaying another copy of said paper in the hand of the picket. That solely by reason of the maintaining of said pickets, as aforesaid, and the acts of said pickets as hereinbefore set forth, many persons who were regular patrons and customers of plaintiffs have been intimidated and caused and induced to cease and have ceased to patronize plaintiffs' said business." The court further found as follows: "* * * That the newspapers displayed by said pickets, as aforesaid, with the headlines referred to said restaurant, as aforesaid, were copies of the East Bay Labor Journal and that said paper has been declared a newspaper of general circulation by decree of the Superior Court of the State of California, in and for the County of Alameda. But in this connection, the court finds that said newspapers were not displayed or offered for sale by said pickets in good faith or in the usual and ordinary manner, or for producing revenue or increasing circulation; that said newspapers were displayed by said pickets, as aforesaid, solely for the purpose of injuring and damaging plaintiffs and their said business and that defendants, pursuant to their said plan and conspiracy to injure and damage plaintiffs, procured and caused said headlines against said restaurant to be printed in bold type in said newspaper so that the same could be displayed in front of and near said restaurant of plaintiffs and at the same time assert the claim that said pickets were merely vendors of newspapers; that said claim of defendants that said pickets were bona fide newspaper vendors is a sham and subterfuge resorted to merely in an endeavor to cover up and conceal their real purpose, namely, to injure and damage plaintiffs. * * *" The foregoing findings are legally sufficient under the decisions of this state to justify the granting of injunctive relief. Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n, 186 Cal. 604, 200 P. 1, 4; Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324; Goldberg, etc., Co. v. Stablemen's Union, 149 Cal. 429, 86 P. 806, 8 L. R. A. (N. S.) 460, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219; Rosenberg v. Retail Clerks' Ass'n, 39 Cal. App. 67, 177 P. 864, 865; Moore v. Cooks', etc., Union, 39 Cal. App. 538, 179 P. 417.

[1, 2] Appellants contend that, even though the representatives stationed by them in front of respondents' café are deemed to be pickets, they were at most engaged in "peaceful picketing," which they claim, in the absence of any prohibitory state statutes or municipal ordinances upon the subject, may not be enjoined. It is evident, however, that the acts found to have been committed went beyond the bounds of peaceful picketing and amounted to physical intimidation of respondents' employees and patrons; and it is well settled by the decisions above cited that such acts will be enjoined. See, also, 15 Cal. Jur. 581, and cases there cited. In this regard it is held that, in order to prove physical intimidation and fear, it is not necessary to show that there was actual force or express threats of physical violence used; that such result may be accomplished as effectually by obstructing and annoying others and by insult and menacing attitude as by physical assault. Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n, supra; Jordahl v. Hayda, 1 Cal. App. 696, 82 P. 1079; Martin on Labor Unions, p. 229. In so holding the Supreme Court, in the case of Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n, supra, in quoting approvingly from another case, said that "intimidation * * * includes persuasion by or on behalf of a combination of persons, * * * resulting in coercion of the will from the mere force of numbers"; and the court then points out

that the same rule is declared in Martin on Labor Unions, supra, as follows: "Even a simple 'request' to do or not to do a thing, made by one or more of a body of strikers under circumstances calculated to convey a threatening intimation, with a design to hinder or obstruct workmen, is unlawful intimidation, and not less obnoxious than the use of physical force for the same purpose." The rule is applied with equal force as to customers and patrons. Goldberg, etc., Co. v. Stablemen's Union, supra.

[3] With respect to the display of the labor journal in front of respondents' place of business by appellants' representatives, it is of course true that the constitutional guaranty against abridgment of the freedom of the press carries with it freedom of circulation and sale of the publication (In re Jackson, 96 U. S. 727, 24 L. Ed. 877), and obviously the fact that a newspaper may support and advocate the cause of a trades union in a controversy with an employer, and uses its columns and headlines to bring to the attention of the public the claim of the union that the particular business in question is being operated in a manner deemed unfair to labor, serves as no legal ground for interfering with the sale or circulation of such newspaper in the immediate vicinity of the place where such business is being carried on, or elsewhere. But it is held in the case of Goldberg, etc., Co. v. Stablemen's Union, supra, that it is an invasion of the constitutional right to acquire, possess, and enjoy property, to place pickets in front of a place of business bearing placards and signs for the purpose of intimidating the patrons or employees of such place of business, and that such acts will be enjoined; and in the present case the trial court found, as already shown, that the display of said journal in front of respondents' place of business was not in good faith for the purpose of circulating or selling the same, and that said journal was not offered for sale in the usual and ordinary manner by newspaper vendors, but was displayed by appellants' pickets as a sham and subterfuge for the purpose of intimidating the patrons and employees of said place of business. It is evident, therefore, that the acts of appellants' representatives in displaying said journal in front of respondents' place of business in the manner and for the purposes found were brought within the rule of the Goldberg Case, supra, prohibiting the illegal display of signs and placards.

[4, 5] The injunctive relief granted, however, was, in our opinion, too broad, for the reason that, not only do the terms thereof go so far as to infringe upon the constitutional right to freely circulate and offer said newspaper for sale upon the public streets, but under the law of this state, in the absence of contractual obligations, a trades union, besides having the right to call a strike, has the legal right also to carry on in connection therewith a boycott, both primary and secondary; and it is evident that the comprehensive terms of the injunction herein enjoin appellants from doing some of the acts which under the decisions of this state it may lawfully do in furtherance of a secondary boycott. As said in Pierce v. Stablemen's Union, supra (page 75 of 156 Cal., 103 P. 324, 327): "The right of united labor to strike, in furtherance of trade interests (no contractual obligation standing in the way) is fully recognized. The reason for the strike may be based upon the refusal to comply with the employees' demand for the betterment of wages, conditions, hours of labor, the discharge of one employee, the engagement of another—any one or more of the multifarious considerations which in good faith may be believed to tend toward the advancement of the employees. After striking, the employee may engage in a 'boycott,' as that word is here employed. As here employed, it means not only the right to the concerted withdrawal of social and business intercourse, but the right by all legitimate means—of fair publication, and fair oral or written persuasion—to induce others interested in, or sympathetic with, their cause, to withdraw their social intercourse and business patronage from the employer. They may go even further than this, and request of another that he withdraw his patronage from the employer, and may use the moral intimidation and coercion of threatening a like boycott against him if he refuse so to do. This last proposition necessarily involves the bringing into a labor dispute between A. and B., C., who has no difference with either. It contemplates that C., upon the request of B., and under the moral intimidation lest B. boycott him, may thus be constrained to withdraw his patronage from A., with whom he has no controversy. This is the 'secondary boycott,' the legality of which is vigorously denied by the English courts, the federal courts, and by the courts of many of the states of this nation. Without presenting the authorities, which are multitudinous, suffice it to state the other view in language of the president of the United States, but recently uttered. [The language referred to is here quoted.]" And continuing, the court said: "Notwithstanding the great dignity which attaches to an utterance such as this, which, as has been said, is but the expression of numerous courts upon the subject-matter, this court, after great deliberation, took what it believed to be the truer and more advanced ground, above indicated and fully set forth in Parkinson v. Building Trades Council, etc. [154 Cal. 581, 98 P. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165], supra. In this respect this court recognizes no substantial distinction between the so-called primary and secondary boycott. Each rests upon the right of the union to

withdraw its patronage from its employer, and to induce by fair means any and all other persons to do the same, and, in exercise of those means, as the unions would have the unquestioned right to withhold their patronage from a third person who continued to deal with their employer, so they have the unquestioned right to notify such third person that they will withdraw their patronage if he continues so to deal. However opposed to the weight of federal authority the views of this court are, that they are not unique may be noted by reading National Protective Association v. Cumming, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; Lindsay v. Montana Federation of Labor, 37 Mont. 264, 96 P. 127, 18 L. R. A. (N. S.) 707 [127 Am. St. Rep. 722], where the highest courts of those states formulate and adopt like principles." Upon the same subject, and with particular reference to the right of striking employees to induce fellow employees to join in such strike, the Supreme Court, in the case of Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n, supra, said: "Furthermore, it is lawful for the employee who has quit to peaceably persuade a fellow employee to leave his position. Moreover, if there are a number of employees who had left a common employer, they are within their legal rights if and when they attempt as a group to persuade other employees, who continue to work, to quit, provided there be no force, violence, or intimidation, physical or moral, used—that is, the mere fact of numbers does not necessarily make such persuasion illegal."

In the present case the broad terms of the injunctive relief granted are doubtless based upon an abstract statement contained in the decisions in the cases of Rosenberg v. Retail Clerks' Ass'n, supra, and Moore v. Cooks', etc., Union, supra, to the effect that "there is no such thing as peaceful picketing." However, the decision in neither of those cases was reviewed by the Supreme Court on petition for hearing before that court, and an examination of the decisions themselves will disclose that the statement referred to was founded on certain language used in the decision in Atchison, etc., R. Co. v. Gee (C. C.) 139 F. 582, which, as will be noted, was a federal case, and not only did it involve acts of actual violence, but, as pointed out by the Supreme Court in Pierce v. Stablemen's Union, supra, the legality of the secondary boycott, in furtherance of which acts of picketing are carried on, is "vigorously denied" in the federal jurisdiction. True, in the Pierce Case, the court goes on to say that picketing in its very nature is calculated to and naturally does incite crowds, riots, and disturbances of the peace; but the argument used was evidently intended to apply to such facts as were then before the court, which showed that the pickets actually used menacing terms and threatening language, such as: "* * * This is a scab stable. When we catch you outside, we will finish you. We will get you yet. It is a scab stable, full of scabs. We will fix you yet. It is a matter of time when we will get you all right. You will never get out of the stable alive. We will break you in half. We will beat you to death. When we catch you outside, we will finish you." As further indication that the court in that case did not intend to hold in the abstract that there could be no such thing as peaceful picketing, we quote the following from its opinion: "As we have undertaken to define boycott, it is an organized effort to persuade or coerce, which may be legal or illegal, according to the means employed. In other jurisdictions where a definition is given to a boycott which imports illegality, the injunction will of course lie against boycotting as such. *In this state the injunction will issue depending upon the circumstance whether the means employed, or threatened to be employed, are legal or illegal*" (italics ours), which is in accord with the general rule declared in Ruling Case Law (vol. 10, p. 454) wherein it is stated that the decision of the question whether picketing is lawful or unlawful depends upon the circumstances surrounding each case; that taking every circumstance into account, if it appears that the object of the picketing is to interfere with those passing in or out by other than persuasive means, it is illegal; but that, if the design of the picketing is to see who can be the subject of persuasive inducement, such picketing is legal, and that whether picketing is lawful or unlawful depends in each particular case upon the conduct of the parties themselves. And the concurring opinion of Justices Angellotti and Sloss, in the Pierce Case, supra, may be taken also as indication of a belief on the part of the court in that case that all forms of picketing are not inherently unlawful, for it is there said: "So far as 'picketing' is concerned, while we are not prepared to hold that there may not be acts coming within that term, as it is accepted and understood in labor disputes, that are entirely lawful, and should not be enjoined, we believe that, as to such 'picketing' as is described in both findings and judgment in this case, the views expressed in the opinion of the court are correct." It will be noted, too, from an inspection of the opinion in the Pierce Case, supra, that, in order to conform to the views therein expressed upon the subject of secondary boycott, the terms of the injunction were modified, the court in this regard saying: "It was, for example, too broad in restraining defendants from 'in any wise interfering with' plaintiff's business, since the interference which we have discussed, of publication, reasonable persuasion, and threat to withdraw patronage, is legal, and such as defendants could employ. So, also, was the injunction too broad in restraining defendants from 'intimidating any customer by boycott or threat of boycott' since, as has been said, the secondary boycott is likewise a legal weapon." So, also, in the case of Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n, supra, the injunction was modified to exclude from its operation a certain form of picketing, the court there saying: "The judgment as entered, however, is too broad in its terms, in that it purports to prohibit acts which may or may not be unlawful, according to the purpose for which they are done, and it does not clearly couple the acts with the unlawful purpose. Thus, for example, the placing of pickets near respondent's place of business for a purpose not at all connected with said business, and not for the purpose of intimidating employees of respondent, so as to coerce them to quit that employment, nor for the purpose of intimidating persons intending to become employees of respondent, so as to prevent them from doing so, could not appropriately be enjoined, since such an act would not be wrongful as against the respondent, and would not be calculated to injure the respondent's business." But as already shown, in that case, as in the present one, physical intimidation and fear was used in carrying on the secondary boycott; in other words, there, as here, in order to accomplish a legitimate object, appellants resorted to illegitimate means; consequently, those illegal acts were enjoined.

Therefore, in order to conform as far as possible with the views expressed in the cases above cited, and to follow the form of the judgment as modified in Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n, supra, it is ordered that the judgment herein be modified and re-entered to read as follows: "It is therefore ordered, adjudged and decreed that defendants herein and each of them and all persons acting for them or either of them or in aid or assistance of them or either of them be and they are hereby perpetually enjoined and commanded to desist and refrain directly or indirectly or by any means or method from doing or attempting to do any of the following described acts: (a) intimidating, threatening, molesting or coercing plaintiffs in the conduct of their business known as the 'Rainbow Cafe' situated at No. 1218 Broadway Street, in the city of Oakland, California, or for any such purposes obstructing or interfering with, or attempting to obstruct or interfere with the free use, occupation and enjoyment thereof by plaintiffs, their agents, servants and employees; (b) intimidating, threatening, molesting or coercing any employee or employees, customer or customers, patron or patrons, of plaintiffs; (c) stationing or placing any picket or pickets with the intention or for the purpose of intimidating, threatening, molesting or coercing, or attempting to intimidate, threaten, molest or coerce any customer, patron or employee of plaintiff now or hereafter patronizing or working for said plaintiffs. It is further ordered, adjudged and decreed that the plaintiffs do have and recover from defendants their costs of suit, taxed herein at the sum of $44.50."

In reviewing cases of this kind and in framing the terms of injunctive relief it is, of course, as said in many of the decisions, impossible to define comprehensively or with exactness each and every act which may or may not be legally done in carrying on a labor controversy; and it is evident that any attempt so to do would lead into a field of unlimited speculation. All that the court can do is to deal with those specific acts which by the evidence are shown to have been committed in furtherance of the particular dispute then before it; and necessarily the question of whether future acts of a different character, if any there be, shall be deemed to fall within the inhibitive provisions of the judgment must be left, primarily at least, to the decision of the trial court in determining any subsequent proceedings based thereon.

As hereinabove modified, the judgment will stand affirmed, respondents to recover their costs.

CASHIN, Justice (concurring).

I concur in the conclusion that picketing, peaceable in fact, if not violative of a statute or ordinance, is not unlawful, and that the judgment should be modified. However, a judgment in cases of this character should so clearly express the mandate of the court that a defendant may readily know what he is restrained from doing. 32 Cor. Jur., Injunctions, § 620, p. 369; Temco Manufacturing Co. v. National Electric, etc., Co., 223 Mo. App. 420, 18 S.W.(2d) 142; Great Northern R. Co. v. Brosseau (D. C.) 286 F. 414. Accordingly, it is my understanding that the word "intimidate," as used in the modified judgment, refers only to fear caused by threats, abuse, or violence, and not to the natural effect of picketing or any other form of boycott, namely, fear on the part of a patron that his own business or calling might suffer, or that he might lose the good will generally of those friendly to organized labor, or a similar apprehension by the owner or the employees of the boycotted business. Further, that the words "interfere and obstruct" are intended to mean physical interference or obstruction, and are not used in the sense of peaceable intervention or opposition.

133 Cal.App. 646

**ROSE et al. v. SAN DIEGO ELECTRIC RY. CO. et al.**

**Civ. 969.**

District Court of Appeal, Fourth District, California.

Aug. 10, 1933.

**1. Appeal and error 🔑1001(2).**

Where verdict and judgment are supported by some evidence, appellate court is bound by implied findings of jury, even though appellate court may have reached contrary conclusion.

**2. Appeal and error 🔑1002.**

Appellate court cannot reverse judgment because of conflict in evidence.

**3. Action 🔑53(2).**

Only one action may be brought to recover damages resulting from wrongful death (Code Civ. Proc. § 377).

**4. Death 🔑41.**

Action for damages for wrongful death should be brought either by deceased's personal representative, or by all of heirs who may recover total pecuniary loss in lump sum (Code Civ. Proc. § 377).

**5. Death 🔑101.**

In action for damages for wrongful death, court should not attempt to apportion loss of each heir in judgment (Code Civ. Proc. § 377).

**6. Parties 🔑35.**

Heir who refuses to join as plaintiff in action for damages for wrongful death should be made defendant (Code Civ. Proc. § 377).

**7. New trial 🔑9.**

In action for damages for wrongful death, wherein answer denied that plaintiffs were sole heirs, granting of new trial on issue of heirship only, not including issue of damages, *held* error (Code Civ. Proc. §§ 377, 657).

Granting of new trial on issue of heirship only, not including issue of damages, constituted error under Code Civ. Proc. § 657, authorizing new trial on all or part of the issues, because question of heirship was so intimately related to amount of recovery as to constitute a single issue, and new trial should have been granted on both questions.

**8. Appeal and error 🔑1170(11).**

Error in granting new trial on issue of heirship in action for wrongful death, without including issue of damages, *held* harmless, where court, on retrial, found that plaintiffs were sole heirs (Code Civ. Proc. §§ 377, 657; Const. art. 6, § 4½).

**9. Evidence 🔑291.**

In action for wrongful death, husband's testimony detailing statements of deceased that husband and mother were sole heirs *held* admissible (Code Civ. Proc. § 377, and § 1870, subd. 4).

Testimony of husband detailing statements of deceased, to effect that her husband and her mother, who were the plaintiffs, were her sole heirs, was admissible, since under Code Civ. Proc. § 1870, subd. 4, heirship may be proved by the declaration of a deceased person.

**10. Death 🔑75.**

In action by alleged heirs for wrongful death, proof of heirship is made by evidence that certain persons, and they only, are heirs (Code Civ. Proc. § 377).

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Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by S. C. Rose and another against the San Diego Electric Railway Company and others. From a judgment in favor of the plaintiff, the defendants San Diego Electric Railway Company and James L. Owen appeal, and the defendant Q. D. McClard separately appeals.

Judgment affirmed.

Wright & McKee and O. M. Monroe, all of San Diego, Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, and V. F. Bennett, of San Diego, for appellants San Diego Electric Ry. Co. and James L. Owen.

Edward J. Kelly, of San Diego, for appellant Q. D. McClard.

Adam Thompson and Renwick Thompson, both of San Diego, for respondents.

MARKS, Justice.

S. C. Rose and Eleanor McIntosh were the husband and mother, respectively, of Margaret Rose. They brought this action for damages for the death of Margaret which resulted from injuries received in a collision between two motor vehicles on the 20th day of December, 1930, in the intersection of Sigsbee and Newton streets, both public thoroughfares in the city of San Diego.

The cause of action finds its source in the provisions of section 377 of the Code of Civil Procedure. One of the issuable facts is whether respondents are the only heirs at law of Margaret Rose, deceased.

The San Diego Electric Railway Company is a corporation operating a railway and motor bus transportation system in the city of San Diego as a common carrier of passengers. On the day of the accident Mrs. Rose was a passenger in one of its busses. James L. Owen, an employee of the railway company, was driving this bus northerly on Sigsbee street. At about the same time Q. D. McClard was driving a small automobile in an easterly direction on Newton street. Both vehicles were on their own right-hand sides of the streets. The automobile came into collision with the bus, striking it at about the center of its left-hand side just as the front end of the bus had reached a place north of the center line of Newton street. The force of the impact threw Mrs. Rose onto the floor of the bus. Another woman was thrown on top of her. A few moments after the accident Mrs. Rose fainted. She was taken to her home, where she received medical attention for about two days when she was removed to a hospital, where she became progressively worse and died on January 9, 1931. An autopsy was performed and the autopsy surgeon found such a diseased condition in her kidneys that he attributed her death to lobar pneumonia, caused by septic poisoning and Bright's disease.

The attending physician of Mrs. Rose gave the progress of her illness substantially as follows: On the first examination there was a discoloration of her chest and such pain that it indicated a broken rib, a discolored bruise on her back and another on her buttocks. Her symptoms and appearance on the day of her injuries did not indicate that death might follow. Her condition became rapidly worse, and a form of insanity developed which the physicians called traumatic psychosis. This required that she be restrained on her bed. She would not eat and her food was given her by "forced feeding." She developed hypostatic pneumonia which resulted in her death. In the opinion of one of her physicians this was caused by her being restrained and confined to one position on her bed. He testified as follows: "Q. Doctor, I want to ask a question or two. Tell me, Doctor, if I am correctly following your theory of the chain of circumstances and causation that resulted in the death of this woman: She had a trauma, that is, a blow; that blow was evidenced by certain bruises on her body. You also concluded that the blow caused an insanity, which you call a traumatic psychosis; that the insanity required or demanded that she be restrained in bed, and that you accordingly restrained her; and that the restraint, plus her lowered resistance, resulted in a pneumonia; and the pneumonia resulted in her death. A. That's exactly true." Another attending physician gave similar testimony.

The intersection in which the accident occurred was an obstructed one, and it is admitted the speed limit there was fifteen miles per hour. There is evidence in the record that McClard drove his automobile at a speed between twenty and forty miles per hour in entering the intersection. There is also evidence that Owen drove the bus at a speed of between sixteen and twenty miles an hour on entering and crossing the intersection. McClard testified that he entered the intersection first at a speed of not more than fifteen miles per hour. Owen testified that he entered at fifteen or less miles per hour, and that before he crossed the south line of the intersection he saw McClard at least fifty feet west of the west line of the intersection and that he did not again see the McClard automobile until the moment of impact. At that time the body of the bus completely blocked the south half of the intersection to eastbound traffic on Newton street.

The jury returned a verdict in favor of respondents in the sum of $3,500. Upon the hearing of a motion for new trial it developed that respondents had failed to introduce evidence that they were the only heirs of Mrs. Rose. The trial court granted the motion on this ground, and the case was again set for trial. Evidence on this question was introduced and the cause again submitted for decision. The trial court found that respondents were the only heirs of deceased, and entered judgments in their favor in the sum of $3,500, the amount awarded by the jury.

McClard took an appeal separately from that taken by the San Diego Electric Railway Company and James L. Owen. He concedes that the evidence was conflicting on the question of the negligence of the drivers of both vehicles, but adopts the other specifications of error of his coappellants.

The San Diego Electric Railway Company and Owen urge that the evidence shows that the negligence of McClard was the sole and proximate cause of the injury and shows no negligence on the part of Owen; that the death of Mrs. Rose was not the proximate result of her injuries in the collision, but from bodily disease which the autopsy established had existed for a considerable time prior to the accident; that the trial court erred in granting a new trial on the question of heirship only; and that the trial court erred in instructing the jury and in refusing instructions proposed by appellants.

The argument that the evidence conclusively shows that the accident was caused by the negligence of McClard and that there was no negligence proven on the part of Owen is met by the testimony of McClard that he entered the intersection first at a lawful rate of speed and the testimony of several witnesses that Owen drove the bus up to and into the intersection at an unlawful rate of speed. Section 113, Cal. Vehicle Act (as amended by St. 1927, p. 1436, § 30).

The jury and the trial court on motion for new trial adopted the theory that both drivers were negligent and that their concurrent negligence was the proximate or contributing cause of the injury.

[1] Under this state of the record, the verdict and judgment being supported by some evidence, we are bound by the implied find-

ings in the trial court, even though we feel that were we sitting as trial judges we might have reached a contrary conclusion. Lutz v. Merchants' National Bank, 179 Cal. 401, 177 P. 158; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Rocha v. Garcia, 203 Cal. 167, 263 P. 238.

[2] The testimony of the two attending physicians of deceased, to which we have referred, showed a causal connection between her injury in the accident and her death. It is true that this is strongly disputed by other evidence. This created a conflict, but we cannot reverse a judgment because of a conflict in the evidence.

We have examined all of the instructions given and all of those refused, and can find no error committed by the trial judge.

The question of the trial court granting a new trial on the issue of heirship only and preserving the rest of the judgment presents a somewhat novel question upon which we have been cited to no California case deciding the precise point.

Section 657 of the Code of Civil Procedure provides that "a new trial is granted, on all or part of the issues." The question here presented is, then, whether in this case the sole heirship of respondents, this being denied in the answer, was so closely interwoven with the amount of damages awarded as to make a single issue in the case. If this be answered in the affirmative, it will follow that the trial court should have granted a new trial on the question of heirship and damages preserving only the judgment on the concurrent negligence of appellants which it had the undoubted power to do. Pretzer v. California Transit Co., 211 Cal. 202, 294 P. 382.

[3-6] This action was brought under the provisions of section 377 of the Code of Civil Procedure. Under this section only one action can be brought for damages suffered by death and is a bar to other actions. It should be brought either by the personal representative of the deceased who acts in the capacity of a trustee for all the heirs in recovering a judgment, or by all of the heirs who may recover in one "lump sum" the total of the pecuniary loss suffered by each. In such a case the court should not attempt to apportion the loss of each heir in the judgment. This should be done in an appropriate proceeding. Munro v. Dredging, etc., Co., 84 Cal. 515, 24 P. 303, 18 Am. St. Rep. 248; Hartigan v. Southern Pacific Co., 86 Cal. 142, 24 P. 851; Robinson v. Western, etc., Gas Co., 184 Cal. 401, 194 P. 39; Estate of Riccomi, 185 Cal. 458, 197 P. 97, 14 A. L. R. 509; Gilmore v. Los Angeles Ry. Corp., 211 Cal. 192, 295 P. 41. If an heir refuses to join as plaintiff he should be made a defendant. Salmon v. Rathjens, 152 Cal. 290, 92 P. 733. In Roach v. Drew, 72 Cal. App. 45, at page 47, 236 P. 568, 569, it was said: "'An action by a portion only of the heirs is not the action authorized by our statute. All the heirs should therefore join as plaintiffs in an action by heirs, and, if the consent of any one who should be so joined cannot be obtained, he may be made a defendant.' [Citing cases.] 'While there can be but one action brought or one recovery had either by the personal representative of the deceased or the heirs, * * * and while the recovery in such an action should be of a single "lump sum" for all, * * * the total recovery to be had is the aggregate of the pecuniary loss of each of the heirs who has suffered a pecuniary loss by reason of the death of the deceased. * * * It is obvious that the distribution among "heirs" of damages recovered by the statutory trustee must be upon the basis of the pecuniary loss of each.' (Estate of Riccomi et al., 185 Cal. 458, 461, 462, 197 P. 97, 98, 14 A. L. R. 509.)"

[7, 8] In cases of this kind it would seem clear that as the amount of the recovery is the total of the pecuniary loss suffered by each of the heirs, the fact that an heir suffering a pecuniary loss is not a party, directly affects the amount of the recovery. Where, as here, the question of heirship is made an issue by the pleadings, and there is no proof that the plaintiffs are the sole heirs of the deceased, the question of heirship is so intimately related to the amount of the recovery as to constitute a single issue, and the new trial should have been granted on both questions. However, on the retrial, evidence was offered to the effect that respondents were the sole heirs of deceased and the trial court so found. Under this state of the record the error was harmless and we cannot reverse the judgment. Section 4½, art. 6, Const.

[9, 10] At the second trial S. C. Rose was permitted to detail statements of the deceased to the effect that her husband and mother, the respondents here, were her sole heirs. Appellants urge that this evidence was hearsay and not competent to support the findings of the trial court. Heirship may be proved by the declaration of a deceased person. Section 1870, subd. 4, Code Civ. Proc.; Estate of Morgan, 203 Cal. 569, 265 P. 241; Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A. L. R. 313. Proof of heirship is made by evidence that certain persons are the heirs of a deceased and that they are the only heirs.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

134 Cal.App. 14

## Ex parte BORAH.

Cr. 2434.

District Court of Appeal, Second District, Division 1, California.

Aug. 22, 1933.

**1. Automobiles** 🔑359.

Punishment for felony under Vehicle Act is controlled thereby, not by Penal Code, limiting jail sentence for offense also punishable by imprisonment in state prison to six months (Pen. Code, §§ 17, 19; St. 1923, p. 517, § 153½, as added by St. 1929, p. 547, § 68; p. 564, § 146, as amended by St. 1931, p. 2133, § 60; p. 565, § 153(a, d), as amended by St. 1925, p. 414, § 18).

**2. Automobiles** 🔑359.

Provision of Vehicle Act, limiting jail sentence of violator, convicted of misdemeanor, to six months, is inapplicable to conviction of felony (St. 1923, p. 565, § 153(c, d), as amended by St. 1925, p. 414, § 18).

Application by William A. Borah for a writ of habeas corpus discharging him from custody pursuant to a conviction of violating the California Vehicle Act.

Writ denied, and petitioner remanded to custody.

John F. Groene, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

CONREY, Presiding Justice.

[1] In a criminal action, People v. Borah, petitioner pleaded guilty of the crime of violation of section 146 of the California Vehicle Act, a felony, and admitted prior conviction of a felony for which he had served a term of imprisonment. By the judgment pursuant to which petitioner is now held in custody, it was ordered that the defendant pay a fine of $1,500, or, in lieu of such payment, that he be imprisoned in the county jail of the county of Los Angeles at the rate of one day for each $2 of said fine not paid.

In default of payment of the fine, petitioner has been confined in the county jail ever since September 16, 1932. He contends that under such sentence the limit of his lawful imprisonment was six months, and therefore that he is now entitled to discharge from custody. In support of this contention he relies upon the provisions of sections 146, 153, and 153½ of the California Vehicle Act (section 146, as amended by St. 1931, p. 2133, § 60; section 153, as amended by St. 1925, p. 414, § 18; section 153½, as added by St. 1929, p. 547, § 68), and sections 17 and 19 of the Penal Code. Section 17 of the Penal Code provides that when a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison. And section 19 provides that, "except in cases where a different punishment is prescribed by this code, every offense declared to be a misdemeanor is punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding five hundred dollars, or by both."

The foregoing sections of the Penal Code state a general rule, without specifying the particular crimes to which they apply. Section 146 of the California Vehicle Act, on the other hand, describes the particular offense of which petitioner herein was found guilty, and declares that one who commits such offense "shall be deemed guilty of a felony." Section 153 (a) of the same act declares that "it shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this act unless such violation is by this act or other law of this state declared to be a felony." It is further provided therein, section 153 (d), that: "Unless another penalty is in this act or by the laws of this state provided, every person convicted of a felony for a violation of the provisions of this act shall be punished by a fine of not less than one thousand dollars nor more than five thousand dollars or by imprisonment in the state penitentiary for not less than one nor more than five years, or by both such fine and imprisonment." Section 153½ of said act reads as follows: "A judgment that the defendant pay a fine for any violation of this act may also direct that he be imprisoned until the fine be satisfied. But the judgment must specify the extent of the imprisonment, which must not exceed one day for every two dollars of the fine, nor extend in any case beyond the term for which the defendant might be sentenced to imprisonment for the offense of which he has been convicted."

By comparison of the judgment with the foregoing provisions of the California Vehicle Act, it will be seen that the imposition of a fine in the sum of $1,500, with the alternative of imprisonment at the rate of one day for every $2 of fine, is directly authorized by that law. We think that the case is not controlled by the provisions of sections 17 and 19 of the Penal Code; but, on the contrary, is controlled by the provisions of the California Vehicle Act, which specifically provide a stated punishment for violations of that act, and which were enacted at a later date than said sections of the Penal Code.

[2] Petitioner also relies upon the provisions of section 153 (c) of said California Vehicle Act, reading as follows: "Unless another penalty is in this act or by the laws of this state provided, every person convicted of a misdemeanor for the violation of the provisions of this act shall be punished by a fine not to exceed five hundred dollars or imprisonment in the county jail for not to exceed six months, or by both such fine and imprisonment." But it will be seen by subdivision (d) of the same section, as above quoted, that another penalty is provided in said act, and for that reason said subdivision (c) is not applicable to the instant case.

Petitioner is remanded to custody.

We concur: HOUSER, J.; YORK, J.

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133 Cal.App. 704

## SEARS et al. v. SUPERIOR COURT IN AND FOR CALAVERAS COUNTY et al.

**Civ. 4951.**

District Court of Appeal, Third District, California.

Aug. 15, 1933.

As Modified on Denial of Rehearing Sept. 14, 1933.

Hearing Denied by Supreme Court Oct. 13, 1933.

**1. Criminal law ⇨260(2).**

When justice's court has jurisdiction of subject-matter and person, neither Supreme Court nor District Court of Appeal may review its proceedings on certiorari; remedy being by appeal to superior court (Code Civ. Proc. § 1068).

**2. Constitutional law ⇨83(3).**
**Master and servant ⇨69.**

Statute penalizing failure to pay discharged employee's wages *held* not to violate Constitution prohibiting imprisonment for debts (Gen. Laws 1931, Act 4743, § 6; Const. art. 1, § 15).

**3. Master and servant ⇨84.**

Complaint in prosecution for violating statute penalizing failure to pay discharged employee's wages *held* sufficient, in absence of demurrer (Gen. Laws 1931, Act 4743).

The complaint charged violation of Gen. Laws 1931, Act 4743, with specific reference thereto, alleging that the defendants while acting as officers of employer discharged employee from service of employer and with intent to annoy, oppress, hinder, delay, and defraud the employee, willfully and unlawfully refuse to pay the employee the wages due to employee, who demanded payment.

**4. Criminal law ⇨90(2).**

Justice's court had jurisdiction of misdemeanor prosecution for discharging and fraudulently refusing to pay wages of employee (Gen. Laws 1931, Act 4743, § 6).

**5. Criminal law ⇨260(11).**

Where court has jurisdiction of cause, mere insufficiency of evidence to support judgment may not be considered on certiorari.

**6. Judges ⇨25(1).**

Where written request to justice of adjoining township to try case did not limit authority to any date, visiting justice could try case on date specified in docket entry or any subsequent date to which it was regularly continued, notwithstanding docket entry regarding written request stated trial was to be on particular date (Code Civ. Proc. § 105).

Visiting justice's authority to try case was not limited to date stated in docket entry, since the written request was general in its terms, and the docket entry was merely prima facie evidence of authority to try the case and was not conclusive regarding the authorized date of trial.

**7. Judges ⇨25(2).**

Visiting justice acquiring jurisdiction by written request to try cause in another township of his county may continue case and retain authority to try it at subsequent date (Code Civ. Proc. § 922).

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Certiorari to Superior Court, Calaveras County; J. T. B. Warne, Judge.

Certiorari proceedings by Harry Sears and another against the Superior Court of the State of California in and for the County of Calaveras, Honorable J. T. B. Warne, presiding.

Writ of certiorari dismissed.

William M. Abbott, K. W. Cannon, and Cyril Appel, all of San Francisco, J. M. Inman, of Sacramento, and Ivores R. Dains, Philip C. Boardman, and Henry A. Plattner, all of San Francisco, for petitioners.

Virgil M. Airola, Dist. Atty., of San Andreas, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The petitioners were convicted in the justice's court of Angels township, Calaveras county, of discharging an employee of their mine without first paying the wages which were due to him, in violation of the provisions of an act of the Legislature regulating the payment of wages by private employers. Stats. 1919, p. 294, and amendments thereto; 2 Deering's Gen. Laws of 1931, p. 2241, Act 4743. Each defendant was fined, with the alternative penalty of one day of imprisonment for each $2 thereof in the event the fine was not paid. Upon appeal to the superior court the judgment was affirmed. In this petition for a writ of certiorari the jurisdiction of the courts is challenged.

It is contended the justice of the peace who tried the cause was without jurisdiction for the reason that he was not requested by the duly elected justice of that township to try the case as required by section 105 of the Code of Civil Procedure. It is asserted the complaint in the criminal proceeding fails to state a cause of action; that the ability of the defendants to pay the wages demanded was neither alleged nor proved; that the judgment is not supported by the evidence; and that the statute regulating the payment of wages is unconstitutional, in that it violates article 1, § 15, of the Constitution, which prohibits the imprisonment of a person for debt.

[1] The writ of certiorari does not lie in the present case. It has been definitely determined by the California authorities that when a justice's court has jurisdiction of the subject-matter and the person involved in the litigation, neither the Supreme Court nor the District Court of Appeal may review its proceedings upon certiorari for the reason that the remedy for error of law or facts on the part of the inferior court is afforded by an appeal to the superior court. Section 1068, Code Civ. Proc.; 4 Cal. Jur. 1054, §§ 25, 26; Roberts v. Police Court, 185 Cal. 65, 195 P. 1053, 1054; Hood v. Melrose, 24 Cal. App. 355, 360, 141 P. 396; People v. Superior Court, 84 Cal. App. 201, 205, 257 P. 922. This is true regardless of whether the petitioner avails himself of his right to appeal to the superior court or not. Where the right of appeal exists the writ of certiorari will not lie. In both the Roberts and the Hood Cases, supra, the writs of certiorari were denied, notwithstanding the fact that judgments of the inferior court had been affirmed on appeal to the superior court from which last-mentioned court there was no appeal. In the case of Roberts v. Police Court, supra, the court says: "It is thoroughly settled that the judgment of a police court or justice's court will not be reviewed on certiorari, after appeal taken therefrom and determination of such appeal in the superior court."

It may be true that when a complaint which is filed in a justice's court fails to allege facts constituting an offense *of which it has jurisdiction*, or when facts are alleged which constitute an offense of which it clearly has no jurisdiction, such as a charge of felony, the judgment of conviction may be annulled on certiorari. Denninger v. Recorders' Court, 145 Cal. 629, 638, 79 P. 360. The reason for this is that, under such circumstances, the inferior court absolutely has no jurisdiction of the subject-matter sought to be charged.

[2] In the present case it is contended the justice's court is without jurisdiction for the reason that the complaint fails to state facts sufficient to constitute a public offense, and because the statute attempting to regulate the payment of workmen's wages is unconstitutional and void.

Section 6 of the act regulating the payment of workers' wages provides: "Any person, firm, association, or corporation, or agent, manager, superintendent, or officer thereof, who having the ability to pay, shall wilfully refuse to pay the wages due and payable when demanded, as herein provided, or falsely deny the amount or validity thereof, or that the same is due, with intent to secure for himself, his employer or other person, any discount upon such indebtedness, or with intent to annoy, harass, or oppress, or hinder, or delay, or defraud, the person to whom such indebtedness is due, shall, in addition to any other penalty imposed upon him by this act, be guilty of a misdemeanor."

It has been held this statute is not unconstitutional or in violation of the provisions of article 1, § 15, of the Constitution. In re Oswald, 76 Cal. App. 347, 244 P. 940; In re Samaha (Cal. App.) 19 P.(2d) 839.

While article 1, § 15, of the Constitution does prohibit the imprisonment of one for debt in any civil action, it specifically excepts from that inhibition debts which are tainted with fraud. That section provides: "No person shall be imprisoned for debt in any civil action, on mesne or final process, *unless in cases of fraud*, nor in civil actions for torts, except in cases of wilful injury to person or property; and no person shall be imprisoned for a militia fine in time of peace."

[3] Assuming that the statute which regulates the payment of workmen's wages is constitutional, the complaint under which the defendants were convicted, in the absence of a demurrer thereto, appears to sufficiently state a public offense. Conceding that the first count fails to state a public offense, the second count of the complaint charges a violation of the statute with specific reference thereto, alleging that the defendants, on September 1, 1932, while acting as officers of the Calaveras Central Gold Mining Company, of which O. H. Lague was an employee, "did then and there discharge said employee from the service of said corporation and did then and there with intent to annoy, harass, oppress, hinder, delay and defraud the said employee, wilfully and unlawfully refuse to pay the said employee the wages then and there due to said employee, who then and there demanded payment of the said wages, the defendants then and there having the ability to

pay the same, all in violation of the provisions of sections 1 to 6 of the said law."

[4] The justice's court certainly had jurisdiction of the persons of the defendants and of the misdemeanors in violation of section 6 of the act above quoted, consisting of willfully refusing to pay the wages of an employee by the officers of a corporation *having the ability so to do*, and the discharge and refusal to pay the wages of an employee with the willful intent to harass and defraud him. These acts are declared by the statute to constitute a misdemeanor. The justice's court has jurisdiction to try such misdemeanors. Even though the complaint may be defective, its allegations are sufficient to confer jurisdiction upon the justice's court.

[5] Where a court has jurisdiction of the cause, the mere insufficiency of the evidence to support the judgment may not be considered on a writ of certiorari. In 4 California Jurisprudence, 1036, § 14, it is said: "Where a court has jurisdiction of the parties and of the subject-matter of the action, such jurisdiction carries with it necessarily the authority * * * to decide the questions submitted to it, incorrectly as well as correctly. Accordingly, error in exercise of its jurisdiction, however gross, cannot be annulled on certiorari; and the writ cannot be used as a mere writ of error for the correction of mistakes, either of law or fact, committed by the inferior tribunal within the limits of its jurisdiction."

Since the justice's court had jurisdiction of the misdemeanors defined by the provisions of the statute regulating the payment of workmen's wages, and an appeal from the judgment of that court was prosecuted to the superior court as provided by law, the writ of certiorari does not lie.

[6] The justice who tried the criminal case was duly requested in writing by the incumbent of that court to try the cause as required by section 105 of the Code of Civil Procedure and the visiting justice had jurisdiction thereof. R. E. Walsh was the duly elected justice of Angels township. In a letter to Justice Shepherd of an adjoining township, dated September 28, 1932, Justice Walsh said: "In the case of People v. Sears and Warwick, * * * I hereby respectfully request that you attend my court at Angels and sit on the trial of this case for me in my place and stead. * * *" This letter was read into the record at the outset of the trial. Under date of September 29th, the duly certified docket shows the following entry: "A request [was made] by Justice of Peace R. E. Walsh, that J. M. Shepherd, Justice of Peace of Murphys Township, on account of illness, act for him and in his stead in the trial of this action at Angels Camp, California, *on this date Sept. 29, 1932.*" By consent of counsel for the defendants the case was continued to October 21st, at which time it was tried by Justice Shepherd, sitting without a jury. It is contended the docket entry shows that Shepherd was requested to try the cause on September 29th only, and that he was without jurisdiction to try it on any other date. This construction of the record is without merit. The written request is adequate to confer jurisdiction on Shepherd to try the case at Angels township on September 29th, or at any subsequent date to which it was regularly continued. The docket entry is merely prima facie evidence of the authority to try the case. It is not conclusive regarding the authorized date of trial. The written request which was read into the record was general in its terms and limited the authority to try the case to no particular date. Section 105 of the Code of Civil Procedure authorizes a justice of the peace to sit and try cases for another justice of the peace in the same county, at his written request. It provides: "A justice of the peace of any township, or city, or city and county may hold the court of any other justice of the peace of any township, city and county, or city within the same county, at his written request, and while so acting shall be vested with all the powers of the justice for whom he so holds court. In which case the proper entry of the proceedings before the attending justice subscribed by him shall be made in the docket of the justice for whom he so holds the court; and the same shall be prima facie evidence of such proceedings, and form and become a part of the record of any, or any part of any and all actions, causes, or proceedings had before such attending justice while so holding the court."

[7] A visiting justice, having thus acquired jurisdiction by written request to try a cause in another township of his county, may continue the case and retain authority to try it at any subsequent date. Section 922 of the Code of Civil Procedure provides in that regard: "In case of sickness or other disability or absence of a justice, another justice of the same county * * * who possesses the legal qualifications prescribed for the court of the absent justice, may, at his request, attend in his behalf, and thereupon is vested with the power and may perform all the duties and issue all the papers or process of the absent justice. In case of a trial the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice before whom the summons was returnable. *If the case is adjourned, the justice before whom the summons was returnable may resume jurisdiction.*"

The writ of certiorari which was heretofore issued in this case is dismissed.

We concur: PULLEN, P. J.; PLUMMER, J.

134 Cal.App. 89

**LAMSON CO., Inc., v. JONES et al.**

**Civ. 7910.**

District Court of Appeal, Second District, Division 2, California.

Sept. 5, 1933.

**1. Municipal corporations** 🔑**348.**

Absence of allegation that building contractor's bond to city was in sum not less than half of amount payable under contract, as provided by statute, was immaterial, where complaint showed that bond was given under such statute (St. 1919, p. 487, as amended by St. 1927, p. 282).

**2. Pleading** 🔑**34(4).**

Presumption is that pleader stated case in manner most favorable to himself.

**3. Municipal corporations** 🔑**348.**

Action on building contractor's bond to city was barred, where work was completed on May 20, 1929, and complaint was not filed until January 9, 1931 (St. 1919, p. 488, § 2, as amended by St. 1925, p. 540; p. 487, as amended by St. 1927, p. 282; Code Civ. Proc. § 1187).

**4. Municipal corporations** 🔑**347(2).**

Where separate bond for benefit of laborers and materialmen was given to city by building contractor, materialmen could not recover on faithful performance bond given to city.

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Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by The Lamson Company, Inc., against H. F. Jones and another. From a judgment dismissing the action, plaintiff appeals.

Affirmed.

Derthick, Cusack & Ganahl, and W. J. Cusack, all of Los Angeles, for appellant.

Haight, Mathes & Sheppard, of Los Angeles (Burke Mathes, of Los Angeles, of counsel), for respondent.

ARCHBALD, Justice pro tem.

Action by plaintiff against a contractor and his surety to recover balance of agreed price of materials furnished and installed by plaintiff in a public service building erected by defendant Jones, as general contractor, under a contract with the city of Glendale. The work was fully completed May 20, 1929, and complaint was filed January 9, 1931. A demurrer filed by defendant Central Surety & Insurance Corporation, on the ground that the action was barred by section 2 of the act of May 10, 1919, amended May 22, 1925 (St. 1919, p. 487, St. 1925, pp. 539, 540), was sustained by the court with leave to amend. A similar demurrer was also interposed by said defendant to the amended complaint filed by plaintiff, which demurrer was sustained without leave to amend and judgment thereafter entered dismissing the action as to the demurring defendant.

[1, 2] Plaintiff has appealed, and contends that its complaint states a cause of action on the faithful performance bond given to the city of Glendale under the contract, even if the labor and material bond is a statutory bond and the action on it barred by said section.

The amended complaint alleges the execution of two bonds. The first bonds said contractor and defendant surety company to the city of Glendale "and to all persons, companies and corporations entitled to file claims under the act approved May 10, 1919, and amendments thereof." The condition of the bond follows the language of the undertaking required to be filed under section 1 of such act (St. 1919, p. 487, as amended by St. 1927, p. 282), even to the provision of "a reasonable attorney's fee, to be fixed by the court," in case suit is brought thereon, and is made by its terms to "inure to the benefit of any and all persons, companies and corporations" entitled to file claims under the act. No question remains, after reading the act and the bond, as to the instrument being a bond given in compliance with the requirements of the act. It is true the complaint does not allege that the penalty of the bond is "in a sum not less than one-half of the total amount payable by the terms of the contract," but we may certainly assume that the pleader would so have alleged if anything appearing on the face of the undertaking was not in conformity with the act, and "it must be presumed that the pleader stated his case in the most favorable manner to himself." Smelser v. Deutsche etc., Kirche, 88 Cal. App. 469, 473, 263 P. 838, 839.

[3] Section 2 of the act referred to (as amended by St. 1925, p. 540) provides, in substance, that suit on the bond may be brought "at any time after the claimant has ceased to perform labor or furnish material or both and until the expiration of six months after the period in which verified claims may be filed as provided herein." The amended complaint shows on its face that the work was fully completed May 20, 1929. Section 2 also provides that claims may be filed under the act at any time prior to the expiration of the period within which claims of lien must be filed for record under section 1187 of the Code of Civil Procedure, or at the utmost ninety days from date of completion. Here the complaint was not filed until nearly eleven months after the six months' period had ex-

pired. The right of action on the labor and material bond was clearly barred.

[4] Appellant urges that it has a right of action on the faithful performance bond exacted of the contractor under the contract and which was also furnished by respondent. Such bond runs to the city of Glendale only, and there is no provision therein which runs to the benefit of labor and materialmen. It is well settled that, where a separate bond has been filed complying with the statute and inuring to the benefit of laborers and materialmen, no recovery can be had by a laborer or materialman upon the faithful performance bond executed in connection with the same contract which does not by its terms inure to his benefit. Maryland Casualty Co. v. Shafer, 57 Cal. App. 580, 208 P. 192; Summerbell v. Weller, 110 Cal. App. 406, 294 P. 414.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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133 Cal.App. 624

## CRONE v. CITY OF EL CAJON et al.

Civ. 946.

District Court of Appeal, Fourth District, California.

Aug. 8, 1933.

Hearing Denied by Supreme Court Oct. 6, 1933.

**1. Judgment** ⟹199(3).

Judgment notwithstanding verdict should be entered only when instructed verdict would have been proper and not where there is substantial, competent, and material evidence supporting cause of party for whom verdict is returned.

**2. Judgment** ⟹199(3).

Judgment for defendant city, notwithstanding verdict for plaintiff in action for death of boy drowned in municipal swimming pool, *held* proper, in view of evidence showing decedent's contributory negligence (St. 1923, p. 675, § 2).

> The evidence showed that decedent, who was 14 years old and could not swim, slipped to his death after working along edge of pool to deep water after being twice sent back to shallow end by his older brother.

**3. Municipal corporations** ⟹734.

City exercised governmental function and acted in governmental capacity in operating swimming pool in its public park, though it charged admission fees, and hence was not liable for death of boy drowned therein, in absence of notice of dangerous condition (St. 1923, p. 675, § 2).

**4. Municipal corporations** ⟹857.

Evidence in action against city for death of boy, drowned in municipal swimming pool, *held* not to show such long-continued neglect of dangerous condition, arising from discoloration of water, as to constitute notice thereof (St. 1923, p. 675, § 2).

**5. Municipal corporations** ⟹854.

To recover from city for death of boy, drowned in municipal swimming pool, because of failure to maintain more than one life guard, such failure must have been proximate cause of death (St. 1923, p. 675, § 2).

**6. Municipal corporations** ⟹847.

City is not insurer of safety of bathers in municipal swimming pool, but is only required to furnish pool not in dangerous or defective condition (St. 1923, p. 675, § 2).

**7. Municipal corporations** ⟹854.

City's failure to have more than one life guard at municipal swimming pool *held* not proximate cause of drowning of boy, whose sinking was not seen by any of number of expert swimmers or many bathers in pool at time (St. 1923, p. 675, § 2).

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Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by J. V. Crone against the City of El Cajon and others. From a judgment for defendant city notwithstanding a verdict for plaintiff after abatement of the action as against the other defendants, plaintiff appeals.

Affirmed.

J. J. Barrett, of San Francisco, and Fred A. Steiner, of San Diego, for appellant.

Philip Storer Thacher, of El Cajon, and J. A. Isaacson and Lester J. Penry, both of San Diego, for respondents.

MARKS, Justice.

This is an appeal from a judgment notwithstanding the verdict, entered after the jury had returned a verdict in favor of plaintiff for damages caused by the drowning of his fourteen year old son in a municipally owned swimming pool. Motions for nonsuit and an instructed verdict were regularly made by defendants.

The allegations of the pleadings before us show that the action as originally brought included the members of the city council of the city of El Cajon as defendants, and sought to recover judgment against them under the provisions of section 1 of an act of the Legislature approved June 13, 1923 (St. 1923, p. 675), which for want of a better name we will refer to as the Municipal Liability Act. No evidence was offered under this phase of the case, and the action against the members of the city council was abated. Recovery against the municipality was sought under the provisions of section 2 of this act.

The evidence disclosed that for several years prior to 1930 respondent had operated a swimming pool during the summer months for the pleasure of its citizens. Small fees for its use were charged, but their total did not pay the cost of its operation. During the summer of 1930 the pool had been in operation for a little more than four weeks prior to July 3d, the date of the drowning which gave rise to this action.

A permit was issued by the California state board of health, which provided that the pool might be operated "subject to the regulations of said Board and subject to the following provisions: (1) The water to be emptied when the bottom at the deep end is no longer clearly visible. * * *" The regulations of the board contained the following: "All water in the pool shall at times of use be bright and clear, so that the bottom of the pool may be plainly visible."

The water for the pool was supplied from the same pipes that furnished domestic water for the citizens of El Cajon. This water carried silt which collected on the bottom of the pool when it was not in use. Bathers would disturb this deposit, discoloring the water. It was the custom of the municipality to have the pool drained and cleaned each Monday. The discoloration of the water increased as the week progressed. According to one witness the water was so discolored on ten or twelve occasions in 1930, between the opening of the pool early in June and July 3d, that the bottom was not visible in the deeper portions. On July 3d, which fell on Thursday, the bottom was not visible beyond a depth of between 4 and 5 feet.

The city employed one lifeguard, who was also a caretaker and ticket seller. During the hours the pool was in use, when not engaged in selling tickets, he acted as lifeguard. He occasionally had volunteers helping him. During the later hours of each day less of his time was spent in selling tickets than during the earlier hours. The shallower parts of the pool were separated from the deeper by a rope for the protection of children and bathers who could not swim. Each foot of variation in the depth of the pool was marked with figures between 6 and 8 inches in height along its side. The pool was built of cement, and was 40 feet wide and 60 feet long. Its shallowest depth was 2 feet with the bottom descending for 51 feet 4 inches to an extreme depth of 9 feet.

At about 2:30 o'clock on the afternoon of July 3, 1930, two sons of appellant, Emmitt, aged 14 years and 33 days, and Truman, aged 18, went to the pool, each paying ten cents for admission. After donning their bathing suits they entered the water. Truman, who was a good swimmer, went to the deep end of the pool, spending his time diving from the springboard and swimming. Emmitt, who could not swim, entered the shallow water and spent some time playing with the smaller children. There were a number of persons in the pool, estimated as high as 40, some of whom were excellent swimmers and who spent their time diving and swimming in the deep water. Twice during the afternoon Truman saw Emmitt hanging on the side of the pool over the deep water and sent him back to the shallow end. Emmitt had worked along the edge holding on to the splash rail with his body hanging in the water. At about 4 o'clock a diver touched a body on the bottom of the deep part of the pool. It was brought to the surface and found to be Emmitt. No one knew the length of time it had been there or how it had gotten there. The evidence indicates that for some time before 4 o'clock the lifeguard had been on duty as such around the pool.

The pool was under the supervision of a committee consisting of a member of the city council and the marshal. There is no evidence that either of these officers, or any other officer of the city, had been to the pool since its opening early in June, or on July 3d, or had any notice, knowledge, or information of the muddy condition of the water on the ten or twelve occasions mentioned in the record, or at any other time, or of any other condition at the pool which might render its condition defective or dangerous, except that the members of the city council all knew that but one lifeguard was employed there.

[1] The rule is well established that a judgment notwithstanding the verdict should be entered only when an instructed verdict would have been proper, and not in a case where there is any substantial, competent and material evidence supporting the cause of the party in whose favor the verdict is returned. For this reason we have summarized the evidence most favorable to appellant, although but few conflicts appear.

Sixteen special issues were submitted to the jury and answers to thirteen were returned, in addition to a general verdict. The answers to the thirteen issues were such that it was unnecessary to answer the other three. These special findings were responsive to issues raised by either the pleadings or evidence and may be thus summarized: That the construction of the pool with a sloping bottom did not make it unsafe or dangerous to bathers and was not the cause of its being slippery; that the mud or silt on the bottom of the pool made it slippery and dangerous for bathers, but that Emmitt Crone did not slip on the floor because of this condition; that the water in the pool was not bright and clear, and this condition contributed to the death of Emmitt; that at the time Emmitt became submerged there was not a sufficient number of lifeguards to keep the pool safe for bathers and that this contributed to Emmitt's death; that the pool lacked certain life-saving equipment, but that this did not contribute to Emmitt's death; that Emmitt was not guilty of contributory negligence; and that the only dangerous or defective condition of the swimming pool of which respondent had any notice or knowledge was that there were insufficient attendants at the "pool adequate for lifeguard purposes to keep the pool and premises safe for bathers."

[2] We have studied the record carefully and under the evidence the only special finding upon which the jury could have reached a contrary finding was the one which found Emmitt free from contributory negligence. The evidence would support the inference, had it been made by the jury, that for a third time Emmitt worked along the edge of the pool to the deep water and slipped to his death. "It would not conform to the dictates of common reason to say that a child of the age of eight years, or even much younger, does not know and fully realize that a fall into a pond of water or a deep reservoir would result in injury to him, if not in his death." Polk v. Laurel Hill Cemetery Ass'n, 37 Cal. App. 624, 174 P. 414, 418. See, also, Beeson v. City of Los Angeles, 115 Cal. App. 122, 300 P. 993.

[3] Appellant urges that because the city of El Cajon charged an admission fee to the swimming pool it ceased to act in a governmental capacity and operated it as a private function in a proprietary capacity and that it was liable for ordinary negligence without regard to the provisions of the Municipal Liability Act. The facts of the instant case square with those of Kellar v. City of Los Angeles, 179 Cal. 605, 178 P. 505, where a similar contention was decided adversely to the plaintiff. Under this authority we must hold that the city of El Cajon was exercising a governmental function and acting in a governmental capacity in operating the swimming pool in its public park.

[4] The elements which must exist in order to support a recovery under the provisions of section 2 of this act are stated in Pittam v. City of Riverside (Cal. App.) 16 P.(2d) 768, 769, as follows: "(1) The injuries to respondent [plaintiff] * * * must have resulted from a dangerous or defective condition of the dumping ground; (2) the city council of the city of Riverside, or some officer or person having authority to remedy such condition, must have had notice or knowledge thereof; (3) it, or he, must have failed or neglected to remedy such dangerous or defective condition within a reasonable time after acquiring such knowledge or receiving such notice; or (4) must have failed to take such action as might be reasonably necessary to protect the public against such dangerous or defective condition within a reasonable time after such knowledge or notice."

We have concluded, under the facts here presented, i. e., the muddied condition of the water on certain days when the pool was in operation, the cleaning and refilling each Monday with water fairly clear, but which grew darker as the week progressed, that there is no showing of a long-continued neglect of an existing condition that would constitute notice under the rule laid down in Boyce v. San Diego High School District, 215 Cal. 293, 10 P.(2d) 62, and other similar authorities.

[5] It is clear from the evidence that the failure to maintain more than one lifeguard at the swimming pool was the only possible lack of due care that might be relied upon by appellant, if this could be regarded a lack of due care, that was brought to the notice of the members of the council or some officer or agent of the city of El Cajon having the authority to remedy such a condition. This limits appellant's right of recovery to this one possible ground. We do not need to decide whether the failure to employ more than one lifeguard might have amounted to ordinary negligence in the operation of the swimming pool, which would create no liability; or whether a dangerous or defective condition of public property would be created by operating it in accordance with a general scheme put into effect by the municipal authorities and in such a manner that a dangerous and defective condition would be created and allowed to exist, under which circumstances there might be a liability. Pittam v. City of Riverside, supra.

The evidence must show some causal connection between the death of Emmitt and the fact that but one lifeguard was stationed at the pool. In order to permit a recovery the failure to have more than one lifeguard must have been the proximate cause of the death. In this we disregard any question of contributory negligence.

[6, 7] The lifeguard was probably around the pool at the time Emmitt disappeared beneath the water. Emmitt's own brother was swimming there. A number of youths, all expert swimmers, were in the pool and over the spot where the body was found. None of them, nor any of the many bathers in the pool, saw Emmitt sink or had any idea he was missing until about the time his body was found. The city of El Cajon was not required to insure the safety of the bathers in its pool, nor can a lifeguard guarantee that no bather will drown in the water he is patrolling. The city was only required to furnish a pool that was not in a dangerous or defective condition. Would two lifeguards have prevented the tragedy? If ten life-

guards had been employed would any one of them have been more likely to have seen the boy sink into the water than the considerable number of bathers who were swimming and diving near the spot where he must have disappeared? Under the facts before us we cannot conclude that the failure to have more than one lifeguard was the proximate cause of Emmitt's drowning.

The case of Bertalot v. Kinnare, 72 Ill. App. 52, presents facts almost identical with those of the instant case except that there the swimming pool was privately owned. It was there said: "It is doubtless the law that the proprietor of such an institution would be liable for injury to a patron, if such injury resulted from lack of ordinary care in providing for his safety, and without fault of the patron; but it is as surely not the law that such proprietor is in any sense an insurer of the safety of his patrons, nor would the death of a patron within his premises cast upon the proprietor the burden of excusing himself from any presumption of negligence. Brotherton v. Manhattan B. I. Co., 48 Neb. 567 [67 N. W. 479, 33 L. R. A. 598, 58 Am. St. Rep. 709].

"It was incumbent upon defendant in error, as plaintiff in the trial court, to sustain his declaration with evidence, and to establish the averments of some one of its counts. The question here presented is simply whether the record shows evidence which would warrant the jury in finding that there was such lack of ordinary care as is alleged, and that it was the proximate cause of the death of the intestate.

"Defendant in error presented no evidence to show just how the lad came to his death, except that some ten or fifteen minutes after he was seen alive and in a place of safety, he was found unconscious, and, it may be, already dead, at the bottom of the swimming tank. * * * A verdict for plaintiff in error [the pool owner] would have been warranted had the jury given credit to the testimony of his witnesses. The verdict for defendant in error was bad, because unsupported by any evidence whatever as to how the intestate happened to meet the disaster which resulted in his death, and what negligence, if any there was, contributed thereto, or was the proximate cause thereof. The verdicts, general and special, could have been based upon nothing but guess-work. Whether the jury guessed that the accident was caused by a slippery floor (not averred but proved), lack of railing (not averred as to the south end), a crowded room, or by simply getting beyond depth in efforts to learn to swim, and negligent omission by attendants to effect a rescue, is immaterial. Certain it is that from the evidence it can not be found that any one of these things had aught to do with the accident, and it is certain, too, that the evidence warrants no conclusion of any negligence after the boy was found in the water; and if negligence was assumed after the discovery of the body, it could not be determined that such negligence had any bearing upon the lad's death in the absence of any evidence as to how long he had been beneath the water before discovery. Neither does it profit to inquire as to any negligence claimed to have been shown on the part of plaintiff in error or his attendants before the discovery of the body, for it can not be determined from this record whether such negligence, if any there was, caused the result of the boy's death.

"In Brotherton v. Manhattan B. I. Co., supra, the court say: 'How Brotherton got back into the deep water and what occurred there is not revealed by any evidence. It is not sufficient to establish a case for the plaintiff that negligence should be proved on the part of the defendant, but it must also appear that the negligence proved was the proximate cause of the injury.' This is a statement of a familiar proposition of law, but it bears particularly upon the case under consideration by reason of similarity of facts.

"Because of the insufficiency of the evidence to sustain the declaration, the verdict should have been set aside and a new trial granted."

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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133 Cal.App. 733

## UNDERHILL v. ALAMEDA ELEMENTARY SCHOOL DIST. OF ALAMEDA COUNTY et al.

Civ. 8873.

District Court of Appeal, First District, Division 2, California.

Aug. 16, 1933.

Hearing Denied by Supreme Court Oct. 13, 1933.

1. **Schools and school districts** ⚷89.

Statute imposing liability upon school district for injuries to pupils *held* to cover injuries received by pupil while playing in school yard, provided injuries result from negligence of district, its officers, or employees (School Code, §§ 2.801, 3.41).

2. **Schools and school districts** ⚷89.

Ordinarily there is no liability for injuries sustained by pupils playing games in school yard (School Code, §§ 2.801, 3.41).

3. **Schools and school districts** ⚷89.

School districts are not insurers of safety of pupils at play or elsewhere (School Code, §§ 2.801, 3.41).

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

**4. Schools and school districts ⚷120.**

Complaint in action against school district for injuries to pupil must allege facts clearly showing violation of duty of care imposed upon school authorities (School Code, §§ 2.801, 3.41).

**5. Pleading ⚷8(17).**

Complaint for injuries to pupil received in baseball game played in school yard, alleging that plaintiff and other children were taking part in games "and/or" were playing in immediate vicinity, and that yard was small and that larger pupils were playing in game, *held* insufficient, since averring opinion only (School Code, §§ 2.801, 3.41).

**6. Schools and school districts ⚷120.**

Complaint *held* insufficient to state cause of action against school district for injuries to pupil received in baseball game played in school yard (School Code, §§ 2.801, 3.41).

> Complaint alleged that district negligently failed to provide a safe playground for plaintiff, in that pupils were required to play in one small single inclosed yard without segregation or separation, and that district negligently sponsored the playing of baseball in said yard and negligently supervised the playing of such baseball game, and that plaintiff and other children of tender and delicate years were taking part in such game and/or were playing in the immediate vicinity of such game, and that larger pupils were participating in the game. Complaint failed to show that the school yard was inadequate in size for the purpose for which it was used, nor that there was anything about nature of the game played which would require that only children of uniform age and size be permitted to engage therein.

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Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by James Raymond Underhill, a minor, by his guardian ad litem, Julian P. Underhill, against the Alameda Elementary School District of Alameda County and others. From an order sustaining a demurrer to plaintiff's complaint, and from judgment entered in favor of defendants, plaintiff appeals.

Affirmed.

John H. Harvey, of San Francisco, for appellant.

Earl Warren, Dist. Atty., of Oakland (Charles V. Barfield and Eldon B. Spofford, both of San Francisco, of counsel), for respondents.

SPENCE, Justice.

This action was brought by plaintiff, a pupil in an elementary school, seeking to recover damages from the defendant school district for injuries received in a baseball game played in the school yard. Defendants' demurrer to plaintiff's second amended complaint was sustained without leave to amend, and, from the judgment entered in favor of defendants, plaintiff appeals.

[1] Plaintiff attempted to state a cause of action under section 2.801 of the School Code imposing liability "on account of injury to any pupil arising because of the negligence of the district or its officers or employees." This section was formerly section 1623 of the Political Code and its provisions have been frequently considered. Ahern v. Livermore Union High School District, 208 Cal. 770, 284 P. 1105; Damgaard v. Oakland High School District, 212 Cal. 316, 298 P. 983; Maede v. Oakland High School District, 212 Cal. 419, 298 P. 987; Henry v. Garden Grove Union High School District, 119 Cal. App. 638, 7 P.(2d) 192; Ellis v. Burns Valley School District (Cal. App.) 18 P.(2d) 79. There is but one of the authorities mentioned in which the injuries were incurred by the pupil while at play, and in that case a judgment in favor of the district was affirmed on appeal. Ellis v. Burns Valley School District, supra. There is no doubt, however, that the section is broad enough in its terms to cover injuries received by a pupil while playing in the school yard provided such injuries arise "because of the negligence of the district or its officers or employees."

The allegations of the complaint herein show that the injuries to plaintiff were directly caused by the swinging of a baseball bat by one of plaintiff's fellow pupils while participating in a baseball game in the school yard. Before discussing the allegations of the complaint by which plaintiff attempted to state a cause of action against the defendant district, we deem it appropriate to make certain observations.

[2-4] It has long been recognized that the physical development of the child must go hand in hand with his mental development. The importance of physical exercise is therefore stressed in our School Code, which expressly requires that "attention must be given to such physical exercises for the pupils as may be conducive to health and to vigor of body." School Code, § 3.41. It is a matter of common knowledge that the school authorities have quite generally provided play areas adjacent to the school buildings and have encouraged and sponsored the playing of such games as baseball, basketball, volleyball, handball, and the like, and have provided equipment therefor. Baseball, as commonly played in school yards, differs from

baseball as played upon the baseball field, in that an appropriate type of softer ball is ordinarily used which renders negligible the chance of injury in the event that any one is struck thereby. All of the above-mentioned games contribute to the physical development of the pupils participating, and there is nothing inherently dangerous about any of them. They seldom result in injury to either the participants or spectators and are ordinarily played by school children of all ages without adult supervision. Nevertheless, it is also a matter of common knowledge that children participating in such games and in fact in any form of play may injure themselves and each other, and that no amount of precaution or supervision on the part of parents or others will avoid such injuries. The injuries which may result from the playing of said games are ordinarily of an inconsequential nature and are incurred without fault on the part of any one. In such cases there is no liability and, of course, the fundamental rules governing liability remain the same, even though the particular injury may prove to be of a more serious nature. The law does not make school districts insurers of the safety of the pupils at play or elsewhere, and no liability is imposed upon a district under the above-mentioned section, in the absence of negligence on the part of the district, its officers or employees. With the foregoing observations in mind, we believe that, whenever an attempt is made to recover damages from a school district for such injuries, the complaint in the action must set forth facts clearly showing a violation of a duty of care imposed upon the school authorities.

[5, 6] Plaintiff's complaint herein was in two counts. Defendants' demurrer was both general and special. We need not consider the special demurrer challenging the certainty of the complaint in numerous particulars, for we believe that under the circumstances the defects in the complaint made it subject to the general demurrer. Plaintiff's claims of negligence appear to have been based on the allegations that the district negligently failed to provide a safe playground for plaintiff, in that the pupils were required to play in "one small single enclosed yard" without "segregation or separation"; that the district negligently sponsored the playing of baseball in said yard and negligently supervised the playing of such baseball game. It it alleged "that plaintiff and other children of tender and delicate years were taking part in such game and/or were playing in the immediate vicinity of such game," and that "larger pupils" were participating in the game. We believe these allegations are wholly insufficient. We pause to point out that it is impossible to tell whether plaintiff was a participant in the game or was playing in the immediate vicinity. This may not be of vital importance on the consideration of the general demurrer, but we deem it appropriate to call attention to the confusion brought about by the misuse of the term "and/or." See Putnam v. Industrial Commission (Utah) 14 P.(2d) 973. Plaintiff places great stress in the briefs upon the size of the school yard. It is merely alleged in the complaint that it was "small," and we presume that said allegation was intended to convey the impression that the yard was inadequate in size for the playing of the game in question. The word "small" is a relative term which is meaningless from a legal standpoint when applied to a school yard. It is of no greater value to the pleader here than were the allegations in Hauser v. Pacific Gas & Electric Co. (Cal. App.) 23 P.(2d) 1068, 1070, that certain wires were "in dangerous proximity" to and at "an insufficient height" above ground. It was there said: "Such words are meaningless as allegations of fact, and are averments of opinion of the pleader only." Plaintiff also stresses the fact that "larger" pupils were playing in the game, but the word "larger" is but of little significance when it does not appear how much larger or older than plaintiff these pupils were. Few games are ever played where all the participants are of absolutely uniform size and age, and an allegation that certain participants were "larger" pupils can have no tendency to show negligence on the part of those sponsoring the game. Plaintiff's complaint fails to show that the school yard was inadequate in size for the purpose for which it was used, and fails to show that there was anything about the nature of the game played which would require that only children of uniform age and size be permitted to engage therein or remain in the vicinity thereof. Plaintiff proceeds upon the theory that the district was under a duty to segregate the pupils in some manner, to refrain from sponsoring the game, and, if the game was permitted, to supervise the play. We know of no express provision of law placing any such duties upon the district, and plaintiff has failed to set forth facts which would give rise to such duties. In the absence of appropriate allegations for that purpose, a cause of action is not stated by merely alleging generally that the district negligently failed to segregate the pupils, negligently sponsored a baseball game, and negligently supervised the same.

From all that appears in the record, we are inclined to believe that plaintiff's unfortunate injury was one of those occasional accidental injuries of a serious nature which befall certain children while at play without fault on the part of any one. At any rate we are of the opinion that the allegations of plaintiff's complaint were insufficient, and that the demurrer was properly sustained.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

133 Cal.App. 701

**PEOPLE v. KOENIG et al.**

Cr. 2387.

District Court of Appeal, Second District, Division 1, California.

Aug. 15, 1933.

**1. Criminal law** ⚿1178.

Alleged erroneous rulings in admitting evidence will not be considered, where defendants did not present arguments or authority pertaining thereto, but merely quoted passages from transcript showing question, objection, and ruling.

**2. Infants** ⚿20.

In prosecution for contributing to delinquency of minor, evidence supported conviction (St. 1915, p. 1225, as amended).

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Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Benjamin F. Koenig and another were convicted of contributing to the delinquency of a minor, and they appeal.

Affirmed.

Lois Preston Gilbert and I. M. Gilbert, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Florence Woodhead, Deputy Dist. Atty., both of Los Angeles, for the People.

DESMOND, Justice pro tem.

Each of the defendants was convicted by a jury on two counts of "contributing to delinquency," and appeal from the judgment of conviction and from the order of the trial court denying their motions for a new trial. It is urged in appellants' brief that the evidence is insufficient to sustain the verdicts, also that appellants' rights were prejudiced by certain rulings, claimed to be erroneous, made by the trial court on questions involving the admission of testimony. No authority is cited in support of this claim of error as to a single ruling; counsel being content merely to quote from the transcript of testimony many short passages showing the question, objection, and ruling. In this situation the remarks of the court in Gray v. Walker, 157 Cal. 381, at page 386, 108 P. 278, 280, are apropos: "Certain errors in admitting or excluding evidence are specified. The objections, rulings, and exceptions are merely stated in appellant's brief, without any citation of authority or any argument beyond the bald declaration that 'in deciding these objections against the defendant the court erred.' We do not feel called upon to consider points so presented"—citing cases.

[1] The case last mentioned is a civil action, but the courts passing upon criminal appeals have taken the same view as to the practice of submitting quotations from the transcript without argument or authority pertaining thereto. People v. Zarate, 54 Cal. App. 372, 374, 201 P. 955; People v. Schlosser, 99 Cal. App. 593, 278 P. 898. See, also, 8 Cal. Jur. 546. We may say, however, that in reading the testimony of this case to determine what weight should be given to the claim of appellants that the verdicts were not supported by the evidence we were impressed with the prompt, fair, and correct rulings made by the learned trial judge who heard the case and can appreciate the difficulty counsel must have experienced in any effort that may have been made to find authority to sustain appellants' claim in regard to these rulings. We find no instance relating to any material testimony where in our opinion the trial court ruled erroneously.

[2] Passing adversely upon the contention that the evidence is insufficient to support the verdict, we have this to say: The defendants were occupying a two-story dwelling in a beach town frequented by sailors; two girls, respectively fourteen and fifteen years of age, testified that, while dressed in skirt and "middy," clothing such as is commonly worn by schoolgirls, and accompanied by two sailors, they were admitted to defendants' house about 5:30 p. m. of January 25, 1933, and served with drinks by the two defendants in an upstairs bedroom occupied by one of the sailors and one of the girls, another room on the same floor being assigned to the other sailor and girl; that they stayed all night with the sailors, and next day bought some new shoes with money which the sailors gave them, returning to one of the bedrooms and placing their old shoes and the hat of one of the girls in a dresser drawer, where they were found by a police officer a day or two later, at about the time the girls were picked up by juvenile authorities. One pair of shoes and the hat were identified as hers by one of the girls and introduced in evidence; the other girl testified that she had tossed into a wastebasket her old shoes when she saw them at the police station, where, according to the officer he had brought them.

The two sailors whom the girls identified as their companions on the night in question testified that they had no acquaintance with them, that they had never taken them to the house occupied by the defendants, and that they did not know the defendants. The defendants testified that they did not know the sailors, and that the girls had never stayed overnight at their house, their story being that on the afternoon of January 26th, the day immediately following the date of the alleged offense, the two girls called at defendants' house looking for work, and, on failing to secure it, prevailed upon defendant Koenig to take charge of a package temporarily; he saying, as he did so, that he would put it in the lower drawer of a dresser upstairs. This package the girls never returned for; but it was in a lower dresser drawer that the police officer found, unwrapped, the two pairs of old shoes and the hat, some wrapping paper and twine, and a sales slip.

It was the duty of the jury to determine in this case who was telling the truth; their verdicts show that they believed the girls. We see no reason why, on this record, and considering the provisions of the Juvenile Court Law (St. 1915, p. 1225, as amended), we should disturb these verdicts.

Judgment and order affirmed.

We concur: CONREY, P. J.; YORK, J.

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133 Cal.App. 669

## TOWEY v. ESSER et al.

## SANTA MARGARITA LAND & CATTLE CO. v. GOODNO et al.

Civ. 8969.

District Court of Appeal, First District, Division 1, California.

Aug. 14, 1933.

Rehearing Denied Sept. 13, 1933.

Hearing Denied by Supreme Court Oct. 11, 1933.

**1. Sales 🔑202(2, 3).**

Title to goods, for which seller agrees to accept check, bill, or note as absolute payment, passes on delivery of goods and acceptance of such instrument, whether honored on due presentation or not.

**2. Sales 🔑191.**

Check given in payment for goods, sold for cash on delivery, is payment only when cash is received thereon.

**3. Sales 🔑191.**

Seller's mere acceptance of check from buyer raises no presumption of absolute payment.

**4. Sales 🔑202(2, 3).**

Title to cattle, sold for cash without understanding that buyer's draft on consignee should be accepted as absolute payment, remained in seller until payment of draft, and dishonor thereof entitled seller to proceeds of consignee's subsequent sale of cattle as against attaching creditor.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by C. J. Towey against Henry Esser and others, in which plaintiff caused attachment of money in the hands of W. H. Goodno, doing business under the name of Pacific Live Stock & Commission Company, and the Santa Margarita Land & Cattle Company filed a complaint in intervention against plaintiff, defendant Esser, and another. From a judgment awarding the money to plaintiff, intervener appeals.

Reversed, with direction.

Hugh Ward Lutz, of Los Angeles, for appellant.

D. Brandon Bernstein, of Los Angeles, for respondent.

KNIGHT, Justice.

Respondent, C. J. Towey, as assignee of Southwest Commission Company, brought this action against Henry Esser and two fictitious parties, to recover the sum of $6,573 claimed to be due for money had and received, money loaned to and expended on behalf of defendants, and on an account stated; and pursuant thereto caused to be attached in the hands of W. H. Goodno, doing business under the name of Pacific Live Stock & Commission Company, the sum of $4,061.66; whereupon appellant Santa Margarita Land & Cattle Company, claiming title to the money so attached, and by leave of court first had and obtained, filed a complaint in intervention to recover said money. Esser defaulted in the original action, and the cause went to trial on the issues raised by the allegations of the complaint in intervention and the answer thereto filed by Towey. It was heard and determined by the court, a trial by jury having been expressly waived, and judgment was entered awarding the money to Towey, from which the land and cattle company has appealed.

The controversy grows out of the following undisputed facts: The Santa Margarita Land & Cattle Company owns a large ranch near Santa Margarita, in San Luis Obispo county, and is engaged in the business of raising and selling cattle. On or about June 17, 1931, Esser, a cattle buyer, called at the ranch to purchase upwards of a hundred head. Having bought cattle from said company three times before within the preceding two years, he was known to the ranch superintendent, named Miller, who transacted the business with Esser on this particular occasion. Miller was authorized by his employer to sell only for cash, and he so informed Esser, the understanding with the latter being that the cattle should be weighed on the ranch scales and the cash paid or a check therefor delivered to the seller when the cattle were weighed out. Accordingly the cattle were rounded up and weighed, and Miller delivered to Esser a "brand certificate" which it was necessary, under the law, for Esser to present to the railroad company before it would accept the cattle for shipment. The cattle were then driven by the seller's men to the loading corrals of the Southern Pacific Company at Santa Margarita, and on Saturday, June 20, 1931, were loaded into three cars and billed by Esser to Pacific Live Stock & Commission Company, Union Stock Yards, Los Angeles, "for the account of John Schwab." Immediately after the cattle were loaded the amount of the purchase price was computed by Miller, and Esser delivered to Miller a draft for $4,475.91, drawn on the consignee, Pacific Live Stock & Commission Company, Union Stock Yards, Los Angeles, and signed "John Schwab by H. Esser." Esser then wrote out a bill of sale, in simple form, which Miller signed and handed back to Esser. Shortly after receiving the draft Miller forwarded the same, together with a report of the sale, to the San Francisco office of his employer, and on June 22, 1931, the draft was deposited in a San Francisco bank for collection. It arrived at the correspondent bank in Los Angeles on June 23, 1931, and at 2:10 p. m. of the same day was presented for payment to the Pacific Live Stock & Commission Company. However, in the meantime the cattle arrived, and about noon of that same day were resold by the Pacific Live Stock & Commission Company and the proceeds of the sale attached by the respondent Towey, who as assignee of the Southwest Commission Company had filed his action at 10:37 that same morning. Consequently payment of the draft by the Pacific Live Stock & Commission Company was refused.

Immediately following the levy of the attachment, Esser left the state, going to Colorado; and he never returned. Schwab was a cattle buyer residing in San Jose, but, according to the intervener's evidence, he denied having any knowledge whatever of the transaction involving the purchase of said cattle by Esser or the giving of said draft in payment thereof. Summons in the original action brought by Towey against Esser was served on the latter personally in Denver, Colo., and, as stated, he defaulted. Upon being served with the complaint in intervention, the Pacific Live Stock & Commission Company deposited in court the net proceeds of the sale of the cattle, amounting to $4,061.66.

[1-3] The trial court's judgment awarding said proceeds to Towey is based on findings, which in effect are legal conclusions drawn from the foregoing facts, that title to the cattle passed unconditionally and absolutely to Esser upon the simultaneous delivery of the cattle and the draft in Santa Margarita on June 20, 1931, despite the admitted fact that it was a sale for cash, and that the draft given in lieu of cash proved to be utterly worthless. In so holding, the decision of the trial court, in our opinion, is, as appellant contends, in direct conflict with and contrary to the law declared in the case of South San Francisco Packing & Provision Co. v. Jacobsen, 183 Cal. 131, 190 P. 628, which involved facts almost identical with those of the present case. There a stock buyer named Jacobsen purchased several carloads of hogs from stockraisers named Taylor and Rosecrans, at their ranch in Idaho, the agreement being that the sale was to be for cash, that the hogs were to be delivered at a certain place in Idaho where Jacobsen or his agent were to receive them, and make payment therefor by check. The hogs were delivered and received accordingly, and the check delivered about midnight on Thursday, June 10, 1915. The check was deposited for collection the following day, and on Monday, June 14th, in due course, it reached the bank in Idaho Falls on which it was drawn, and payment was refused for lack of funds. It appears that on the day the check was drawn Jacobsen had money deposited in the bank, but not sufficient to cover the check, and that on the following day he increased his balance to a sum more than enough to pay the check, but by Monday he had reduced the balance far below the amount called for by the check, and consequently payment was refused. Shortly after purchasing the hogs Jacobsen disappeared, but in the meantime he had shipped the hogs to the South San Francisco Packing & Provision Company and it had resold them; and as soon as Taylor and Rosecrans discovered that the check was worthless they demanded from the South San Francisco Packing & Provision Company, under a claim of ownership, the proceeds of the sale of the hogs. However, as here, shortly before such demand was made, a creditor, the Western Meat Company, filed an action against the buyer, Jacobsen, and attached the fund in the hands of the packing company; thereupon the packing company instituted a suit in interpleader and paid the fund into court. There, as here, also, the trial court held that, despite the fact that the check was worthless, title to the hogs passed at the time of the delivery of the check therefor, and that consequently the attaching creditor, the Western Meat Company, was entitled to the proceeds from the sale of the hogs. On appeal it was held to the contrary, and the judgment was reversed, the court holding that the sellers, Taylor and Rosecrans, were entitled to the proceeds. The decision was based upon the legal proposition, as it is stated in substance in the syllabus, that, "where personal property is sold to be paid for upon delivery by check, the sale is to be treated as one for cash, and if the check is dishonored, the title to the property, as be-

tween the parties to the sale, remains in the seller, who may retake the property, or if the property has been resold, claim the proceeds in the hands of the second purchaser as against an attaching creditor of the original buyer." Among the numerous authorities cited by the court in support of its decision are Benjamin on Sales (7th Ed.) 755; 23 R. C. L. 1448; 35 Cyc., pp. 308, 322 and 327. True, as pointed out by the court therein, where the seller expressly agrees to accept a check or bill or note, as absolute payment, title to the goods will pass upon the delivery of the goods and the acceptance of such check or bill or note, regardless of whether the paper is honored on due presentation thereof; but, as the court goes on to say, where goods are sold for cash on delivery, and payment is made by check, such check is, in fact, payment only when the cash is received on it; and there is no presumption that the seller takes the check as absolute payment merely from the fact that he accepts it from the buyer, the presumption being, says the court, just to the contrary, citing National Bank of Commerce v. Chicago, etc., Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566; Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. Rep. 527; Johnson-Brinkham Co. v. Central Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615. In applying the foregoing rules to that particular case, the court said: "In effect, this sale was for cash as distinguished from a sale on credit, payment to be made, as is customary in similar commercial transactions, by check, and as it was not agreed that the check was to be received as absolute payment, and the delivery of the goods also was conditional, and the check, upon due presentation, was dishonored, title to the hogs remained in the seller." And in conclusion the court said: "The title to the hogs, therefore, as between the parties to the sale having remained in the original sellers, it follows, we have no doubt, that the fund in the hands of the plaintiff, the purchaser from Jacobsen, constituting part of the purchase price, belongs to the original sellers, Taylor & Rosecrans; and we also entertain no doubt that so far as the attaching creditor is concerned it has no better right to the fund than Jacobsen himself. (Ward v. Waterman, 85 Cal. 491, 508, 24 P. 930.)" Two later cases citing the Jacobsen Case with approval are Clark v. Hamilton Diamond Co., 209 Cal. 1, 284 P. 915, and Galeppi v. C. Swanston & Son, 107 Cal. App. 30, 290 P. 116.

[4] And so, in the present case, the undisputed evidence shows that the sale of the cattle to Esser was to be a sale for cash as distinguished from a sale on credit, and that there was no understanding or agreement whatever that the draft given by Esser was to be accepted as absolute payment. On the contrary, the evidence shows it was taken merely in accordance with the custom followed in similar commercial transactions. Therefore, under the authorities above cited, as between the parties to the sale, title to the cattle remained in the seller dependent upon the payment of the draft; and since the draft was dishonored the seller was entitled, as in the Jacobsen Case, to the proceeds from the sale of the cattle as against the attaching creditor, who had no better right thereto than Esser himself would have had.

Moreover, in the Jacobsen Case, supra, it was strongly indicated that, if the check were given for the purpose and with the intention of perpetrating a fraud, the sale would have been void both as to Jacobsen and his attaching creditor. The court went on to point out, however, that, after the issuance of the check and before its presentation for payment three days later, Jacobsen on two occasions had more than sufficient money on deposit to meet its payment, which, the court stated, coupled with the presumption of innocence and fair dealing, furnished some foundation for the finding of the trial court against fraud. But in the present case the evidence shows without conflict that Esser clearly intended to and did in fact perpetrate an absolute fraud. He falsely represented that Schwab was the real purchaser of the cattle, he gave a spurious draft in payment thereof, purporting to be the draft of Schwab, and he shipped the cattle under Schwab's name to the Los Angeles commission house for the account of John Schwab; whereas, as stated, Schwab knew nothing whatever about the transaction. It is evident, therefore, that the seller here established a much stronger case in its favor than did the sellers in the Jacobsen Case.

Respondent seeks to avoid the controlling effect of the decision in the Jacobsen Case on two grounds: First, he asserts that it is based on facts different from those of the present case; but he has wholly failed to point out any material difference, and after a careful examination we have been unable to find any. Secondly, he intimates that the rule of that case was changed by the adoption in this state in 1931 of the so-called Uniform Sales Act (St. 1931, p. 2235 [Civ. Code, §§ 1721–1800]). The answer to this is that the transaction here involved was closed before the end of June, 1931; whereas the Uniform Sales Act did not become operative until August 14, 1931, and it is expressly declared therein (Civ. Code, § 1797) that none of its provisions shall apply to any sale or to any contract to sell, made prior to the taking effect of said act.

For the reasons hereinabove assigned, the judgment is reversed; and exercising the authority granted by section 956a of the Code of Civil Procedure this court finds from the undisputed evidence and contrary to the findings of the trial court that title to said cattle at all times remained in the Santa Margarita Land & Cattle Company, the seller thereof. The findings being thus modified, the trial court is directed to enter judgment accordingly in favor of the intervener, the Santa Margarita Land & Cattle Company, for the amount of the net proceeds derived from the sale of said cattle by the Pacific Live Stock & Commission Company.

We concur: TYLER, P. J.; CASHIN, J.

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134 Cal.App. 19

## GOMEZ v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9056.

District Court of Appeal, Second District, Division 1, California.

Aug. 23, 1933.

**1. Costs ⟹131.**

Rule allowing indigent person to prosecute action without prepayment of court fees does not apply where some other financially responsible person is partially interested in subject-matter of litigation.

**2. Costs ⟹131.**

Indigent person should not be relieved of prepayment of court fees in prosecuting action, where such person's attorney has interest in result under contingent fee contract.

**3. Champerty and maintenance ⟹5(1).**

Contingent fee contract between attorney and client is not champertous.

Application by Louis R. Gomez for writ of mandate to be directed to the Superior Court for Los Angeles County, Hon. Hartley Shaw, Presiding Judge thereof.

Application denied.

Proctor K. Perkins and Marion P. Betty, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondents.

HOUSER, Justice.

It appears that petitioner, who represents himself as "an indigent person," is the plaintiff in an action pending in the superior court of the county of Los Angeles, and that heretofore his application to said court to the effect that he be permitted "to further prosecute" his said action in forma pauperis was denied for the sole reason (which is conceded to be the fact) that the attorney who represents the plaintiff in said action "has a contingent interest therein." Petitioner now seeks from this court a mandate by which the said superior court and a designated judge thereof shall be required "to make an order permitting the petitioner to prosecute his action without the prepayment of the jury and reporter's fees."

[1] In effect, repeatedly it has been declared by the courts of this state that in its simplicity, not only the policy of the courts, but as well the unwritten law, is that "without money and without price" indigent persons shall be afforded the use of the trial courts in the maintenance and for the protection of their civil rights. The obstacle in the way of the full and unabridged recognition by such courts, as well as the permissive mutual execution of such privilege by the respective interested parties, arises when the situation presents conditions which in some manner indicate the constructive absence in the litigant of the essential quality of destitution, or at least of such property as, from a practical standpoint, precludes the expenditure by him of the funds represented by the legal fees and costs in the premises. It is apparent that, where the right sought to be enforced, or to be protected, is one in which some person who is presumably financially responsible is either equally or partially interested with the litigant, as by a joint, a common, or a community interest in the subject-matter of the existing or proposed litigation, the rule should not be given application. Ordinarily, the difficulty lies primarily in an endeavor to determine the existence of the legal ownership by some outside party of some pecuniary interest either in the cause of action itself or in the anticipated results or fruits thereof. It is manifest that, as a result of a valid agreement entered into between an indigent person who was the possessor of a cause of action and some financially responsible person prior to the institution of legal proceedings, whereby a contingent interest in the cause of action was transferred from the former to the latter, and on the termination of the action an equal, or any substantial, division between such interested persons of any moneys realized from the judgment occurred, a situation would be presented which should disclose such an interest in the subject-matter of the litigation by the outside party as should have forbidden the exercise of the privilege ordinarily extended to destitute persons by which they may be or are excused from the payment of fees incident to the litigation.

Concretely, and by way of illustration, if perchance, in consideration of the advancement by some individual to an indigent person of moneys to cover living expenses of

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⟹For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

the latter pending a determination of his action against some third person, it should be agreed between the interested persons that an equal division of the proceeds of the action should take place between them, it should be clear that the destitute person should not be accorded the privilege of maintaining his action at the expense of the public. It should also be apparent, when established as a fact that the contribution by the "outsider" was either in aid of, or was incident to, the contemplated or existing legal proceedings instituted or defended by the indigent person, neither the particular means or method employed, nor the manner by which the indigent person was financially assisted, should be considered either as determinative of, or even as material to, the question of whether the "outsider" was interested in the anticipated recovery in the litigation. In other words, whether the contribution was made by a payment of cash to the destitute person, or whether such contribution consisted of goods, wares, merchandise, or services performed, or to be performed, would be wholly immaterial. Concededly, a contract might be entered into between a poverty-stricken person, who was possessed of a good cause of action against some other individual, or a corporation, and some avaricious and unconscionable person, by which, and in consideration of the passing from the first mentioned to the last of something of comparatively trifling value by which the pressing necessities of the first-mentioned person might be immediately alleviated, the last-mentioned individual would become entitled to the whole and every part of any money, however great in amount, which might be recovered in an action proposed to be instituted on said cause of action; or, even in the absence of immediate consideration therefor, a sense of delayed justice, as it affected his asserted cause of action, might be the controlling inducement to an indigent person to agree with an attorney in effect that, if he would prosecute the action, for his services in that regard the attorney might be entitled to whatever he might recover therein. In such circumstances it would seem unlikely that any one would seriously contend that, because the action was to be maintained or carried on in the name of the indigent person, the prepayment or payment of fees, court costs, etc., should be waived by the state. No difference in principle is apparent between such a situation and one in which a large, or even a small, percentage of the anticipated recovery is owned by some "outsider," or by an attorney, acquired by him in payment of services either performed, or to be performed, by him in the conduct of the case.

[2, 3] Reverting to the instant facts in that regard, it appears that the attorney who at all times here in question has represented the petitioner "was employed in said action under a contingent contract for his fees"; that is to say, as was expressed in the written understanding of the parties thereto, the "compensation will be one-third of such amount as you (the indigent person) receive either by suit, compromise or settlement. * * *"

Ordinarily, the determination of the question of the interest of the "outsider," or his right to participate in any recovery which may result from proposed or pending litigation, necessarily depends upon the legality and the binding force of the contract between the parties. In some jurisdictions it has been held, and still may be the law therein, that such a contract, being a variety of maintenance or champerty, is illegal and at least voidable; but in this state, as early as 1863, in the case of Mathewson v. Fitch, 22 Cal. 86, 95, it was held that "the offense of maintenance is unknown to the laws of this State." In that case, in effect, it was also held that a contract between an attorney and his client for a contingent fee was valid and enforceable; and in the later cases of Hoffman v. Vallejo, 45 Cal. 564; Luco v. De Toro, 91 Cal. 405, 18 P. 866, 27 P. 1082, and Bergen v. Frisbie, 125 Cal. 168, 57 P. 784, the latter principle was affirmed. In addition thereto, in the first two of the last-cited cases, it is held that such a contract transfers to the attorney an equitable interest in any judgment which may be recovered. See, also, Howell v. Budd, 91 Cal. 342, 27 P. 747; Tracy v. Ringole, 87 Cal. App. 549, 262 P. 73; Kelly v. Smith, 204 Cal. 496, 268 P. 1057; Cassetta v. Del Frate, 116 Cal. App. 255, 2 P.(2d) 533.

As far as the industry of respective counsel has disclosed, no ruling has ever been announced by any appellate tribunal of this state where the sole question submitted to it has been identical with that here at issue. However, in each of two cases the element of "contingent fees" as it affected the privilege of an indigent person to prosecute a cause of action without the prepayment of the statutory filing fees, etc., included with other alleged obstacles thereto, has been the subject of consideration; and in each of such cases, although no direct intimation was given by the court respecting the single element of "contingent fees," the indications were that, where it appeared that a contingent fee had been agreed upon between the indigent person and his attorney, the ordinary rule by which the prepayment of filing fees, etc., would be waived had no proper application.

In the course of the opinion in the case of Martin v. Superior Court, 176 Cal. 289, 297, 168 P. 135, 138, L. R. A. 1913B, 313, it is said: "Our next consideration is the narrow one of objections urged by respondents to the sufficiency of the petitioner's moving papers addressed to the superior court. Certain of these appear in the verified return of the judge of that court. The plaintiff's verified petition before the superior court declared that no person other than himself had any interest in the successful prosecution of the action. The judge's return declares that he had information and belief to the effect that the attorneys for the plaintiff had a contingent interest, being a contingent fee, in the successful outcome of the litigation, and that for this added reason the plaintiff's application was refused. But if it be conceded that issue was here joined upon the direct averment of plaintiff's petition, something more is required as to the nature, source, origin, and soundness of the court's belief, before its order can be upheld on this ground. This showing is not made. Yet in view of the fact that the attorneys for the plaintiff were before the superior court, it could most easily have been made."

In the case of Jenkins v. Superior Court, 98 Cal. App. 729, 277 P. 757, the petitioner applied for a writ of mandate to compel the respondent judge to grant leave to the petitioner to proceed in forma pauperis in a certain action then pending in the court in which the said judge presided. From the petition it appeared that the petitioner was an administrator of an estate, and that the only asset of said estate was a cause of action for the death of the person whose estate was being administered. After the complaint was filed for such alleged wrongful death, the petitioner made application to the lower court for leave thereafter to proceed in such action in forma pauperis, setting forth in the petition that the deceased left no estate, and that petitioner had no funds except such as she received from her employment, from which she derived the sum of $100 per month. It further appeared from the petition that the next of kin of the deceased was the petitioner and her brother. No showing was made that the brother was not in a position to auvance costs. "It also appeared that the petitioner had employed attorneys to represent her in the action upon a contingent basis." The application for the writ of mandate was denied.

In other jurisdictions where the question has arisen, the decision thereon generally has depended upon a determination of the foundational issue of whether a contract for a contingent fee was champertous; and where in that respect a conclusion has been reached in the affirmative, the necessary result has been that such a contract, being void and unenforceable, could not affect the primary right of the indigent person to prosecute his action in forma pauperis. Stevens v. Sheriff, 76 Kan. 124, 90 P. 799, 11 L. R. A. (N. S.) 1153; United States ex rel. Payne v. Call (C. C. A.) 287 F. 520. But, as hereinbefore has been indicated, the rule in this state is that a contract by an attorney with his client to the effect that the fee to be paid for the services of the attorney shall be contingent is not champertous; hence, as far as a decision by the courts of this state is concerned, the authorities which rely upon the illegality of such a contract as a basis for the conclusion that the right of the indigent person is unaffected by such a contract are inapplicable.

By the weight of authority, both federal and the state of New York, as well as some of English origin, the practice of permitting an indigent person to sue without the prepayment of filing fees, etc., is held improper, where it appears that, in the action in which the indigent person seeks to invoke such rule, either an attorney or some other assumedly financially responsible person has a contingent interest in the result of the action. Boyle v. Great Northern Ry. Co. (C. C.) 63 F. 539; Feil v. Wabash R. R. Co. (C. C.) 119 F. 490; Phillips v. Louisville & N. R. R. Co. (C. C.) 153 F. 795; United States v. Ross (C. C. A.) 298 F. 64, 33 A. L. R. 728; Chetkovich v. United States (C. C. A.) 47 F.(2d) 894; Cahill v. Manhattan Ry. Co., 38 App. Div. 314, 57 N. Y. S. 10; Harris v. Mutual Life I. Co., 20 N. Y. Civ. Proc. R. 192; Downs v. Farley, 12 N. Y. Civ. Proc R. 119; In re Roberts, 33 Chanc. Div. 265; Lindsay v. Tyrrell, 44 Eng. Repts., Full Reprint, 889.

It follows that the application to this court for a writ of mandate in the premises should be, and it is, denied.

We concur: CONREY, P. J.; YORK, J.

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133 Cal.App. 756

## PEOPLE v. ABRONICA et al.

Cr. 1734.

District Court of Appeal, First District, Division 2, California.

Aug. 18, 1933.

**Criminal law** 🔑1182.

Where no appearance was made for appellant at time set for oral argument other than request for additional time to file brief, and no brief was filed though time granted for that purpose had expired, conviction was affirmed (Pen. Code, § 1253).

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Salvador Abronica and others were convicted of first degree robbery, and they appeal.

Affirmed.

Raine Ewell, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

PER CURIAM.

The defendants and appellants were convicted in the superior court in the city and county of San Francisco of a felony, to wit, robbery, and the jury fixed the crime in each instance as of the first degree.

Judgment on each verdict was duly entered March 14, 1933, and the appellants filed a joint transcript on appeal in this court on March 27, 1933. The cause was regularly placed upon the calendar for oral argument on June 12, 1933. No appearance was made for appellants at the time the cause was called for hearing other than a request for additional time to file a brief. No brief has been filed in their behalf, and the time granted for that purpose has long since expired.

Pursuant to the provisions of section 1253 of the Penal Code, the judgments and the orders denying new trials in each cause are affirmed.

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133 Cal.App. 751

## PEOPLE v. JAMES et al.

Cr. 1729.

District Court of Appeal, First District, Division 2, California.

Aug. 18, 1933.

1. **Criminal law 🔑543(2).**
Evidence *held* sufficient to support trial court's finding that due diligence was exercised to find complaining witness before district attorney read his testimony on preliminary hearing (Pen. Code, § 686).

2. **Criminal law 🔑543(2), 1158(4).**
Question of diligence to find absent witness before reading his testimony on preliminary hearing is for trial court, whose finding, supported by substantial evidence, cannot be disturbed on appeal (Pen. Code, § 686).

3. **Criminal law 🔑1119(4).**
Suggestion of error, not showing what provoked district attorney's alleged improper statement in closing argument that defense might know why complaining witness was absent, cannot be considered (Rules of Supreme Court and District Courts of Appeal, rule 2, § 7).

4. **Criminal law 🔑730(11).**
District attorney's statements in closing argument, implying that defense might know why complaining witness was absent, *held* not prejudicial to defendants, where court immediately instructed jury not to regard arguments as evidence.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Alfred R. James and Rudolph Rugge were convicted of robbery in the second degree. and they appeal.

Affirmed.

Joseph M. Trusty and Henry J. Kleefisch, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

NOURSE, Presiding Justice.

The two defendants were tried jointly before a jury on an information charging robbery. The verdict was guilty of robbery in the second degree. From the judgment following the verdict and from the order denying their motion for a new trial both defendants have appealed upon a single typewritten record.

[1, 2] The appellants raise two points—the discretion of the trial court in permitting the district attorney to read to the jury testimony of the complaining witness given upon the preliminary hearing, and misconduct of the district attorney in his argument to the jury.

The testimony was read under permission of section 686 of the Penal Code after the prosecution had satisfied the trial court that the complaining witness could not be found within the state. Evidence was received showing that a subpœna had been issued and that a police officer had made diligent search for him at his place of business and at his place of residence; that the officer had made inquiries and learned that the witness had sold his business and given up his residence; that further search and inquiry failed to produce any information as to where he could be found. Upon this evidence the trial court found that due diligence had been exercised. The appellants merely state that the subpœna should have been issued some days earlier. The whole question of diligence is one for the trial court and its finding thereon cannot be disturbed when, as here, there is substantial evidence to support it. People v. Fay, 82 Cal. App. 62, 70, 255 P. 239; People v. Udell, 113 Cal. App, 356, 357, 298 P. 56.

[3] The alleged misconduct is based on the statement of the district attorney in his closing argument in which he denied responsibil-

ity for the disappearance of the complaining witness and implied that the defense might know why he was not present. This statement was manifestly made in response to some remark of the defense, but the record does not show what provoked the statement complained of. The suggestion of error does not comply with section 7 of rule II of the Rules of the Supreme Court and District Courts of Appeal and for that reason cannot be considered. People v. Bragdon, 103 Cal. App. 26, 27, 283 P. 881.

[4] Furthermore, the trial court immediately instructed the jury not to regard these arguments as evidence and we cannot find that appellants were prejudiced by the occurrence.

The judgment and order are affirmed.

We concur: STURTEVANT, J.; OGDEN, Justice pro tem.

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133 Cal.App. 644

## PEOPLE v. SIVIN.

Cr. 155.

District Court of Appeal, Fourth District, California.

Aug. 10, 1933.

Hearing Denied by Supreme Court Sept. 6, 1933.

**1. Constitutional law ⟹211.**

Statute applicable to single class cannot be declared unconstitutional as discriminatory, where it is based on constitutional, natural, or intrinsic distinction, and is applicable to all persons or things within such class.

**2. Constitutional law ⟹250.**

**Forgery ⟹2.**

Statute relating to forgery *held* not invalid for penalizing forgery only of persons and not including that of corporations (Pen. Code, § 473).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Charles Sivin was convicted of forgery, and he appeals.

Affirmed.

Louis C. Levy and George De Wolf, both of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Ralph O. Marron, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

[1, 2] The defendant was convicted of the crime of forgery, and has appealed from the judgment upon the sole ground that section 473 of the Penal Code is unconstitutional. It is argued that a corporation is a person within the meaning of section 470 of the Penal Code; that no punishment is provided for a corporation by section 473; that this constitutes an arbitrary discrimination between individuals and corporations; and that section 473 is therefore void, and the judgment must be reversed.

It is well settled that a reasonable classification is permitted if the same be based upon a natural, intrinsic, or constitutional distinction. As was pointed out in People v. Schomig, 74 Cal. App. 109, 239 P. 413, 414: "The Constitution does not deprive the Legislature of power to pass all special acts; but forbids special laws in all cases where a general and uniform law can be made applicable (Argyle Dredging Co. v. Chambers, 40 Cal. App. 332, 181 P. 84), and in order to declare a law unconstitutional, as being discriminatory, it must appear that it is not founded upon a natural, intrinsic, or constitutional distinction, but that it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law."

In Martin v. Superior Court, 194 Cal. 93, 227 P. 762, 765, the court said: "It is conceded, as indeed it must be, that, where a classification of persons or things is distinctive and such distinction is based upon some 'constitutional, or natural, or intrinsic distinction,' laws may be made applicable to such class alone, providing the act is uniform as to all persons or things within such class."

Without discussing the question as to whether a corporation could commit this particular crime, it is apparent that a general and uniform law, in the sense contended for by the appellant, cannot be made applicable in fixing the punishment for crimes of such a nature that any penalty short of imprisonment is entirely inadequate. If no distinction could be made between a corporation and an individual, it would logically follow that there could be no punishment by confinement, since a corporation cannot be imprisoned. For this reason, if for no other, a corporation cannot stand in precisely the same relation as an individual to the subject of the law here in question, and this fact alone constitutes a natural, intrinsic, and constitutional basis for the distinction here complained of.

In People v. Schomig, supra, it was held that a statute fixing a penalty for the violation of another act by a corporation, other than that provided for an individual committing the same offense, was not violative of the Constitution as discriminatory. The principle is the same whether applied to a difference in the punishment provided or to the entire omission of any punishment for a corporation.

No arbitrary discrimination appears in the provisions of the Code section complained of, and the theory advanced by the appellant is without merit.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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## SALOMON v. MEYER.*

Civ. 7912.

District Court of Appeal, Second District, Division 2, California.

Sept. 5, 1933.

Hearing Granted by Supreme Court Nov. 2, 1933.

**1. Trial 🔑194(16).**

Instruction that it is continuing duty of pedestrian crossing street to look in direction from which danger should be anticipated and that verdict must be for defendant, if plaintiff failed to exercise ordinary care in crossing street, and such failure proximately contributed to injury, though defendant motorist was negligent, *held* not erroneous as directing verdict for defendant or instruction that plaintiff was contributorily negligent as matter of law.

**2. Automobiles 🔑217(5).**

It is duty of person about to cross street likely to be dangerous to look before doing so and continuously thereafter.

**3. Automobiles 🔑217(5).**

It is pedestrian's duty to look to right and left after voluntarily putting himself in position which may be perilous.

**4. Automobiles 🔑226(2).**

Pedestrian attempting to cross street without exercising care of ordinarily prudent person cannot recover for injuries caused by running into automobile, if such failure proximately contributed thereto, regardless of driver's negligence.

**5. Appeal and error 🔑110.**

No appeal lies from order denying motion for new trial.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Agnes Salomon against Albert F. Meyer. From a judgment for defendant and an order denying plaintiff's motion for a new trial, plaintiff appeals.

Appeal from order denying new trial dismissed, and judgment affirmed.

Fred W. Morrison, of Los Angeles, for appellant.

Paul Barksdale D'Orr and Thomas A. Reynolds, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Plaintiff sued defendant for injuries due to the latter's alleged negligence in operating his automobile. Defendant denied that he was negligent and pleaded contributory negligence on the part of plaintiff. The jury returned a verdict in favor of defendant, upon which judgment was entered, and plaintiff has appealed.

The sole error urged by appellant relates to an alleged prejudicial instruction given by the court.

The accident happened on December 4, 1928, between 5:30 and 6 o'clock p. m., at the intersection of Jefferson street and Gramercy place, in Los Angeles. Jefferson street runs east and west, and defendant was proceeding west on said thoroughfare. Plaintiff was crossing Jefferson street from north to south in the pedestrian zone marked by white lines, as required by city ordinance. It was stipulated that a traffic ordinance of the city was in effect at the time making it unlawful for the operator of any vehicle to drive into any crosswalk outside of the central traffic district while a pedestrian was engaged in crossing the half of the roadway therein over which such vehicle is traveling. The location in question was outside the central traffic district.

Among other instructions, not shown by the record, the court gave the following, of which appellant complains: "I instruct you that it is a duty resting upon any person attempting to cross a street that is likely to be dangerous, before placing himself or herself in a position of danger, to look in the direction from which such danger is to be anticipated. This is a continuing duty, and is not met by looking once and then looking away. In the exercise of ordinary care it is the duty of the pedestrian to look to the right and to the left whenever he or she has voluntarily put himself or herself into a position which may be one of peril coming from either direction. If you believe from the evidence in this case that the plaintiff, in attempting to cross the street, did so without exercising that degree of care which would have been exercised by a person of ordinary prudence, under the instructions that I have

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*For subsequent opinion see 32 P.2d 631.

just given you, and if you find that such failure upon her part proximately contributed to her injury, then the plaintiff cannot recover, and your verdict must be in favor of the defendant; and this is true even though you may believe that the driver of the automobile was also negligent."

The evidence showed that defendant's headlights were on, that daylight had ended, and that it was fairly dark. Plaintiff testified that she "first looked all around from east to west, and saw—from a distance far away—the car coming, but that was far away. So I crossed the street—started to walk—walk fast, * * * and I was struck and I fell down. * * * I did not see the automobile that struck me, it came so suddenly from the back." That after stepping off the curb into the street plaintiff "walked straight ahead" and did not look again in the direction of the car which she had seen coming, and only looked "to see where the white line was"—"I walked on there"—is undisputed. Plaintiff fell in the pedestrian crossing. It is apparent from the evidence that she walked into the side of defendant's automobile as defendant swerved his car away from her in an attempt to avoid her. The testimony of defendant and his wife, who was with him, shows that plaintiff stepped into the right rear fender of his car. A witness for plaintiff who was driving a car east on the south side of Jefferson street, defendant's car at the time being between his vehicle and plaintiff, testified that "Mrs. Salomon came in contact with the other side of the [defendant's] car, the right front fender, I should say." Joe Berard, a witness for plaintiff, was sitting at the front window of his home, in front of which the pedestrian zone was located, and testified that he saw the right front fender of defendant's car strike plaintiff. This witness said she "fell right close to the center of the white zone; her body was half past the cross zone * * * half past the 12-inch zone. Q. Do you mean one of the pedestrian zone lines? A. Yes sir." Other questions indicated he meant the west line marking the zone.

Regardless of which fender plaintiff contacted, the only conclusion that could be drawn from the evidence is that she ran into it. If she had been hit by the front of the fender, her body would not have remained in the pedestrian zone, much less on the west side of it.

[1-4] In our opinion the instruction complained of is subject to criticism, but we fail to see that, under the evidence presented, it amounts to a direction to the jury to return a verdict for defendant or an instruction that plaintiff was guilty of contributory negligence as a matter of law, as contended by appellant. To tell the jury "that it is a duty resting upon any person attempting to cross a street that is likely to be dangerous, before placing himself or herself in a position of danger, to look in the direction from which such danger is to be anticipated" neither instructs the jurors that the place where the plaintiff attempted to cross was dangerous, nor that she placed herself in a position of danger, but leaves them to determine those facts for themselves. That it is the duty of such a person about to cross a street that is likely to be dangerous, or who is about to place himself or herself in a position of danger, to look before so doing, would seem to be a correct statement of the law as well as a commonplace, well known to every person of ordinary intelligence and concerning which the jurors would not need instruction. To say that such duty continues as one proceeds into a street that is likely to be dangerous, and before placing oneself in a position of danger, would seem to be equally so. It still leaves open to the jury the question of fact as to whether or not plaintiff was in a street that was likely to be dangerous, or placed herself in a dangerous position. If she was in a street likely to be dangerous, or did place herself in a position of danger, certainly the duty to look devolved upon her. She could not shut her eyes and walk hurriedly into danger and then say she was not negligent or was acting as would a person of ordinary prudence. It is equally true that "in the exercise of ordinary care it is the duty of the pedestrian to look to the right and to the left whenever he or she has voluntarily put himself or herself into a position which may be one of peril." Nor, in our opinion, does the statement of such commonplaces tell the jury that plaintiff had no right to assume that in the pedestrian zone, protected by the ordinance, she was in a place of safety, or that defendant would obey the ordinance and stop to let her pass. That is all involved in the question left to the jury to determine, i. e., whether the street was "likely to be dangerous" and whether or not plaintiff placed herself in a position of danger at any time in her progress across the roadway. And with such commonplaces in mind, if the jury believed that the plaintiff "in attempting to cross the street did so without exercising that degree of care, which would have been exercised by a person of ordinary prudence," and "that such failure upon her part proximately contributed to her injury," she certainly could not recover, regardless of how negligent defendant might have been; and that, in our opinion, is in effect what the second instruction complained of tells the jury.

While we cannot commend the instruction complained of to the profession, we fail to see any error in giving it under the evidence in this case. Even if erroneous, after an examination of the entire cause, including the evidence, we do not see how the jury could have reached a different conclusion.

[5] Appellant has also appealed from the order denying her motion for a new trial, from which, since 1915, no appeal lies.

Appeal from order denying new trial dismissed. Judgment affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

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133 Cal.App. 694

## WOODS et al. v. WISDOM.

### Civ. 1047.

District Court of Appeal, Fourth District, California.

Aug. 14, 1933.

**1. Automobiles 🔑245(75).**

Whether laborer on public highway continuing to clear loose stones from pavement when seeing automobile approach and struck by motorist having sufficient clearing for passage was contributorily negligent *held* for jury.

**2. Automobiles 🔑163(1).**

Motorist must keep alert watch for laborers on street, and avoid injuring them.

**3. Automobiles 🔑219.**

Laborer on street is not negligent in failing to continuously look and listen for approaching vehicles.

**4. Automobiles 🔑163(2).**

Motorist approaching workman, clearing stones off highway, and not driving on unoccupied portion of pavement so as to avoid striking worker should have sounded horn, though workman knew of approaching automobile.

**5. Trial 🔑260(1).**

Refusing instruction covered by other instructions *held* not error.

**6. Appeal and error 🔑757(4).**

Reviewing court need not examine instructions given by trial court, where appellant failed to present in brief other given instructions bearing on same subject as did given and refused instructions complained of.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by Leslie A. Woods against G. W. Wisdom in which the People of the State of California on the relation of the State Department of Public Works, Division of Highways intervened. From an adverse judgment, defendant appeals.

Affirmed.

Irving E. Read, of Los Angeles, for appellant.

A. F. Molina, of San Diego, for respondent Leslie A. Woods.

P. A. Whitacre, of San Diego, for intervening respondent.

MARKS, Justice.

On the 27th day of July, 1931, plaintiff was working on United States highway No. 80 at a point between Bostonia and Johnstown in the county of San Diego. He was an employee of the state department of public works, division of highways.

United States highway No. 80, which at this point runs in an easterly and westerly direction, has a paved portion in its center 16 feet in width, with an 8-foot shoulder on its south side and an 11-foot shoulder on its north side, both of which were fit for use by pedestrian and vehicular traffic on the day in question.

At the point of the accident involved here, a grader was being driven easterly along the southerly portion of the highway by J. D. Williamson, another employee of the state department of public works, division of highways. The plaintiff was riding on the rear of the grader. One of his duties required that he keep the paved portion of the highway clear of loose stones. Seeing several stones lying on the northerly edge of the pavement, he jumped from the grader and proceeded across the highway to remove them. He saw an automobile approaching from the east at a distance of about 600 feet. While removing the stones he saw the approaching car a second and a third time, the last when it was about 75 yards distant from him. He was standing on the extreme northern edge of the pavement facing in a northwesterly direction when he was struck by the defendant's car and seriously injured. The grader was using the southerly 18 inches of the pavement and the southerly dirt shoulder. The day was clear, the pavement was dry, and there was no other traffic on the highway.

The plaintiff filed this action to recover damages for his injuries, and the intervener filed its complaint in intervention to recover the moneys expended by it under the Employers' Liability Act of the state of California (St. 1911, p. 796). The jury returned a verdict against the defendant and the judgment followed, which he seeks to have reversed on this appeal.

[1] The defendant presents as grounds for a reversal of the judgment, first, that the

evidence shows that the plaintiff was guilty of contributory negligence as a matter of law; second, errors of the trial court in its rulings on the admission of evidence; third, errors of the trial court in instructions given and in instructions refused.

In presenting his first ground for a reversal, defendant urges that as the plaintiff knew an automobile was approaching from the east it was contributory negligence for him to continue his work of removing the stones while standing on the paved portion of the highway. In this connection it should be observed that there was at least 13 feet of the paved portion of the highway clear and unobstructed between the grader and the plaintiff over which the defendant could have driven his car in safety without endangering either himself, the driver of the grader, or the plaintiff. It seems clear, under the circumstances, that if the defendant had been observing the road ahead and had used even the slightest degree of care he would not have driven his automobile into plaintiff and caused his injury.

**[2, 3]** It has been repeatedly held that a laborer, whose duties require him to be in a public street, is not required to be constantly on the lookout for approaching vehicles, since he should devote his time to the performance of his duties. Under such circumstances it is the duty of the driver of a motor vehicle to keep an alert watch for laborers on the street and avoid running them down. The laborer is entitled to keep his mind on his work, and it is not negligence as a matter of law for him to fail to continually look and listen for approaching vehicles. State, etc., Ins. Fund v. Scamell, 73 Cal. App. 285, 238 P. 780; Regan v. Los Angeles Ice, etc., Co., 46 Cal. App. 513, 189 P. 474. Under such circumstances the contributory negligence of the laborer is a matter of fact to be determined by the jury. King v. Green, 7 Cal. App. 473, 94 P. 777. The jury having found the plaintiff free from contributory negligence and the defendant guilty of negligence which proximately caused the injury, we cannot disturb the judgment on appeal.

**[4]** The defendant complains because the trial court overruled his objections to questions eliciting answers to the effect that the defendant failed to sound his horn in approaching the place of the accident. He urges that as the plaintiff knew of the approaching automobile it was not necessary for the motorist to give any alarm. The evidence discloses that defendant ran down a workman, who was in plain view, working on the street, without sounding any warning of his approach and while there were unoccupied portions of the street over which he might have driven if he had changed the direction of his car slightly and thereby have avoided the accident. We have concluded that under these circumstances the motorist who fails to change the direction of his car should give timely warning of his approach by sounding his horn and thus give the workman the lone chance of a jump for safety. It would seem that some warning should be given before a blow is struck by a dangerous agency such as a fast moving automobile. Common courtesy should require the warning, and the law should demand no less. Under similar circumstances evidence of the failure to give such warning has been held proper. Devecchio v. Ricketts, 66 Cal. App. 334, 226 P. 11; King v. Green, supra.

The first instruction given of which defendant complains consisted of a correct summary of subdivision a of section 113 of the California Vehicle Act (as amended by St. 1927, p. 1436, § 30). It was proper to give this instruction. The other instruction about which complaint is made contains a quotation from section 95 of the same act (as amended by St. 1929, p. 531, § 37). Under the authority of King v. Green, supra, and Devecchio v. Ricketts, supra, this instruction was also proper.

**[5]** The refused instruction to which defendant calls our attention laid particular emphasis on the testimony of defendant. It was amply covered by other instructions given, and there was no error in refusing it.

**[6]** Defendant has failed to present in his brief, or a supplement thereto, other instructions given bearing upon the same subjects as those given and refused of which he complains. Although not required to do so under these circumstances (Coats v. Hathorn, 121 Cal. App. 257, 8 P.(2d) 1038), we have examined all the instructions given by the trial court and find they correctly cover the law applicable to this case.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

133 Cal.App. 769

## In re DERRUAU'S ESTATE.

## DERRUAU v. OLIVIE et al.

Civ. 9142.

District Court of Appeal, First District, Division 2, California.

Aug. 21, 1933.

Hearing Denied by Supreme Court Oct. 19, 1933.

**1. Wills** 🔑**168.**

Under statute effective at testator's death, will made before marriage was revoked only as to surviving spouse, notwithstanding that statute effective at time of marriage provided for total revocation (Civ. Code, § 1299; Probate Code, § 70).

**2. Wills** 🔑**384.**

Where there was no total revocation of will which would entitle appellant to participate in estate, he could not complain of any error in treating will as partially revoked (Probate Code, § 70).

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Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

In the matter of the estate of Elie Derruau, deceased. From a decree directing final distribution, Maurice Derruau, heir at law, appeals, opposed by Auguste Olivie, executor, and Marie Derruau, heir at law.

Affirmed.

H. U. Brandenstein and James J. Cronin, Jr., both of San Francisco, for appellant.

Ross & Ross, of Redwood City, for respondent Auguste Olivie, executor.

SPENCE, Justice.

This is an appeal by Maurice Derruau, one of the heirs of Elie Derruau, deceased, from the decree of final distribution herein.

[1] In 1929, Elie Derruau made his will and thereafter in 1930 married Marie Couralet, who survived him upon his death in 1932. Prior to 1931, and at the time of the testator's marriage, section 1299 of the Civil Code provided: "If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless. * * *" In 1931 said section was repealed. At that time a new section designated as section 70 of the Probate Code was adopted and was in force at the time of the testator's death. The new section provided: "If a person marries after making a will, and the spouse survives the maker, the will is revoked *as to the spouse, unless.* * * *" (Italics ours.) It will be seen at a glance that the original section provided for a total revocation, while the new section provided for a partial revocation, viz., revocation only as to the surviving spouse. The testator's will herein was admitted to probate, and by the decree of final distribution the estate was distributed thereunder, except that said will was treated as revoked as to the surviving wife.

Relying on the provisions of the original section (section 1299, Civ. Code) in force at the time of the testator's marriage, appellant contends that the revocation was total; but in our opinion this contention cannot be sustained. Appellant cites and relies upon In re Estate of Berger, 198 Cal. 103, 243 P. 862, 864, but that decision is not in point. There the court was dealing with an antenuptial will of a woman. After making her will the testatrix married twice, and her second husband predeceased her. Section 1300 of the Civil Code, in force at the time of her marriages, provided: "A will, executed by a woman, is revoked by her subsequent marriage, and is not revived by the death of her husband." That section as amended in 1919 (St. 1919, p. 1239, § 1) and in force at the time of the testatrix's death in 1924 read: "If, after making a will, the testatrix marries, and the husband survives the testatrix, the will is revoked, unless. * * *" It was there held that the will was not entitled to probate as the marriage of the testatrix had produced "absolute and complete revocation" under the statute in force at the time, and that the will was not "revived by a subsequently enacted statute changing the manner of revocation."

[2] The situation here is quite different. The section in force at the time of the testator's marriage (section 1299, Civ. Code) did not provide that revocation of the testator's will was produced by marriage alone, but such revocation was also dependent upon the survival of his wife. In other words, there could be no revocation under the terms of said section until the testator's death. As there was no revocation of the testator's will solely by reason of his marriage while said section was in force, and as that section had been repealed prior to his death, it cannot be relied upon as effecting total revocation of the testator's will as claimed by appellant. The distinction between the facts in Re Estate of Berger, supra, and those in the present case is suggested on page 111 of 198 Cal., 243 P. 862. Appellant criticizes the language there used by the court as it indicates that the new section (section 70, Probate Code) should be given what appellant terms a retroactive or retrospective effect. We cannot agree with appellant's views, but we are not called upon here to discuss the question of whether the trial court properly applied the section in force at the time of the testator's death, which section was enacted after the testator's marriage. We have already expressed the view that the will was not revoked by the repealed section. The only question remaining would

be whether the trial court should have distributed the entire estate under the terms of the will or whether it properly treated the will as partially revoked by virtue of the terms of the new section. In neither case would appellant share in the estate, as he was neither a devisee or legatee under the will. There being no total revocation which would entitle appellant to participate, he could not complain, even assuming the trial court erred in treating the will as partially revoked under the terms of the new section. A determination of that question could affect only the rights of parties who have not appealed from the decree of final distribution.

Respondent makes the contention that appellant should have raised his point on an appeal from the order admitting the will to probate, and cannot raise it upon an appeal from the decree of final distribution, but in view of the conclusion we have reached it is unnecessary to discuss this question.

The decree is affirmed.

We concur: NOURSE, P. J.; DOOLING, Justice pro tem.

### CALLAHAN v. MARTIN et ux.†

Civ. 1006.

District Court of Appeal, Fourth District, California.

Aug. 24, 1933.

Rehearing Denied Sept. 20, 1933.

Hearing Granted by Supreme Court Oct. 23, 1933.

**Mines and minerals 🔑55(4).**

Instrument conveying landowner's mineral royalty to husband and wife jointly, survivor thereof, their heirs and assigns forever, conveyed vested interest in realty.

Appeal from Superior Court, Los Angeles County; James L. Allen, Judge.

Action by C. B. Callahan against Frank Martin and wife. Judgment for plaintiff, and defendants appeal.

Reversed.

C. E. McDowell and W. M. Greathouse, both of Los Angeles, for appellants.

Pease, Dolley & Elson, of Los Angeles, for respondent.

MARKS, Acting Presiding Justice.

This is an action to quiet title. Both parties trace their titles to a common source, Jose Gonzales, who, on July 31, 1928, together with his wife, executed and delivered to appellants an instrument in writing whereby they did "grant, bargain, sell, convey, transfer, assign and set over unto said Frank Martin and Stella Meyer Martin, husband and wife as joint tenants, three per cent (3%) landowner's royalty being three per cent (3%) of all oil, gas and other hydrocarbon substances and/or minerals produced, extracted and saved on the following described real property located in the County of Los Angeles, State of California, to-wit:

"Lot Five (5) of Block eighty-four (84) in the Townsite of Santa Fe Springs as per Map recorded in Book 26, pages 37 to 40 Miscellaneous Records of said County.

"To have and to hold unto the said buyers or the survivor of them, their heirs and assigns forever."

Respondent instituted this action to quiet title against whatever interest appellants acquired under this instrument. The trial court found that at the time of its execution Gonzales was the owner in fee of the real estate; that the instrument was recorded on August 1, 1928; and that respondent acquired his title after that date.

The sole question presented here is whether or not appellants acquired an interest in the real property under the writing from which we have quoted. The precise question has been decided in the case of Beam v. Dugan (Cal. App.) 23 P.(2d) 58, where it is held that a similar instrument conveyed a vested interest in the real property. It follows that respondent's title should not have been quieted against this interest.

Judgment reversed.

I concur: JENNINGS, J.

### DEPARTMENT OF WATER & POWER OF CITY OF LOS ANGELES v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.*

Civ. 9152.

District Court of Appeal, Second District, Division 1, California.

July 17, 1933.

Hearing Granted by Supreme Court Sept. 14, 1933.

**1. Master and servant 🔑417(4½).**

Petition for writ of certiorari or review of award of Industrial Accident Commission must conform to provisions of Code of Civil Procedure so far as applicable and not in conflict with Workmen's Compensation Act (St. 1917, p. 875, § 67(d).

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† For subsequent opinion see 43 P.2d 788.

*For subsequent opinion see 32 P.2d 354.

**2. Master and servant 🔑417(4½).**

Petition for certiorari to review award of Industrial Accident Commission must be verified (Code Civ. Proc. § 1069; St. 1917, p. 875, § 67(d).

**3. Master and servant 🔑367.**

Compensation award against city as special employer, to dependents of employee of contractor building dam for city *held* proper.

> Award of compensation against city as special employer of employee of contractor building dam for city was proper under evidence authorizing finding that deceased, at time of fatal injury, was employed by contractor as general employer, and by city as special employer, and that city through its general construction foreman had right to and did give instructions and exercise control over method of doing work.

**4. Master and servant 🔑417(7).**

In workmen's compensation case, appellate court will not weigh evidence beyond point necessary to determine whether jurisdictional foundation for award exists.

Proceedings under the Workmen's Compensation Act against the Department of Water & Power of the City of Los Angeles and another for compensation for the death of Mark A. Winkler, deceased employee. On application by the Department of Water & Power of the City of Los Angeles for certiorari to review an order of the Industrial Accident Commission awarding compensation.

Petition for writ of review denied.

Erwin P. Werner, City Atty., of Los Angeles, for petitioner.

Arthur I. Townsend, of San Francisco, for respondent commission.

CONREY, Presiding Justice.

The proceeding before the commission was upon a claim for compensation to the dependents of one Mark A. Winkler, whose death resulted from injuries arising out of and occurring in the course of his work as an employee. It is admitted that the liability exists as against at least one of the two alleged employers. The award was made not only against the insurance carrier of the employer Mono Construction Company, but also against the petitioner herein. The question presented for decision by this court is stated by petitioner as follows: "Does the Workmen's Compensation Act make a municipal corporation, building a large dam, liable as a special employer for the accidental death of an employee of an independent contractor doing excavation work on the project, where the only control by the municipal corporation was as to the route the excavation work was to take and where the usual characteristics of the employer and employee relationship existed between the employee and the independent contractor?"

The facts assumed in the statement above quoted are justified by the record as shown in the petition, except only as to the clause reading, "where the only control by the municipal corporation was as to the route the excavation work was to take."

[1, 2] The petition fails to conform to the requirements of rule XXVI, section 4, of the rules of this court, in this, that the rule requires that "such application, if based upon a want of evidence sufficient to warrant the conclusion of the commission, must fairly state all the material evidence relative to the point as to which such want of evidence is claimed to exist." A petition for writ of certiorari or review of an award of the Industrial Accident Commission must be made in accordance with the provisions of the Code of Civil Procedure, "so far as applicable and not in conflict with this act." Workmen's Compensation Act of 1917, § 67, subd. (d), St. 1917, p. 875. Therefore the petition must be verified, like any other petition for a writ of review. Code Civ. Proc. § 1069. In the present instance petitioner has placed his statement of the case, together with a few excerpts from evidence, in the brief of its attorney, and not in the verified petition.

[3, 4] But if we disregard the foregoing criticism of the petition, and consider the evidence referred to in the brief, together with the evidence presented in the answer to the petition, we find that there was evidence tending to prove and sufficient to authorize the commission to make its finding that the said Mark A. Winkler, at the time when the injury was sustained by him, was employed by Mono Construction Company as a general employer, and by the petitioner herein as special employer; and that the petitioner through its general construction foreman had the right to and did give instructions and exercise control over the method of doing the work to such an extent and in such detail that upon such evidence the commission had the authority or jurisdiction to make its award against the petitioner as special employer of the deceased. It is not the function of this court to weigh the evidence beyond the point where it is ascertained that there is a jurisdictional foundation for the award.

The petition for writ of review is denied.

We concur: HOUSER, J.; YORK, J.

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## DE GARMO v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.*

Civ. 9229.

District Court of Appeal, Second District, Division 1, California.

Aug. 21, 1933.

As Amended Aug. 28, 1933.

Rehearing Denied Sept. 15, 1933.

Hearing Granted by Supreme Court Oct. 20, 1933.

**1. Appeal and error** ⚷461.

Stay of execution could not be had where appeal bond was part cash and part surety, and judgment exceeded the part cash (Code Civ. Proc. §§ 942, 948).

> This is so since a stay of execution upon a judgment on appeal therefrom is a matter of statutory regulation, and an appeal bond which is part surety and part cash, the cash not being equal to the amount of the judgment, is not a substantial compliance with Code Civ. Proc. § 942, which expressly provides for a bond binding sureties personally and makes no provision for a bond of a dual nature, nor a substantial compliance with section 948 which provides that a deposit in court of the amount of the judgment shall be equivalent to filing the bond.

On Rehearing.

**2. Mandamus** ⚷55.

Mandamus to compel issuance of execution on judgment *held* to lie against county clerk, whose refusal rested upon void superior court order (Code Civ. Proc. § 1085).

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Application by G. C. DeGarmo for a writ of mandate prayed to be directed to the Superior Court of the State of California, in and for the County of Los Angeles, Walton J. Wood, as Judge thereof, to compel the cancellation of an order approving an undertaking upon an appeal, and to secure issuance of a writ of execution by L. E. Lampton, as the County Clerk of the County of Los Angeles.

Writ granted against county clerk.

Newby & Newby, G. C. DeGarmo, and W. M. Crane, all of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, Fred M. Cross, Deputy County Counsel, and Meserve, Mumper, Hughes & Robertson, all of Los Angeles, for respondents.

DESMOND, Justice pro tem.

This is an application for a writ of mandate or such other writ as may be appropriate to secure cancellation of an order made by a judge of the superior court of Los Angeles county approving an undertaking upon an appeal from a judgment entered in favor of plaintiff for the sum of $37,480; and also to secure issuance by the county clerk of a writ of execution upon the judgment which plaintiff, here the petitioner, has obtained.

While the trial court was conducting the hearings to determine the sufficiency of the undertaking entered into by various sureties, the defendants offered to post the sum of $5,000 with the county clerk to be held as additional security under the bond, the court having indicated that it desired an additional $20,000 in the way of sureties above those appearing on the undertaking, and the $5,000 cash being offered in lieu thereof. Counsel for defendant agreed that a cashier's check indorsed to L. E. Lampton, county clerk, should stand as part of the bond or undertaking, "the sum to be held by the County Clerk, to abide the decision of the reviewing court in case judgment appealed from is affirmed shall be applied in satisfaction of the judgment." This arrangement followed a declaration by the trial judge that he hesitated about allowing every item presented as a part of the aggregate undertaking of $74,960. There can be no question, therefore, that the $5,000 was intended for and was accepted by the court as part of the undertaking, especially in view of the language employed in the indorsement entered by the court upon the document as follows: "May 22, 1933. The appellants having deposited with the clerk the sum of $5,000.00 as part of the undertaking and to be used to satisfy any final judgment against appellants, the written undertaking is approved. Walton J. Wood, Judge." This conclusion is confirmed by consideration of the formal order approving the undertaking signed May 24, 1933, nunc pro tunc as of May 22, 1933.

It is apparent from the foregoing that the undertaking upon appeal, furnished by appellant and by the court approved, does not meet the requirement of section 942 of the Code of Civil Procedure, because that section makes no provision for a bond of a dual nature, part cash and part surety, but expressly provides for a written undertaking binding sureties personally to pay whatever is due from appellant upon affirmance of the judgment, if appellant fails to pay. Section 948 of the Code of Civil Procedure provides that: "In all cases where an undertaking is required on appeal by the provisions of this title a deposit in the court below of the amount of the judgment appealed from, shall be equivalent to filing the undertaking." Inasmuch as the judgment in this case was $37,480, it is manifest that the deposit of $5,000 does not meet the requirement of section 948.

[1] We have then a situation in which appellant has failed to furnish a sufficient un-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 33 P.2d 411.

dertaking or a sufficient cash deposit within the terms of the Code provisions. As stated in Mohn v. Superior Court, 53 Cal. App. 425, 428, 200 P. 360, 361: "A stay of execution upon a judgment on appeal therefrom is a matter of statutory regulation, and can only be had upon a substantial compliance with the provisions of the Code." Since there is here no substantial compliance with the Code requirements, it follows that petitioner is entitled to his writ.

It is ordered that a peremptory writ of mandate issue to the county clerk of Los Angeles county, respondent herein, returnable in ten days from the service thereof, commanding him to issue an execution upon the judgment as prayed for; this order being made, however, without prejudice to the right of appellants to apply for a writ of supersedeas within ten days from and after the date upon which this order becomes final in this court; that is, within forty days after entry of this amended order.

We concur: CONREY, P. J.; YORK, J.

### On Rehearing.

PER CURIAM.

In the petition for rehearing there are several points suggested, but only one which we think requires any comment in addition to that contained in the opinion filed in deciding the case.

It is suggested by respondent Lampton in his petition for rehearing that the writ of mandate may not properly issue against him, because the superior court was not made a party before this court. In the argument under that heading it is further suggested that, where the interests of parties will be affected by the issuance of a writ, they must be made parties to such proceedings.

The superior court, together with respondent Lampton as county clerk, was named as a respondent in this proceeding. The court issued its alternative writ to the clerk alone. If we admit for the purposes of the argument that we should have issued the writ to the superior court as well as to the clerk, and if we further agree that it would have been better practice to direct that the parties in interest in the action in the court below be brought in to defend their interests in the matter, nevertheless the actual presentation to this court was, in fact, not thereby altered. Respondent Lampton was represented here by the same counsel who had appeared for the defendants in the action in the court below; and we do not doubt that the argument made by them in the proceeding here upon the merits was exactly the same argument which they would have made if the writ had been issued to the superior court and to the parties in interest in the action. Therefore it would be an idle act to grant a rehearing merely for the purpose of bringing in additional parties.

[2] The order herein made for issuance of the peremptory writ has been by this court rested solely upon the opinion that the order of the superior court relied upon by respondent to justify his refusal to issue the execution was a void order. From this we concluded that the case here presented "a situation in which appellant has failed to furnish a sufficient undertaking or a sufficient cash deposit within the terms of the code provisions." We adhere again to the resulting conclusion that the writ should issue against respondent clerk, the purpose being "to compel the performance of an act which the law specially enjoins, as a duty resulting" from his office. Code Civ. Proc. § 1085.

Petition for rehearing is denied.

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134 Cal.App. 86

## SHAW v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

Civ. 9218.

District Court of Appeal, First District,
Division 1, California.
Aug. 29, 1933.

**1. Appeal and error 🔑117.**

Order refusing to relieve party from default in presenting bill of exceptions in due season because of mistake, inadvertence, surprise, or excusable neglect is appealable.

**2. Mandamus 🔑4(3).**

Order denying motion to relieve petitioner from apparent default in presenting bill of exceptions in due season being appealable, trial court could not be compelled to grant motion by mandamus (Code Civ. Proc. § 473).

Application for writ of mandamus by R. L. Shaw to compel the Superior Court of the State of California, in and for the County of Alameda, Honorable John D. Murphey, Judge, to grant a motion to relieve petitioner from apparent default in presenting bill of exceptions.

Writ denied.

Francis Gill and Pillsbury, Madison & Sutro, all of San Francisco, for petitioner.

PER CURIAM.

Application for writ of mandate. It appears from the contents of the petition filed therefor that petitioner proceeded to take an appeal from an adverse judgment in the respondent court pursuant to the alternative method provided by section 953a of the Code of Civil Procedure; that he complied with all necessary legal requirements to obtain a record on appeal, but that thereafter the phonographic reporter who had officiated at the trial died, and consequently it was impossible for petitioner within the time allowed by law or at all to have a record on appeal prepared in accordance with the provisions of said Code section. Meanwhile, his time for taking the appeal by way of bill of exceptions had lapsed; also his motion for new trial was denied by operation of law. Upon the grounds and for the reasons mentioned he presented a motion to the respondent court, under the authority of section 473 of the Code of Civil Procedure, seeking to be relieved from the apparent default on his part in preparing and presenting within the statutory time a bill of exceptions to which he was then compelled to resort in order to present his case on appeal, or, in the alternative, to set aside the order denying his motion for a new trial and to grant a new trial. The motion was denied, and he now seeks by way of mandamus to compel the respondent court to "entertain anew" said motion and thereupon to relieve him from said apparent default, or, in the alternative, to vacate the judgment and grant him a new trial.

[1] It has been definitely settled in this state, however, that an order refusing to relieve a party from default in presenting a bill of exceptions in due season on account of mistake, inadvertence, surprise, or excusable neglect, is an appealable order. It was expressly so held in Stonesifer v. Kilburn, 94 Cal. 33, 29 P. 332; and one of the latest decisions of the Supreme Court so holding is Wood v. Peterson Farms Co., 214 Cal. 94, 3 P.(2d) 922, 923, the court there saying: "It has been held that an order denying relief from default in the preparation of a statement or bill of exceptions is appealable. Murphy v. Stelling, 138 Cal. 641, 643, 72 P. 176; Brode v. Goslin, 158 Cal. 699, 701, 112 P. 280."

[2] Since it appears, therefore, that petitioner is afforded ample remedy by appeal to review the merits of the motion which he now seeks by this proceeding in mandamus to compel the trial court to grant, the application for the writ is denied.

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133 Cal.App. 772

## PEOPLE v. FULLER.

Cr. 2403.

District Court of Appeal, Second District, Division 1, California.

Aug. 21, 1933.

**Criminal law** 🔑998.

Accused changing plea of not guilty to guilty by reason of promises by officers that court would put accused on probation and sentence him for second degree robbery *held* entitled to withdraw plea of guilty and have sentence for first degree robbery set aside.

Evidence disclosed that accused was charged with robbery while armed with a deadly weapon and originally entered plea of not guilty; that while in jail at request of chief of detectives and deputy district attorney, and with approval of his attorney, he made complete disclosure in regard to offense charged upon representations made to him by officers that in consideration therefor every effort would be made to secure probation for him, and that he would receive no more severe punishment than is provided for second degree robbery; and that on trial, court imposed sentence for first degree robbery and denied accused's motion to change his plea from guilty to not guilty.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Russell C. Fuller was convicted of robbery while armed with a deadly weapon. From an order denying accused's motion to set aside the judgment and sentence, to withdraw plea of guilty, and to enter plea of not guilty, accused appeals.

Reversed and remanded, with directions.

Houser & Houser, of Long Beach, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

DESMOND, Justice pro tem.

Defendant appeals from an order of the trial court denying his motion (1) to set aside the judgment and sentence imposed upon him, (2) to withdraw his plea of guilty, (3) to be permitted to enter a plea of not guilty.

This appellant, charged with the crime of robbery while armed with a deadly weapon, had originally entered a plea of not guilty. While held in jail awaiting trial, at the request of a chief of detectives and a deputy district attorney, and with the approval of his own attorney, he made a complete disclosure in regard to the offense charged, and gave the law enforcement authorities such information as they desired and as was within his knowledge concerning other criminal activities in the community where the offense complained of was committed. Defendant was induced to make these disclosures by representations made to him by the officers mentioned that in consideration therefor every effort would be made to secure probation for him, and that at any rate upon a plea of guilty he could rest assured that he would receive no more severe punishment than is provided for second degree robbery; the district attorney having recommended and the court having accepted a plea of guilty to the offense of robbery in that degree in the case of an alleged accomplice of the defendant, who, it appears, was armed at the time of the offense, the defendant then being unarmed.

Acting upon these representations and inducements, the defendant changed his plea from not guilty to guilty and applied for probation. The court, on a statement of the facts relating to the offense being made by a deputy district attorney, fixed the crime as first degree robbery, and at a later time denied probation and sentenced defendant to San Quentin for the term provided by law. Prior to sentence being imposed, appellant's counsel asked the court to permit the defendant to withdraw his plea of guilty, stating that the request was based upon the inability of the prosecuting officers to secure for the defendant what they had given him every reasonable hope to expect, namely, lenient treatment at the hands of the court.

The judge, notwithstanding this presentation of the case, denied the request and imposed the sentence for first degree robbery. A week later he denied the formal motion on matters now before us. This motion was supported by affidavits as to which there is no counter showing, and which, uncontradicted as they are, indicate that the appellant in this case was the victim of the same kind of legal fraud as the appellant in the case of People v. Schwarz et al., 201 Cal. 309, 257 P. 71, 73, where, under practically the same state of facts as in the instant case, the Supreme Court entered a reversal. Here, as in that case, it may be said: "The facts as alleged fully warrant the conclusion that substantial rights of the defendant have been taken away from her without an opportunity for a hearing on the merits, and this by those persons charged with the enforcement of the law." It is interesting to note that counsel for the respondent, differentiating this case from one where a defendant voluntarily "gambles" on getting probation, and desiring to see that no injustice is done the defendant, joins with counsel for appellant in citing the case last mentioned as authority for a reversal at our hands. Accordingly, in expressing our decision, we adopt, so far as it is applicable, the language employed in that case.

The order of May 18, 1933, denying the motion to set aside the judgment and sentence, to grant permission to withdraw the plea of guilty, and to enter a plea of not guilty, is reversed, and the cause is remanded to the court below, with instructions to allow a further hearing of said motion, and if the material allegations made in support thereof are sustained, to accord to said defendant the right to withdraw said plea of guilty and to enter a plea of not guilty, and for such further proceedings not inconsistent with this opinion as may seem meet and proper, including vacating of the finding as to the degree of the offense charged.

We concur: CONREY, P. J.; YORK, J.

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134 Cal.App. 16

## HOOVER v. KING.

**Civ. 8891.**

District Court of Appeal, First District,
Division 2, California.
Aug. 23, 1933.

**1. Damages 🔑131(2).**

$5,000 to 53 year old nurse for swelling and bruising of right knee, right ankle, and left elbow, leaving no scars, and swelling on right side of head, *held* excessive.

**2. Appeal and error 🔑1067.**

In action for injuries resulting from automobile collision, refusing instruction that injured party must use ordinary care to avoid aggravating or prolonging effects of injury *held* not prejudicial error under evidence.

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Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by S. Leila Hoover against Sam King. Judgment for plaintiff, and defendant appeals.

Reversed and remanded.

Myron Harris, R. J. Darter, and John Jewett Earle, all of Oakland, for appellant.

Kilpatrick & Goodman, of Oakland, for respondent.

SPENCE, Justice.

Defendant appeals from a judgment in favor of plaintiff in the sum of $5,000 awarded for personal injuries resulting from an automobile accident. Defendant contends that the damages are excessive and that the trial court erred in refusing to give a certain instruction proposed by defendant.

[1] The facts surrounding the happening of the accident need not be stated, as the questions raised on this appeal relate solely to the issue of damages. When the automobiles of plaintiff and defendant collided, plaintiff's automobile was damaged to some

extent, but plaintiff was neither thrown from her car nor rendered unconscious. Plaintiff sustained no fractures of any kind and her injuries appeared to be quite superficial in their nature. She remained at the scene of the accident for some time, examined her car, and conversed with defendant regarding the cause of the accident. Plaintiff and defendant exchanged cards and plaintiff stated that she was not hurt much. She did not seek or receive any emergency treatment, and after talking to some people at the drug store in the vicinity of the accident, she accepted a ride to her home. She did not consult a physician until the evening of the following day, when she went to a doctor's office for that purpose. The evidence produced on behalf of plaintiff showed that the physical injuries were slight and temporary in their nature. There was a swelling and a bruising of the right knee, right ankle, and left elbow. These injuries were treated with hot applications, and her physician testified that they had cleared up entirely some time prior to the trial, which was held four and one-half months after the accident. There were no scars. Plaintiff also had a swelling on the right side of her head which was tender for about six weeks. The doctor prescribed rest in bed, ice bags on the head, mustard footbaths, and sedatives. Plaintiff did not go to a hospital, but remained in bed at home for about two weeks, and was partially disabled for about four weeks thereafter. Plaintiff had resumed the driving of her automobile some time prior to the trial. The only injury claimed to be serious or lasting was some loss of memory. Plaintiff's testimony on this subject was far from satisfactory and was practically negatived in its entirety by her general ability as a witness. Her physician's testimony on this subject was predicated upon statements made by plaintiff and certain memory tests, the results of which appeared to have been quite normal. We may state that defendant's expert testimony showed that plaintiff had suffered no permanent or lasting injury of any kind as a result of the accident. No special damage for loss of wages was alleged, but plaintiff endeavored to show loss of earning capacity under the general allegation of damage. Plaintiff was fifty-three years of age. She had worked as a nurse, but was not working at the time of the accident. During the ten months preceding the accident she had worked on but two cases and only for eleven weeks. The proof of loss of earning capacity was entirely based upon the testimony of plaintiff and her physician relating to her alleged loss of memory, which testimony has been commented upon above. The evidence relating to the expenses incurred as a result of the accident including X-rays showed that these expenses amounted to something less than $300.

After considering all of the evidence most favorable to plaintiff, we are still of the opinion that said evidence was insufficient to sustain the award of $5,000. In Aspe v. Pirrelli, 204 Cal. 9, 266 P. 276, and Davis v. Renton, 99 Cal. App. 264, 278 P. 442, the facts were not exactly on all fours with the present case, but the injuries were somewhat similar. The showing of damage in the last-named case was even stronger than the showing made in the present case. The court there referred to the well-settled rules governing appellate courts in considering the question of excessive damages, but after reviewing the evidence held that the judgment should be reversed. Upon the authority of the cases cited we cannot escape the conclusion that the judgment here cannot be permitted to stand.

[2] The refused instruction had to do with the duty of an injured party to use ordinary care to avoid aggravating or prolonging the effects of an injury. Its correctness as an abstract proposition of law may be conceded, but under the evidence in the present case we do not believe that the mere failure to give said instruction would alone constitute prejudicial error requiring a reversal.

The judgment is reversed, and the cause is remanded to the trial court for a new trial solely upon the issue of damages with directions to the trial court upon settlement of that issue to enter judgment in favor of plaintiff for the amount so found. The defendant will recover his costs on this appeal.

We concur: NOURSE, P. J.; DOOLING, Justice pro tem.

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134 Cal.App. 32

## PEOPLE v. CHWISTEK.

Cr. 2373.

District Court of Appeal, Second District, Division 1, California.

Aug. 24, 1933.

**1. Homicide** 🔑250.

In determining whether homicide constituted murder or manslaughter, jury could consider defendant's flight following shooting, and statement when arrested that deceased was killed because he double-crossed defendant (Pen. Code §§ 189, 1181, par. 6).

**2. Homicide** 🔑244(1), 248.

Evidence warranted conviction of first degree murder as against contention that shooting was accidental or in self-defense (Pen. Code, §§ 189, 1181, par. 6).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

John Chwistek was convicted of murder in the first degree, and he appeals.

Affirmed.

Thomas W. Cochran, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

DESMOND, Justice pro tem.

Defendant was convicted by a jury of first degree murder and sentenced to state prison for life, in accordance with the recommendation returned with the verdict. From the judgment and an order of the trial court denying a motion for a new trial, this appeal is taken.

It is contended that the evidence was insufficient to sustain the verdict of first degree murder or any homicide of a higher degree than manslaughter, and that therefore the verdict was contrary to the law and the evidence; also, that the trial court erred in not reducing the crime to manslaughter, under provisions of section 1181, Penal Code, par. 6; it being urged that upon consideration of the evidence and the law such action should now be taken by this court. It is incumbent upon us, therefore, to review the circumstances surrounding the commission of this offense.

On December 22, 1932, the defendant, a mechanic by trade, was engaged in the bootlegging business, having been, as he claimed, unable to secure other employment. Working for him was one Frank Tschurl, a brother-in-law of the deceased, Frederick Kasprovitz. Tschurl testified that about 7 o'clock of the morning of the date mentioned, while he was in the house occupied by himself and defendant, the latter told him of his suspicion that Kasprovitz had been involved in a raid made upon defendant's place of business; that with a customer named Joe they consumed two pints of whisky between 7 and 8:30 a. m., defendant taking about eight drinks and also drinking some wine, all without eating any breakfast; that defendant was in his opinion intoxicated, but was apparently in his accustomed jolly frame of mind when he left the house, not later than 11 a. m., having meantime taken a bath and appearing when about to leave the house with an automatic revolver in his hand, which the witness tried unsuccessfully to persuade him to leave at home; the defendant saying, "Now, I am going to go out and find out things and do things." There was testimony to the effect that defendant frequently carried several hundred dollars on his person and often went armed. The wife of the deceased testified that shortly before 1 p. m., seeing defendant on her back porch while she was in the kitchen with her husband, she said, "Here comes Johnnie. Come in"; that the defendant entered the kitchen, took a position within a few feet of the deceased, who was standing in the kitchen smoking a pipe, and asked him, "How much money did you get from Frank?" Upon Kasprovitz denying that he had received any money, defendant, according to Mrs. Kasprovitz, called him some vile names and drew a gun from his overcoat pocket, whereupon Kasprovitz said to his wife, "You see he is so yellow he needs a gun to talk to me"; that while defendant held the gun pointed at Kasprovitz and was uttering the words, "You are damned right and I will give you plenty," she got between the two men, telling defendant he did not need the gun and that he had better go out and get out; that her husband moved her to one side, and defendant thereupon backed out of the house and down the steps, Kasprovitz following him unarmed and step by step till they both passed down the back steps into the back yard to a point where defendant had parked his car; that there their voices subsided as they talked Polish, a language which the witness did not understand, for about ten minutes, during which time she "thought they made up, because they did not holler any more; neither one of them hollered"; that she then heard shots fired, and ran toward the door, and "that is where Fred met me." The record of Mrs. Kasprovitz' testimony at this point reads as follows:

"Q. When you ran towards the door, which door did you run towards? A. To the screen door.

"Q. And how many shots did you hear fired? A. There was four shots, yet it sounded like three, it was so fast; it was awfully fast.

"Q. Then you say you ran towards this door? A. Yes; and that is where Fred was; he was coming in, and I was going out.

"Q. He had already come up the steps? A. Yes.

"Q. Now, when the shots were fired, will you state whether or not Fred was still out in the yard, or was he up on the porch at that time? A. I think the shots were still going when he was coming; that is the way it seemed to me.

"Q. I see; and what is the next thing you saw when you met Fred there at the door? What was the next thing that was done? A. He said, 'He got me; he got me;' he says, 'Call the police.'

"Q. Did he have his pipe at that time? A. He still had the pipe in his hand."

It is undisputed that one of the bullets fired by defendant entered the abdomen of Kasprovitz and caused his death; the evidence indicating that shortly after entering his home, on being shot by defendant, he went first toward the telephone and then out a door and fell to the ground, where at about 2 p. m. a police officer saw him still alive but unable to talk. The jury was taken to view the premises and had an opportunity to observe the kitchen of the Kasprovitz home, the back porch, the screen door of the porch, the back steps, and the back yard. Their attention was there directed to three holes appearing respectively, first, in the main portion of the house, that is, to the left of the porch at a point midway between the window and the edge of the house; second, in the wood panel of the screen door of the porch; and, third, in the door jamb of the screen door. The witness Tschurl identified three bullets which were received in evidence, as to which quoting from appellant's brief, "He stated that he had dug the smaller one from the siding of the house near the driveway about two feet from the end of the house and about four feet or four and a half feet above the ground. That he had taken one of the other bullets from the screen door out of the panel at a height of about two feet, and that the third bullet had been taken out of the frame up in the corner of the same door; and that when he had extracted the bullet it had been necessary for him to open the screen door to remove it."

After the shooting, defendant ran through back yards and over fences and down a railway right of way to a lumber yard, where a police officer, one Magness, later found him hiding under a pile of lumber, at that time having in his pocket the automatic revolver which he had used with such deadly effect, and which still contained two bullets. To this officer defendant had first stated that he had no gun and that he had not done the shooting; later, on being asked by the officer why he shot the man, said that "Fred had double-crossed him and that he was a dirty stool pigeon." At this time defendant asked the officer to take him to a hospital so he could undergo a sobriety test; Magness merely replying that the doctor at the police station could look him over, if he needed such a test. This officer testified that in his opinion defendant, at the time of his arrest, was not intoxicated to such a degree that he did not know what he was doing. He further testified as follows: "A. I asked the defendant, again, the circumstances regarding the shooting, as to where he was when he fired the shots, and where Kasprovitz was when he fired the shots, and why he shot. The defendant stated that Kasprovitz was a prizefighter and he was afraid of him. He came towards him; he was coming towards him; and he backed down the steps; and he said Fred put his hand in his pocket like he was going to draw out a gun, and that he beat him to the draw. He said he was afraid that Kasprovitz was either going to hit him or he was going to shoot him. * * * And I asked him why he thought Kasprovitz was going to shoot him. Well, he said he knew that Kasprovitz carried a gun; he was known to carry a gun; and he said, 'You go search the house, and you will find a gun.' Well, I went in and search the house, the lower portion of the house, and found a gun." He also testified that he found the body of the deceased upon the sidewalk and that he did not see any weapon on the body. Another officer, Harry Burch, gave the following testimony: "I asked the defendant if he had shot Fred Kasprovitz with a 25 automatic; and he said that he had. I asked him if he had shot him, that day, in the afternoon; and he said that he had. And I asked him why he shot him; and he said that Fred was a 'dirty rat.' I asked him to show me where he and Fred were standing at the time that he shot him; and he showed me. And I asked him if the shells—where the shells would fly from the gun after they were ejected; and he picked up some shells and showed me. He said those were the shells." The witness then identified three shells as the ones picked up by the defendant on that occasion and they were marked in evidence. He continued with the conversation as follows: "I asked the defendant if he had at any time seen a gun on the person of Fred Kasprovitz, and he said he had not." (Rep. Tr., pp. 191 to 194, inclusive.)

Mr. Rex McCormick, a neighbor of the deceased, testified that, just prior to his observing the defendant in flight, he had heard four shots, "two shots, and about two seconds later there were two more shots"; further, "when I heard the last two shots I started for the front door, and as I did, I saw this man go back through the driveway." This witness stated that Magness, the police officer, asked defendant why he had shot Kasprovitz, and defendant said he had done to him "just like all stool pigeons ought to be done to."

The defendant's version of his meeting with the deceased in the Kasprovitz kitchen differed from that of Mrs. Kasprovitz, in that he said, "Fred, did Frank give you any money, or did you make any money on the case that I had?" to which Kasprovitz replied, denying in profane language that he had made any money on the case, calling defendant a yellow rat, and saying to his wife, "Look at him, he has got his hand in his pocket." He stated that he was afraid of deceased because he saw a gun in his hand, and thereupon produced his own gun and aimed it at Kasprovitz; Mrs. Kasprovitz then coming between them. Immediately thereafter, while on the back porch. he realized that what he saw in the hand of the deceased was not a gun, but a pipe.

As to the actual shooting, the defendant testified that as he turned and tried to open the door of the automobile and enter it Kasprovitz made a quick move, turned around, and jumped up closer to the car, and, while they were shifting their positions, "Pulling his right hand back. I thought that he went after a gun; and, at the same time, he reached with his left hand and got hold of my hand.

"Q. Got hold of which hand of yours? A. Of my right hand, with his left hand.

"Q. And did you have anything in your right hand at that time? A. I had a revolver.

"Q. What did he do in relation to your right hand? A. He jerked my hand and at the same time the shots fired.

"Q. Well, why did you fire the shots? A. I was excited, and I don't mean to fire, but when he jerked my hand it just happened that I pulled on the trigger and it went off.

"Q. How far away was he from you at that time? A. About one foot." (Rep. Tr., pp. 303 to 306, inclusive.)

He testified further as follows:

"Q. Do you remember how many shots you fired? A. I fired—I am sure of firing one, when he got hold of my hand, or two.

"Q. Are you sure of any more than that? A. Yes; when he jerked me, then I jerked myself back and I almost fall down at that time; and I pulled myself towards to the house, and I fire one or two more shots, I do not remember.

"Q. Now, what was your mental state at that time? A. What do you mean by 'mental state?'

"Q. Were you excited or not? A. I was, yes; I was very excited.

"Q. And in what way did that show itself? A. I got scared.

"Q. Got what? A. Well, I was afraid, when he was coming for me, all that time; and then when I heard the shots—when I fire, I got scared all together, all excited; I didn't know what I was doing."

Further testimony was as follows (Rep. Tr., 320):

"Q. Now, during that period (i. e., while he was backing down the steps and through the yard to the point where his car was parked) did Fred Kasprovitz, at any time, after you had started and up to the time as you came to the automobile, say anything? You may take the stand. A. Yes, sir.

"Q. What did he say? A. He said, 'You son-of-a-bitch! I get you, this time.'

"Q. And when did he say that? A. When he was on the steps.

"Q. You mean the steps from porch 2? A. From the porch to the driveway.

"Q. And when you got to the automobile, what did he say then, if anything? A. I asked him to get away from me. I say, 'Fred, please let me go; I did not come in here to fight with you; I come in here to talk with you.' He say, 'You son-of-a-bitch, this is the last time you talk to me.'

"Q. Now, what did you say, if anything? A. Well, I could not say anything, because just about that time he jumped for the gun.

"Q. What was the state of your mind at that time, when he jumped for the gun? A. I tried to beat it away.

"Q. What was the state of your mind? A. I understood that he was going to beat me or kill me, or beat me up.

"Q. Were you afraid? A. Yes, sir.

"Q. How great was your fear? Can you describe the degree of your fear? * * * A. Well, I was so afraid that I did not know just what to do."

The defendant also stated that certain threats which had previously been made against him by deceased, who was considerably larger and more powerful than himself, together with what he had heard about Kasprovitz' brutality, had made him very much afraid of the deceased.

Counsel for appellant contends "that the evidence failed to show a crime of any greater degree than that of manslaughter," arguing that defendant did not have an immediate intention of taking the life of the deceased "or that he would have shot him the instant he pulled his gun in the kitchen of the deceased's home," further that: "Assuming for the sake of argument, but without conceding same to be a fact, that defendant went to the home of the deceased with murder in his heart, with a deliberate, wilful and premeditated intent to take the life of the deceased, the facts proved clearly show that such intent, if any, was abandoned either through fear of the deceased or the cooling of the defendant's anger or for some other reason, possibly a realization of the possible consequences, the intent was completely abandoned by the defendant and when he was told to leave the house by Mrs. Kasprovitz he immediately complied, but the deceased, who was a much larger man and very powerfully built, followed him step by step holding his pipe in his hand (the exact position of which does not clearly appear from the testimony, other than from the testimony of the defendant) and, when Mrs. Kasprovitz attempted to step in between them, the deceased curtly told her to get out of the way and pushed her to one side continuing to advance toward the defendant. Thus they reached a point in the vicinity of the defendant's automobile and appeared to Mrs. Kasprovitz to be talking in friendly tones as their voices were no longer loud and angry, and they stood there conversing in Polish for several minutes. She could see their faces and testified that she thought the quarrel was all over from their expression and voices, but she could not see anything but the faces of the two men. By a fair interpretation of this testimony there was some evidence not only that the defendant abandoned any design or intention, if any, to take the life of the deceased, but that he attempted to retreat and that the deceased thereupon became the aggressor."

Answering this contention, it may be that the jury concluded that Kasprovitz' action in moving his wife to one side and following the defendant with his gun still in evidence down the steps was taken for the purpose of getting Mrs. Kasprovitz out of an extremely dangerous position; in fact, realizing that the defendant at all times after first entering the kitchen had his gun drawn and that the deceased at no time had any weapon, it is difficult to conceive of his position as being that of an aggressor. On the theory that in some way this case presents an instance of self-defense, counsel invokes the doctrine of People v. Knapp, 71 Cal. 1, 9, 11 P. 793, saying: "The defendant was therefore entitled to have his testimony considered as bearing on the question of self-defense, and even though his testimony should fail to show a complete justification for the killing it would be sufficient in the absence of any other testimony bearing on the question to raise a reasonable doubt in the minds of the jurors as to the degree of the crime, whether it were manslaughter or murder. Section 1097 of the Penal Code reads as follows: 'When it appears that the defendant has committed a public offense, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only.' It might be contended by the prosecution that the jury were entitled to disbelieve the testimony of the defendant as to the circumstances of the actual shooting, but in that event there is left no testimony whatsoever as to the facts and circumstances immediately preceding the shooting and a verdict of first degree murder based upon such circumstances can not be sustained." Citing People v. Howard, 211 Cal. 322, 295 P. 333, 71 A. L. R. 1385.

[1] The closing language of this argument brings us face to face with the vital point of this case. We do not agree that the testimony of the defendant, as given on the stand, was the sole testimony upon which the jury was bound to base its verdict. The jurors had a right to consider the fact that immediately after the shooting defendant fled, and that, when apprehended by the officers, instead of saying that the death was the result of an unfortunate accident or that he shot in self-defense, he stated that he had killed the deceased because he had double-crossed him, and was a dirty stool pigeon; also that, when asked later by the police officer Burch "Why did you shoot Fred Kasprovitz?" he said, "I don't know. I will get the rope for this. I killed my best friend." Mrs. Kasprovitz also testified that, when the officers brought the defendant back to the house, when he was crying, he said, "I killed my best friend for nothing, that is all." Finally, it must be said that the jury may have considered as amply proven the fact that, while the two men were close beside each other just prior to the shooting, the deceased immediately thereafter made his way up the back steps, and, as he or his wife opened the screen door to admit him to the house, one of at least three bullets fired by the defendant in the direction of and against the house, which was at an elevation of several feet above the yard, entered the jamb of the screen door, while that door was open. All this discloses a situation where the jury could have found beyond a reasonable doubt that deceased, running, or attempting to run, away from defendant and on his own property and unarmed, was pursued by a rain of bullets. Taken in conjunction with the testimony of the witness McCormick as to the sequence of the firing of the shots, "Two shots, and about two seconds later, two more shots," Mrs. Kasprovitz' statement, "I think the shots were still going when he was coming," and appellant's own testimony, "Yes, when he jerked me, then I jerk myself back, and I almost fall down at that time; and I pulled myself forward to the house, and I fired one or two more shots, I do not remember," the facts recited placed the jury in position where they had before them as evidence bearing on the degree of the crime physical facts and various conditions other than defendant's testimony that the shooting was either an accident or resorted to in self-defense. Can it be said then that there was no evidence to sustain the verdict of first degree murder, as defined in section 189, Penal Code?

People v. Bowman, 81 Cal. 567, 22 P. 917, lays down the principle that "it is the province of the jury to determine, from all the facts and circumstances in evidence, whether the killing is accompanied by all the ingredients which go to make up the crime charged"; and in People v. Traichoff, 26 Cal. App. 659, 147 P. 1178, we find the following language: "There need be no appreciable space of time between the intent to kill and the act of killing. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer; and, if such is the case, the killing is murder in the first degree [citing cases]; and the question of whether or not the defendant in this case acted with deliberation or premeditation in the act of killing was, under the circumstances just narrated, clearly a question of fact for the jury."

[2] In considering the motion for a new trial and the request that the offense be reduced from first degree murder to a lesser or included offense, the learned trial judge

in this case, after postponing action for several days and exhaustively summarizing the evidence, decided that under the law and the evidence he was not justified in granting the motion for a new trial or in reducing the offense. Taking the same view, we hold that the judgment and order must be affirmed, and it is so ordered.

We concur: CONREY, P. J.; YORK, J.

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133 Cal.App. 747

### BARTLETT v. FEDERAL OUTFITTING CO., Inc., et al.

Civ. 8890.

District Court of Appeal, First District, Division 1, California.

Aug. 18, 1933.

Hearing Denied by Supreme Court Oct. 16, 1933.

**1. Libel and slander ⚿89(1).**

Rule that published words of common or ordinary import are either libelous per se or not at all does not obtain, where special damages are pleaded.

**2. Appeal and error ⚿916(1).**

On appeal from judgment of dismissal on pleadings, appellate court must assume that plaintiff's charges are true.

**3. Pleading ⚿49.**

Complaint *held* to state cause of action for tort in mailing to plaintiff's employer notice of forged assignment of wages, whether called action for libel, negligence, or damages.

**4. Libel and slander ⚿32.**

False and malicious publication, naturally and proximately resulting in special damages or injury, is actionable, though not libelous per se.

**5. Damages ⚿20.**

Party is liable in tort for all consequences reasonably and naturally flowing from or following his wrongful act, whether actually contemplated or not.

**6. Pleading ⚿49.**

Complaint alleging facts showing right to recover damages for defendant's publication of words not defamatory states cause of action, though not technically one for libel; name of action being immaterial.

**7. Master and servant ⚿341.**

Whether creditors, maliciously exhibiting to debtor's employer forged assignment of debtor's wages, knew of employer's rule that employee assigning wages to creditor would be discharged, was immaterial on question of their liability to employee for damages, though publication was not libelous per se.

**8. Pleading ⚿53(2).**

Plaintiff had right to state cause of action for damages from defendants' mailing to plaintiff's employer of notice of forged assignment of plaintiff's wages in inconsistent counts for libel and negligence.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Carl E. Bartlett against the Federal Outfitting Company, Inc., and another. From a judgment for defendant on the pleadings and an order dismissing the action without leave to amend, plaintiff appeals.

Reversed.

Lionel B. Benas, of Oakland, and B. E. Kragen, of San Francisco, for appellant.

Edgar C. Levey and Marvin E. Lewis, both of San Francisco, for respondents.

PER CURIAM.

This is an appeal from a judgment on the pleadings after the impaneling of a jury and from an order dismissing the action without leave to amend, upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

The complaint comprises two causes of action: One sounding in libel for the special damages alleged therein, for general damages and also for punitive damages for malice; the second for damages for the negligence of defendants in committing the acts complained of. A demurrer to plaintiff's complaint was interposed, argued, and overruled. At the trial, and after a jury had been impaneled, the court required plaintiff to elect upon which cause of action he would proceed to trial. Plaintiff elected to stand on the first. Upon motion of defendants the court then dismissed the action upon the ground that the complaint failed to state facts sufficient to constitute a cause of action, and granted a judgment for defendants without leave to amend.

The causes of action as set forth in plaintiff's complaint are substantially as follows: The first alleged that plaintiff was employed by the Sun Life Assurance Company, and was engaged by that company under a contract a portion of which provided, in substance, that plaintiff could not assign his commissions, or any part thereof, to any firm, person, or corporation, and that, in the event of such assignment, his contract with the company would be canceled. It is then alleged that defendants maliciously mailed to plaintiff's employer a notice of assignment of wages by plaintiff, which assignment was in fact and in truth never made. As a result of this act on the part of defendants, plaintiff was discharged and his contract canceled, causing him the loss and damage alleged in his complaint. The second count is one for damages for the negligence of defendants in publishing such notice and assignment.

[1] In reaching the conclusion that the complaint failed to state a cause of action, the trial court was of the opinion that, as the first count of the complaint was based upon the theory of libel, the words in the alleged publication, being clear and unequivocal and not libelous per se, were not libelous at all. In support of the conclusion of the trial court, respondents have cited us to the following authorities: Hearne v. De Young, 119 Cal. 670, 52 P. 150, 499; Des Granges v. Crall, 27 Cal. App. 313, 149 P. 777; Chavez v. Times-Mirror Company, 185 Cal. 20, 195 P. 666; Bates v. Campbell, 213 Cal. 438, 2 P.(2d) 383; Vedovi v. Watson & Taylor, 104 Cal. App. 80, 285 P. 418. In none of these cases, however, was special damage pleaded for the purpose of stating a cause of action. Under these circumstances the courts have held that words of common or ordinary import contained in a publication are either libelous per se or not at all. Where, as here, however, special damages are pleaded, this rule does not obtain.

[2-6] Plaintiff charged, and for the purposes of this case we are bound to assume the charges to be true (Allred v. Sheehan, 54 Cal. App. 688, 202 P. 681), that defendants maliciously published a direct falsehood and signed plaintiff's name thereto without his consent or knowledge, and thereby caused plaintiff to suffer damages, which damages were directly alleged. The facts pleaded clearly state a tortious wrong committed by defendants, and this irrespective of whether the action be called one for libel, negligence, or damages, and plaintiff should have been permitted to show that the damages suffered were the immediate, proximate, and direct result of the actual words published. Where a publication is not libelous per se, but special damages or injury is alleged as a natural and proximate result of such publication, and the publication is alleged to be false and to have been maliciously made, it is actionable. A party is liable in tort for all the consequences that reasonably and naturally flow from or follow his wrongful act, whether the consequences were actually contemplated or not. 17 R. C. L. 264, 311 et seq.; Cooley on Torts (4th Ed.) p. 499; Briggs v. Brown, 55 Fla. 417, 46 So. 325; Harrison v. Burger, 212 Ala. 670, 103 So. 842; Morasse v. Brochu, 151 Mass. 567, 25 N. E. 74, 8 L. R. A. 524, 21 Am. St. Rep. 474; Lombard v. Lennox, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528. While, as above stated, the action may not be technically one for libel if the words are not defamatory, the name of the action is of no consequence provided plaintiff has stated sufficient facts to show a right of recovery. Hollenbeck v. Ristine, 105 Iowa, 488, 75 N. W. 355, 67 Am. St. Rep. 306; Morasse v. Brochu, supra.

[7] Respondents further contend in support of the judgment that the alleged publication, not being libelous per se, could not become libelous by virtue of the existence at the time of its publication of a specific contract between plaintiff and his employer, the existence of which was not alleged to be customary to the general employment of plaintiff, as the publication did not naturally cause damage. Whether defendants knew of the employer's rule that an employee who assigned his wages to a creditor would be discharged is immaterial where one claiming to be an assignee maliciously exhibits a forged wage assignment to the employer. Askins v. Sparks (Tex. Civ. App.) 56 S.W.(2d) 279.

[8] And finally, as to the claim that the court erred in compelling plaintiff to elect on what cause of action he would proceed to trial, it is sufficient to say that plaintiff had the right to state his cause of action in inconsistent counts. Tanforan v. Tanforan, 173 Cal. 270, 159 P. 709.

The judgment of dismissal is reversed.

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133 Cal.App. 612

## MENDELSOHN v. VAN HERICK.

Civ. 8774.

District Court of Appeal, First District, Division 1, California.

Aug. 8, 1933.

Rehearing Denied Sept. 7, 1933.

Hearing Denied by Supreme Court Oct. 6, 1933.

**1. Negligence ⇨32(1).**

Invitee may assume that premises are reasonably safe for purpose for which invitation was extended, and is entitled to recover from owner for personal injuries sustained as result of owner's failure to exercise ordinary care to maintain premises in reasonably safe condition.

**2. Negligence ⇨134(5), 135.**

Evidence supported findings that injuries of person invited to inspect uncompleted building were caused by owner's negligence in leaving trash and unattached timber on unprotected stair and that invitee was not contributorily negligent.

**3. Negligence ⇨32(1).**

That work is being done upon premises to which owner invites another does not relieve owner from exercising ordinary care to keep premises in reasonably safe condition.

**4. Negligence 🔑56(1).**

Proximate cause of invitee's injuries was stepping upon piece of cement or plaster on unprotected stair, which threw her against unattached timber, which fell and caused invitee to fall from stair.

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Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Carrie Mendelsohn against William Van Herick. From a judgment for plaintiff, defendant appeals.

Affirmed.

Cooley, Crowley & Supple, of San Francisco, for appellant.

Carey & Gorfinkel, of San Francisco, for respondent.

KNIGHT, Justice.

While inspecting an apartment house nearing completion, at the invitation of the owner and in contemplation of renting an apartment therein, plaintiff fell from a stairway and was injured, as a result of which she instituted this action for damages against the owner and upon trial before the court sitting without a jury was awarded judgment for the sum of $3,500, from which the defendant has taken this appeal.

At the time the accident happened the building was 95 per cent. finished; and the defendant owner being desirous of having the apartments rented as soon as they were ready for occupancy, for some six weeks prior to the accident, had been inviting and permitting people to examine them. Signs were displayed at the front entrance reading, "Open for inspection," and, "Reservations now being made," etc.; and prior to the date on which plaintiff was injured approximately one hundred prospective tenants had visited the premises, and seven or eight apartments had been leased. Plaintiff resided with her married daughter a short distance from the apartment house and during its construction passed it frequently. About 4 o'clock in the afternoon, during the month of March, in response to a special invitation extended by the leasing manager who was present on the premises, plaintiff, accompanied by her daughter, called at the building for the purposes mentioned, entered through the main door, crossed the lobby, and started to ascend the concrete stairway, which was built in three flights, winding to the left; the second and third flights being constructed at right angles with the one immediately below, with platforms at the top of the first and second flights. The right-hand side of the stairway abutted against the walls of the building, but the left side was unprotected; the balustrade not then having been installed. The day preceding plaintiff's visit the plasterers had been at work on the walls adjacent to and the ceiling above the stairway, and the refuse left by them on the stairway had not been removed. Part of it consisted of a piece of heavy scaffolding, about six feet long, which was not attached or fastened in any manner to the stairway or the building, but which had been left standing on the stairway in a vertical position, with one end resting on the tread of the stairway about a foot from the wall and the other end against the wall; furthermore, the light on the stairway which came through the main doorway was more or less obscured by boards and scaffolding which had not then been removed; and defendant's building superintendent was aware of all these existing conditions at the time plaintiff called to visit the premises. As plaintiff reached the fourth tread of the second flight of stairs, she stepped on some small hard object which she did not see, and which later proved to be a piece of plaster or cement; and she was thrown thereby against the loose timber on the stairway, which fell upon and precipitated her over the unprotected side of the stairway to the concrete floor below, a distance of eight or ten feet; and besides suffering severe contusions of the back and legs she sustained a fracture of the body of the second lumbar vertebra, which confined her to her bed for approximately five and a half months.

[1-3] It is held generally that an invitee is entitled to assume that the premises he is invited to enter are reasonably safe for the purposes for which the invitation is extended, and that he is entitled to recover damages from the owner for personal injuries sustained as a result of the owner's failure to exercise ordinary care in maintaining the premises in a reasonably safe and suitable condition. 45 C. J. 826; Thompson on Negligence, vol. 1, p. 890; Madigan v. O. A. Hale & Co., 90 Cal. App. 151, 265 P. 574; Brinkworth v. Sam Seelig Co., 51 Cal. App. 668, 197 P. 427. Here the trial court found that the accident which resulted in plaintiff's injuries was proximately caused by the failure of defendant to exercise such ordinary care and was not contributed to in any manner by any negligence on her part; and after reviewing the evidence, we are satisfied that the trial court's findings are supported thereby. It is true, as defendant contends, that "an invitation to use property on which work is being done extends to the property in its then condition, and invitees using the property assume the risk of such condition" (45 C. J., p. 837); but obviously such rule does not do away with the legal duty imposed upon the owner to use ordinary care to keep the premises in a reasonably safe condition for those he has invited to come upon them.

[4] Defendant points out that under the general rule the owner is not liable where the danger which resulted in the injury to the invitee is obviously exposed to the invitee or which would be obvious to him upon the ordinary use of his own senses (Weddle v. Heath, 211 Cal. 445, 295 P. 832); and it is argued therefrom that plaintiff may not recover here because the presence of the timber on the stairway and the fact that the outer edge of the stairway was not protected by a balustrade were admittedly obvious to any one ascending the stairway. All of this may be true, but as will be noted neither of those two elements constituted the proximate cause of plaintiff's fall. Beyond question they contributed largely to the serious injuries she sustained, because if it had not been for the presence of the timber on the stairway and the absence of a balustrade, or other protection on the outer edge of the stairway she would not have fallen over the edge of the stairway to the cement floor eight or ten feet below. But the actual cause of plaintiff's fall was the piece of mortar or cement on the steps. In other words, if there had been no piece of mortar or cement on the steps she would not have fallen at all; and in this connection plaintiff testified and the trial court found that its presence on the stairs was not obvious and that as a matter of fact plaintiff did not see it before she stepped on it and fell.

Defendant contends also that in order to sustain the judgment it must appear from the evidence not only that plaintiff's fall was caused by "a hidden risk," but that the "hidden risk" was known to defendant or had existed long enough for him to have known about it. As stated in Thompson on Negligence, supra, the owner "of real property is under the duty of exercising reasonable or ordinary care and prudence to the end of keeping his premises safe for the benefit of those who come upon them by his invitation, express or implied; and if, through a neglect of this duty, they are, without negligence or fault of their own, injured by reason of any negligent defect therein, he must pay damages. The person so invited to come upon the premises of the other, is entitled to assume that they will be in a reasonably safe condition." And here, as already pointed out, the building superintendent admitted having known of the refuse left on the stairway by the plasterers, including pieces of scaffolding, and that he knew also of the absence of the balustrade. Therefore, the trial court's finding that "* * * defendant negligently and carelessly kept and maintained the main stairway of said apartment house, leading from the lobby or first floor to the second floor thereof, in an unsafe, improper and dangerous condition * * *" appears to be legally supported.

Defendant makes the further point that in any event plaintiff should have used the elevator instead of attempting to ascend the stairway. The answer to this point is that plaintiff was not aware that an elevator had been installed; and, moreover, it was not established that on this particular day the elevator was in a condition to be used by passengers.

A number of authorities have been cited by the respective parties in their briefs, but a discussion of them is unnecessary because the law of the case appears to be well settled, the question of defendant's liability resting almost entirely upon the determination of the facts; and since the trial court's findings on the vital issues are legally supported by evidence, they are controlling on the appeal.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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133 Cal.App. 754

## PEOPLE v. DE FANTI.

Cr. 1715.

District Court of Appeal, First District, Division 2, California.

Aug. 18, 1933.

**Criminal law** 🔑1182.

Judgment of conviction *held* affirmed, where defendant made no appearance at time appeal was called for hearing, and failed to file brief (Pen. Code, § 1253).

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Morris De Fanti was convicted of robbery of the first degree, and, from the judgment and from an order denying his motion for a new trial, he appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

PER CURIAM.

The defendant and appellant was convicted in the superior court in the city and county of San Francisco of a felony, to wit, robbery, and the jury fixed the crime as of the first degree.

Judgment on the verdict was entered January 4, 1933, and the transcript on appeal was filed in this court on January 13, 1933. The cause was regularly placed on the calendar for oral argument on June 12, 1933. No appearance was made for appellant at the time the cause was called for hearing other than a request for additional time to file a brief. No brief has been filed in his behalf, and the time granted for that purpose has long since expired.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order denying a new trial are affirmed.

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133 Cal.App. 757

## PEOPLE v. COHEN.

Cr. 1738.

District Court of Appeal, First District, Division 2, California.

Aug. 18, 1933.

**Criminal law 🔑1182.**

Where defendant filed no brief, and time allowed therefor had expired, judgment of conviction and order denying new trial were affirmed (Pen. Code, § 1253).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Abe Cohen was convicted of conspiracy to cheat and defraud, and he appeals.

Judgment and order denying a new trial affirmed.

Walter H. Duane, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

PER CURIAM.

The defendant was convicted in the superior court in the city and county of San Francisco of a felony, to wit, conspiracy to cheat and defraud as defined by section 182, Penal Code.

Judgment on the verdict was entered April 5, 1933. The transcript on appeal was filed April 13, 1933, and the cause was regularly placed on the calendar for oral argument on June 12, 1933. No appearance was made for appellant at the time the cause was called for hearing other than a request for additional time to file a brief. No brief has been filed in his behalf, and the time granted for that purpose has long since expired.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order denying a new trial are affirmed.

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133 Cal.App. 643

## PEOPLE v. HERRERA.

Cr. 152.

District Court of Appeal, Fourth District, California.

Aug. 9, 1933.

**Criminal law 🔑1182.**

Judgment was affirmed where defendant failed to make any appearance before reviewing court (Pen. Code, § 1253).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Proceeding by the People of the State of California against Juan Herrera. From the judgment, defendant appeals.

Affirmed.

A. A. George, of Fresno, for appellant.

Glenn M. Devore, Dist. Atty., of Fresno, for the People.

MARKS, Justice.

The clerk's transcript in this case was filed with the clerk of this court on May 1st, and the reporter's transcript on June 6, 1933. The case was placed on the calendar of July 11, 1933, and at that time an order was made giving appellant ten days from that date within which to file his opening brief. As the appellant has filed no brief, the case was ordered submitted on August 8, 1933. The appellant having failed to make any appearance before this court, the judgment is affirmed under the provisions of section 1253 of the Penal Code.

We concur: BARNARD, P. J.; JENNINGS, J.

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133 Cal.App. 640

## SERVISS v. JONES et al.

Civ. 8935.

District Court of Appeal, First District, Division 1, California.

Aug. 9, 1933.

**1. Divorce 🔑254.**

Deed pursuant to divorce decree, awarding husband money judgment and wife realty, waived husband's claim to realize judgment against realty, notwithstanding grantee's conveyance and subsequent acquisition of realty (Civ. Code, § 1069).

**2. Appeal and error 🔑1008(1).**

Trial court's reasonable construction of ambiguous instrument will not be disturbed, though another construction seems equally tenable.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Action by Clara O. Serviss, also known as Clara O. Jones, against Robert W. Jones and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Henry D. Lawrence, of Long Beach, for appellants.

Fred Miller, of Long Beach, for respondent.

CASHIN, Justice.

An appeal by defendants Jones from a decree quieting plaintiff's title to certain real property in Los Angeles county and enjoining the issuance of a sheriff's deed to the property.

According to a stipulated statement of facts submitted to the trial court, plaintiff was formerly the wife of defendant Robert W. Jones. In an action for divorce between them the real property mentioned was awarded to plaintiff as her separate property, and by the same decree said defendant was awarded judgment against plaintiff for $380. It was stipulated that: "On February 26, 1929, plaintiff and defendant, Robert W. Jones, by grant deed conveyed the above-described property by mesne conveyances to plaintiff Clara O. Jones as her separate property." On March 12, 1929, the above judgment was recorded in Los Angeles county, and on March 13, 1929, the deed mentioned was also recorded. On March 14, 1929, plaintiff transferred the property to John G. Fell by grant deed, which was recorded on the same day. On March 30, 1929, defendant Robert W. Jones executed to plaintiff a grant deed of the same property, which was recorded on April 2, 1929. This deed contained the following provision: "This deed is given to carry out the mutual agreement of the parties hereto that said property shall become vested in the grantee herein as her sole and separate property free of all interest or claim or title of the grantor herein now existing or which may hereafter arise by reason of the marital relations of said parties, and it is so accepted by said grantee, whose signature is subscribed hereto for confirmation thereof." Later defendant last named caused an execution to issue on the judgment, and on April 29, 1929, the same was levied upon the property. Fell thereupon brought suit against said defendant and the sheriff to enjoin a sale under the execution, and on February 16, 1931, judgment was entered permanently enjoining said sale.

As the ground for its judgment the court found: "That said defendant Robert W. Jones by the terms and conditions of a certain grant deed from Robert W. Jones and Clara O. Jones, as grantors, to Clara O. Jones, as grantee, and dated May 30, 1929, and covering the premises described in plaintiff's complaint, which said deed is recorded in book 9090, p. 296, Official Records in the office of the County Recorder of Los Angeles county, California, did waive the lien that is impressed upon said real property by the said record of said judgment, and by such waiver was estopped from enforcing payment of said judgment against said real property by means of the execution levied by the defendant William I. Traeger, sheriff, as alleged in paragraph 2 of plaintiff's first cause of action in said complaint."

On January 28, 1930, after the last-mentioned suit had been commenced, Fell transferred the property to plaintiff as her sole and separate property, and this deed was also recorded.

On April 17, 1930, another execution issued upon the same judgment and was levied upon the property. The property was sold thereunder to defendant Robert W. Jones, and a certificate of sale thereof was recorded. On March 26, 1930, the certificate was assigned by said defendant to defendant William H. Jones. Following this the present action was commenced to quiet title and enjoin the issuance of a sheriff's deed to the property.

The complaint alleged that the deed to plaintiff from defendant Robert W. Jones was executed for a valuable consideration, and this was not denied. It was the conclusion of the trial court that defendants had no right or title to the property, and judgment was entered accordingly.

Defendants contend that, notwithstanding Robert W. Jones waived his right to execute his judgment on the property, the plaintiff having conveyed to Fell and having subsequently received a reconveyance, the property became subject to the lien of the judgment and to sale on execution.

[1, 2] As stated, the judgment was entered and the same recorded before the latter deed to plaintiff was executed. Because of the fact that he chooses his own language, a deed is to be interpreted against the grantor, and consequently in favor of the grantee (8 R. C. L., Deeds, p. 1051; Civ. Code, § 1069), and, when different constructions of a provision are equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made (Civ. Code, § 1069). Here the claim against plaintiff was existing when the deed was executed, and arose out of the marital relations of the parties. It may fairly be concluded from the language of the instrument that with respect to this or any other claim so arising against plaintiff said defendant intended to waive all right to enforce it against this piece of property; and the fact that plaintiff conveyed and then received a reconveyance of the same constitutes no valid reason for a different conclusion. Where the language of an instrument is ambiguous and either of two interpretations

may reasonably be sustained, that of the trial court will not be disturbed, even though another interpretation may seem equally tenable. Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 300 P. 34; Slama Tire Protector Co. v. Ritchie, 31 Cal. App. 555, 161 P. 25; Manley v. Pacific Mill & Timber Co., 79 Cal. App. 641, 250 P. 710. Here the conclusion of the trial court is fairly supported by the language of the deed, appears to be in accordance with the intention of the parties, and no valid reason for reversal has been shown.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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133 Cal.App. 698

## PEOPLE v. McCOMBS.

**Cr. 2361.**

District Court of Appeal, Second District, Division 1, California.

Aug. 15, 1933.

**1. Criminal law ⚷1036(2), 1054(1).**

Alleged error in curtailing cross-examination of complaining witness concerning testimony at preliminary hearing *held* not reviewable, in absence of exception and offer of proof.

**2. Criminal law ⚷656(2).**

In prosecution for grand theft, court's questioning of defendant relating to character of admitted prior convictions *held* not error (Pen. Code, § 1025).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Order denying motion for new trial; William Tell Aggeler, Judge.

Duard E. McCombs was convicted of grand theft, and he appeals.

Judgment and order denying motion for new trial affirmed.

William I. O'Shaughnessy, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

DESMOND, Justice pro tem.

Defendant, convicted by a jury of the crime of grand theft, appeals from the judgment and from an order of the trial court denying a new trial.

The information alleged that he had suffered two prior convictions of felonies for which he had been imprisoned; the first, burglary; the second, violation of section 37, Federal Criminal Code (18 USCA § 88) and National Motor Vehicle Theft Act (18 USCA § 408) which convictions were admitted by the defendant.

Appellant claims that the trial court was guilty of misconduct in questioning defendant during the trial about the felonies of which he had been convicted, the convictions having been admitted by defendant at the time of arraignment; that the court erred in refusing to permit cross-examination of the complaining witness concerning his testimony at the preliminary hearing; that the verdict is contrary to the evidence by reason of the improbability that the complaining witness' identification of the defendant was correct. Considering these objections in reverse order, it appears from the record before us that the evidence was clearly sufficient to show that the defendant is the person by whom the crime was committed.

[1] The contention of appellant's counsel that his cross-examination of the complaining witness as to his testimony at the preliminary hearing was unjustifiably curtailed is based upon the court's sustaining an objection to inquiry concerning testimony appearing on page 23 of the preliminary transcript at line 18; the objection being "on the ground that it is immaterial and not being in any wise different from what the witness testified to today." To this the court remarked, "I will have to look at the transcript to determine that objection. May I see the transcript, please? Well, I don't believe that is in any way impeaching; it is practically what he testified to here. The objection is sustained." Just what language appeared in the transcript at the point referred to we do not know, for it is not quoted in appellant's brief, but no exception was taken to the ruling of the court at the time, nor was any offer of proof made, and we must conclude, therefore, that the conclusion of the court that the earlier testimony of this witness, at the page and line indicated, did not contradict his testimony at the trial, was well grounded.

[2] We come now to the claim that the judge who tried this case was guilty of misconduct in questioning the defendant concerning his prior convictions. The record on that matter reads as follows:

Question by Mr. Coleman: "Have you ever previously been convicted of a felony? A. Yes.

"Mr. Coleman: That is all.

"Q. By the Court: What felony have you been convicted of? A. Burglary.

"Q. What other felony? A. Conspiracy to violate the Dyer Act.

"Q. Conspiracy to violate the Dyer Act? A. Yes, accessory after the fact, or something to that effect."

Appellant argues that these inquiries by the court were improper, as being prohibited by section 1025 of the Penal Code, which in part provides as follows: "In case the defendant pleads not guilty, and answers that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial." However, the cases generally hold that when the defendant has made himself a witness, questions as to the character of the offense may be asked. People v. Eldridge, 147 Cal. 782, 786, 82 P. 442; People v. La Verne, 212 Cal. 29, 297 P. 561; People v. Romer (Cal. Sup.) 23 P.(2d) 749. It does not appear, therefore, that any error arose in this regard.

Having reviewed carefully all the evidence in this case, we see no valid reason why the verdict of the jury should be disturbed.

Judgment and order are affirmed.

We concur: CONREY, P. J.; YORK, J.

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133 Cal.App. 725

## BATES v. ESCONDIDO UNION HIGH SCHOOL DIST. OF SAN DIEGO COUNTY et al.

Civ. 1049.

District Court of Appeal, Fourth District, California.

Aug. 15, 1933.

Hearing Denied by Supreme Court Oct. 13, 1933.

1. **Pleading 🔑345(1).**
   On appeal from judgment on pleadings, there must be entire absence of allegation of some necessary fact to support judgment.

2. **Appeal and error 🔑837(4).**
   On appeal from judgment on pleadings for defendant, reviewing court cannot consider anything outside of complaint and must disregard defects that might be reached by special demurrer.

3. **Municipal corporations 🔑723.**
   Right of action against public agency or its officers performing governmental function arises only where action is authorized by law.

4. **Schools and school districts 🔑112.**
   School teacher *held* not "officer" within statute requiring verified claim to be filed, where injury to person or property resulted from dangerous or defective condition of certain publicly owned property or was caused by negligence of officer (St. 1931, p. 2476, § 1).
   [Ed. Note.—For other definitions of "Officer," see Words & Phrases.]

5. **Schools and school districts 🔑120.**
   In action for injuries to pupil resulting from teacher's negligence in operation of school bus, it was unnecessary to allege filing of verified claim within 90 days of accrual of cause of action (St. 1931, p. 2476, § 1; Civ. Code, § 1714½; School Code, § 2.801, as amended by St. 1931, p. 2487).

6. **Pleading 🔑347.**
   Uncertainty of pleading does not authorize judgment on pleadings.

7. **Evidence 🔑5(2).**
   Reviewing court did not take judicial notice that certain high schools were on vacation during August, 1931, when accident happened.

8. **Schools and school districts 🔑164.**
   High schools *held* authorized to give instruction in agriculture during regular school term or in vacation schools under statutes (School Code, §§ 3.670, 3.805).

9. **Schools and school districts 🔑120.**
   Complaint, in action against school districts for injuries sustained by pupil, alleging negligent operation of school bus on return tour from agricultural school during vacation, *held* to state cause of action if tour was legally constituted school activity (School Code, § 2.801, as amended by St. 1931, p. 2487; §§ 1.80 and 1.90 as re-enacted by St. 1931, p. 2579 and p. 2206; and §§ 3.670 and 3.805).

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Edgar Bates, by his guardian ad litem, Gilbert Bates, against the Escondido Union High School District of San Diego County and others. From judgment on the pleadings for the named defendant and for the Grossmont Union High School District of San Diego County, plaintiff appeals.

Reversed.

A. M. Thompson and Robert B. Burch, both of San Diego, for appellant.

Thomas H. Whelan, Dist. Atty., and Frank T. Dunn, Deputy Dist. Atty., both of San Diego, for respondents.

Frank J. Macomber, of San Diego, for respondent Grossmont Union High School Dist.

MARKS, Justice.

This is an appeal from a judgment on the pleadings which was rendered in favor of Escondido Union High School District of San Diego County and the Grossmont Union High School District of San Diego County, both duly organized and existing union high school districts.

[1, 2] In considering whether the judgment is supported by the record, it is only necessary

for us to determine whether or not the complaint states a cause of action against the Union High School Districts of Escondido and Grossmont. In order to support such a judgment there must be an entire absence of allegation of some necessary fact or facts. This court cannot consider anything outside of the complaint itself and must disregard any defect that might be reached by a special demurrer. Hibernia Savings & Loan Society v. Thornton, 117 Cal. 481, 49 P. 573.

The complaint alleges the legal existence of the two union high school districts; that appellant was a student in one of them; that John W. Gray was an employee of the Escondido Union High School District and L. T. Simmons of the Grossmont Union High School District; that in August, 1931, the duly authorized officers of the districts arranged an agricultural school tour for some of their students in the agricultural courses; that the Grossmont Union High School District furnished its bus and the districts placed Gray and Simmons in charge of the tour; that appellant was selected for the tour of inspection, which visited at the State Agricultural College at Davis, Cal., and agricultural exhibits at other points in California; that Gray and Simmons alternated in the actual driving of the bus and that all of the students were under their care and control; that Gray and Simmons were acting as employees of the two districts and in the course of their employment; that on August 28, 1931, when the party was returning from the tour, and at a point on a public highway about ten miles north of the city of Paso Robles, Gray, who was operating the bus, drove carelessly, negligently, and without regard for the safety of appellant and the other passengers and at an undue rate of speed on a curve in the highway and into collision with an automobile driven by George Warner, causing the serious injury of appellant. It is alleged that the accident was caused by the concurrent negligence of Gray, Simmons, and Warner. There is no allegation that a verified claim or demand for damages was filed within ninety days from the date of the accident with either of the high school districts.

Respondents state the questions to be decided upon this appeal as follows:

"1. Is an action of the sort outlined in the above-described complaint such as to come under the provisions of section 1 of Act 5150 of Deering's General Laws, 1931, so as to require the filing of a claim with the secretary of the legislative body of the School District within ninety (90) days from the time of the accrual of the cause of action and before the commencement of the action, and

"2. Is there any authority in the law for the planning and carrying out of a joint trip such as this by the School Boards so as to make the teacher handling this trip the authorized agent and employee of the School District, and thereby holding the District liable for any negligent act of these teachers during such trip?

"This latter question may be divided into two branches: (a) Can the Escondido High School District be held chargeable for the negligence of its teacher John W. Gray under the circumstances as outlined above? and (b) can the Grossmont Union High School District be held chargeable for the negligence of John W. Gray, a teacher of the Escondido Union High School District, under circumstances as outlined above?"

Respondents' contention that the filing of a verified claim for damages is a necessary prerequisite to the institution of this action is based on language contained in section 1 of an act of the Legislature approved June 19, 1931 (St. 1931, p. 2476), as follows: "Whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, and/or the negligence or carelessness of any public officer, a verified claim for damages shall be presented in writing and filed with such officer and the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred."

[3] In considering the question here presented we should keep before us three acts of the Legislature, each of which waive the immunity of a public agency against suit for damages when such agency is acting in its governmental capacity and is exercising a governmental function. These acts are the act approved June 13, 1923 (St. 1923, p. 675), which we will call the Public Liability Act, section 1714½ of the Civil Code, and section 2.801, article 4, part 2, of the School Code (as amended by St. 1931, p. 2487). A right of action against a public agency, or its officers, performing a governmental function, only arises in those instances where it is authorized by law. Pittam v. City of Riverside (Cal. App.) 16 P.(2d) 768.

The Public Liability Act gives such a right of action: (1) (section 2) Against the public agency for damages to person or property "resulting from the dangerous or defective condition of public * * * property" in cases and under conditions there specified, and (2) (section 1) against the "member of any * * * board of school trustees * * * for the negligent act or omission of any appointee or employee * * * when the member or members of such board making such appointment or employment knew or had notice that the person appointed or employed was inefficient and incompetent. * * *"

Section 1714½ of the Civil Code provides a liability on the part of a school district owning a motor vehicle for damages by reason of death or injury to person or property resulting from the negligent operation of such motor vehicle by its officer, agent, or employee when acting within the scope of his office, agency or employment. This section would seem to restrict actions brought under it to those cases where the injury was caused by a motor vehicle *owned* by the defendant district and negligently operated by an officer, agent, or employee of the district owning the vehicle and acting within the scope of his office, agency or employment. The phrase "operation of any said motor vehicle" in this section is used "in its popular and ordinary sense as applied to motor vehicles." Chilcote v. San Bernardino County (Cal. Sup.) 23 P. (2d) 748, 749. In the instant case the bus was owned by the Grossmont Union High School District and at the time of the accident was being operated by Gray, who was an employee of the Escondido Union High School District. Of course, it is also alleged that the bus was under the joint control of Gray and Simmons. It is not necessary for us to decide whether a liability on the part of either or both districts would be created by this section under these facts.

Section 2.801 of the School Code (as amended by St. 1931, p. 2487) creates a liability on the part of a school district for injury "to person or property arising because of the negligence of the district, or its officers or employees." In speaking of section 1623 of the Political Code, which was re-enacted with modifications in the School Code, the Supreme Court said: "As amended in 1923 [it] creates a liability on the part of the school districts for damages sustained by a pupil by reason of the negligence of the school district, its officers, or employees." Ahern v. Livermore Union High School District, 208 Cal. 770, 782, 284 P. 1105, 1110. It would seem that the district is liable to a pupil for damages following an injury caused by the ordinary negligence of the district, its officers or employees. Damgaard v. Oakland High School District, 212 Cal. 316, 298 P. 983; Maede v. Oakland High School District, 212 Cal. 419, 298 P. 987; Henry v. Garden Grove Union High School District, 119 Cal. App. 638, 7 P. (2d) 192. Section 1623 of the Political Code was re-enacted in 1929 into sections 2.800 to 2.806, inclusive, of the School Code with an important change in language [St. 1931, p. 2487]. The old section restricted liability to "a pupil." The new section enlarged this to liability for injury "to person or property" without the former limitation. This would seem to extend the liability to all damages to person or property caused by ordinary negligence of the district, its officers or employees, acting within the scope of their office or employment.

[4, 5] We have seen that the act approved June 19, 1931 (St. 1931, p. 2476), requires a verified claim to be filed where injury to person or property results from a "dangerous or defective condition" of certain publicly owned property or where it is caused by the negligence of an officer. This suit is not predicated upon the negligence of an officer of either school district nor could it be as a school teacher is not such an officer. Leymel v. Johnson, 105 Cal. App. 694, 288 P. 858. In so far as the provisions of this act are involved here, it only requires the filing of the verified claim where injury or damage results from a dangerous or defective condition of some form of public property. This parallels the provisions of the Public Liability Act which gives the right of action for damages so caused. It does not by its terms require the filing of any such claim where the injury results from damage caused by negligence to recover which the right to sue is given by section 1714½ of the Civil Code or section 2.801 of the School Code. The complaint does not attempt to bring the cause of action within the terms of the Public Liability Act, but within the provisions of either section 1714½ of the Civil Code or section 2.801 of the School Code. As the act in question does not require the filing of any verified claim for damages before instituting an action under the provisions of those code sections, it was unnecessary to allege the filing of such a claim.

[6] In considering the second contention of respondents we wish to observe that the complaint in this action is far from a model pleading. It is uncertain and leaves much to intendment. However, the uncertainty of a pleading furnishes no ground for support of a judgment on the pleadings. We believe that the allegations of the complaint or the necessary inferences to be drawn from them set forth the following facts: That the two high school districts included agricultural courses in their curricula and that appellant was taking such a course in one of them; that the boards of trustees of the districts planned the tour in question for the instruction of the students taking it; that Gray and Simmons were placed in charge of the tour by the districts; that while Gray was driving the bus at the time of the accident it was under the joint control of both men; that their negligence, concurring with that of Warner, was the proximate cause of the accident. The only question now arising is whether the boards of trustees had any authority in law to authorize the tour.

[7] Respondents urge that we should take judicial notice that both schools were in vacation during August, 1931. We have no knowledge on this subject. We do know that some of the high schools in the state commence their regular fall terms early in August. We

hesitate to take judicial notice of a fact concerning which we have no information.

[8] Section 3.805 of the School Code (1929) provides that high schools may give courses in agriculture. Section 3.670 of the same code provides that school boards may maintain vacation schools of high school grade. The two respondent schools were therefore authorized to give instruction in agriculture during either the regular school term or in vacation schools.

Section 1.80 of the School Code (as re-enacted by St. 1931, p. 2579) authorizes school boards to furnish transportation to pupils under the conditions there specified. Section 1.90 of the same code (as re-enacted by St. 1931, p. 2206) provides: "The governing board of any school district may use the school busses of the district to transport pupils attending the schools of the district to and from school athletic contests or other school activities held within or without the district and in which such pupils participate."

[9] We therefore conclude that if the tour was a regularly and legally constituted school activity of the respondent high schools, that a liability would attach for injury "to person or property arising because of the negligence of the * * * employees" of the districts, or against either district because of the negligence of its employee. Section 2.801, School Code. Out of an overabundance of caution we deem it best to state that we are establishing the law of the case only in so far as the sufficiency of the complaint is concerned. The evidence may not support some of the inferences which we have drawn from the allegations.

We suggest that appellant, if he be so advised, be permitted to amend his complaint.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

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134 Cal.App. 73

## FOREST LAWN MEMORIAL PARK ASS'N, Inc., v. STATE BOARD OF EMBALMERS AND FUNERAL DIRECTORS et al.

Civ. 4975.

District Court of Appeal, Third District, California.

Aug. 28, 1933.

Hearing Denied by Supreme Court Oct. 26, 1933.

**1. Licenses 🔑22.**

Petitioner for license as funeral director *held* to be conducting business at specific street address or location as required by statute, though building was within confines of cemetery (St. 1929, p. 259, § 3, as amended by St. 1931, p. 1737, § 3).

Facts were that the engineering department of city had fixed and assigned to mortuary building a street number, that building was approximately 300 feet from property line of street, and that building, though within confines of cemetery, was a large imposing structure separate and distinct from any other building in group.

**2. Evidence 🔑20(1).**

It is common knowledge that many mortuaries are set back from property line of street at various distances, and that some are even inclosed by iron or masonry walls.

**3. Licenses 🔑20.**

As regards right to license as funeral director, it is not necessary, in order to have designated street number, that mortuary building must be abutting on street (St. 1929, p. 259, § 3, as amended by St. 1931, p. 1737, § 3).

**4. Licenses 🔑20.**

Petitioner *held* entitled to license as funeral director as against contention that place of business located in cemetery would not be devoted exclusively to care and preparation for burial and transportation of human dead bodies (St. 1929, p. 259, § 3, as amended by St. 1931, p. 1737, § 3).

**5. Licenses 🔑20.**

Petitioner *held* entitled to license to conduct business of funeral director as against objection that proposed funeral establishment was situated on land dedicated to cemetery purposes (St. 1931, p. 2434).

**6. Licenses 🔑22.**

State board of embalmers and funeral directors has no powers other than those granted in statute creating it, and cannot deny license to applicant who has complied with statute for any reason not set forth therein (St. 1929, p. 259, § 3, as amended by St. 1931, p. 1737, § 3).

**7. Licenses 🔑22.**

As regards granting of license as funeral director against objection that funeral establishment was situated on land dedicated to cemetery purposes, question of what would constitute cemetery purposes is question for judicial body, not board of funeral directors and embalmers (St. 1931, p. 2437, § 2).

**8. Constitutional law 🔑230(3).**
**Licenses 🔑7(1).**

Funeral Directors and Embalmers Act *held* not invalid as denying equal protection (Const. Cal. art. 1, § 21; Const. U. S. Amend. 14; St. 1929, p. 261, § 9, and pp. 259, 260, §§ 3, 7, as amended by St. 1931, pp. 1737, 1739, §§ 3, 6).

Application by Forest Lawn Memorial Park Association, Inc., for a writ of mandate prayed to be directed to State Board of Embalmers and Funeral Directors and others to compel the issuance to petitioner of a license to conduct the business of funeral director in California.

Writ granted.

John L. McNab, of San Francisco, Call & Murphey and H. R. Snyder, all of Los Angeles, and Glenn Whitney and Harold Morrison, both of Glendale, for petitioner.

Frank J. Barry and W. L. Pollard, both of Los Angeles, and Albert E. Sheets, of Sacramento, for respondents.

Mr. Presiding Justice **PULLEN** delivered the opinion of the court.

Petitioner herein, Forest Lawn Memorial Park Association, Inc., a corporation, seeks by this writ of mandate to compel respondents, state board of embalmers and funeral directors, to issue to petitioner a license to conduct the business of funeral director in the state of California, as provided in an act entitled Funeral Directors and Embalmers Act, chapter 140, p. 258, St. 1929 (as amended by St. 1931, p. 1736).

Petitioner was empowered by its articles of incorporation, among other things, to engage in, conduct, and deal generally with and in everything pertaining to the preparation of bodies for burial, including the owning, operation, and management of mortuaries, and to do all things necessary or incidental to the preservation, burial, or cremation of bodies of deceased persons. In accordance with such corporate powers petitioner presented and filed with respondent board, upon an approved form, a written application for a funeral director's license to be issued to Mr. M. Newton Howell, the duly elected, qualified, and acting president of petitioner. Accompanying this petition were the plans of a building then under construction situated in the group of administrative offices of Forest Lawn, and designated 1716 South Glendale avenue, Glendale, Cal. This building has now been completed and is ready for occupancy by petitioner, where it proposes to carry on its business as a funeral directing establishment, and includes a chapel, preparation rooms, and display rooms.

An objection or protest was filed with the state board of embalmers and funeral directors to the granting of this petition, and the matter was set for hearing, and, after a hearing thereon, respondent took the application and the objections thereto under advisement, and in due time the petition was denied, and the matter now comes before us on an application for a writ of mandate.

From the order of the board it appears that the refusal to grant the application was based upon two grounds: First, that petitioner's proposed place of business would not be conducted at a specific street address or location, or devoted exclusively to the care and preparation for burial or transportation of human dead bodies; and secondly, that petitioner's proposed funeral directing establishment was situated upon land dedicated for cemetery purposes as defined in the General Cemetery Act (chapter 1148, p. 2434, St. 1931), and therefore petitioner could not conduct an "established business" thereon, as such term is defined by the Funeral Directors and Embalmers Act.

No objection was found by the board to the applicant's corporate capacity, the qualifications of its president, the character of its officers, directors, or members or the form or substance of its application for a license; neither was objection found with applicant's mortuary establishment.

Petitioner alleges that the action of the respondent in refusing its application was arbitrary and capricious, not in conformity with, or supported by, the facts established at the hearing thereon, is contrary to the provision of the Funeral Directors and Embalmers Act in California, and is in violation of the right of petitioner under said act to conduct and carry on said business and is in excess of its jurisdiction.

[1-3] Respondent found that petitioner's proposed place of business would not be conducted at a specific street address or location as required by the provisions of section 3 of the statute (as amended by St. 1931, p. 1737), which defines a "funeral director" as a person, partnership, corporation, association or other organization engaged in or conducting as an established business, the business of preparing for burial dead human bodies, etc., and then defines an "established business" to mean a place of business conducted at a specific street address or location devoted exclusively to the care and preparation for burial or transportation of human dead bodies, etc.

It is held by the board that this requirement as to a specific street address or location is not fulfilled because the proposed mortuary is located approximately 500 feet from a public thoroughfare on lands controlled by applicant within the confines of a cemetery, and that the place of business is not accessible to the public, as the cemetery is inclosed by a high wall, and the entrance thereto is by gates which are and may be closed to the general public at certain hours of the day or night as applicant may determine, and the claim that the business has a specific street address is not obviated by numbering the building wherein the proposed funeral directing business of applicant is to be conducted as 1716 South Glendale avenue, for the reason that the building is not situated on South Glendale avenue, but approximately 500 feet therefrom. As to these findings of respondent board we do not find support in the record nor in the act itself.

The engineering department of the city of Glendale in the usual course of its duties fixed and assigned to said mortuary building the street number 1716 South Glendale avenue. The record discloses that the building in question is approximately 300 feet from the property line of Glendale avenue, that it is directly opposite the entrance, and the space between the building and the entrance is open, and drives and walks lead directly from the entrance to the mortuary building. This building is a large and imposing structure separate and distinct from any other building in the group, with at least five entrances, all opening on to the driveway directly leading to the entrance.

An inspection record by an employee of the board on file also recites that floodlights were being installed to light the area between the building and Glendale avenue, and the particular section occupied by the mortuary building and the driveway to the entrance thereof is to be separate from the cemetery ground at night, and the entrance gates will remain open twenty-four hours a day. Even if this arrangement were not proposed, we would not be inclined to attach great importance to the fact that the proposed mortuary building was not immediately fronting upon the avenue. It is a matter of common knowledge that many mortuaries are set back from the property line at various distances; that some are even inclosed by iron or masonry walls. The argument of respondent would lead one to assume that even the front doors of a mortuary must remain open and unlocked throughout the twenty-four hours. Neither is it necessary in order to have a designated street number that a building must be abutting upon the street. The purpose of the statute was undoubtedly to prevent the issuance of a blanket license to transact such business of a funeral director, to have said business conducted at a fixed and designated place or establishment where it could be found by officers and inspectors of the board, and where individuals having business to transact could, by the use of ordinary intelligence, find the mortuary. Even conceding, however, that the mortuary has no specific street address, it cannot be claimed that it is not at a specific location; the statute requiring either a specific street address or a specific location. Surely the location is specific, and the business will be carried on at a fixed place or establishment.

[4] Objection is also made by respondent that petitioner's proposed place of business neither is nor will be devoted exclusively to the care and preparation for burial and transportation of human dead bodies.

This construction is based, not upon the fact that within the building or structure itself other businesses will be carried on, but rather that the land upon which the mortuary is located had been dedicated exclusively for a cemetery and cemetery purposes, and therefore it would be impossible to devote the building exclusively for the care of human dead bodies. The error in this reasoning is that the dedication is of the area known as Forest Lawn Memorial Park, while the exclusive feature as required by the act refers to, and is confined to, that much smaller area within the structural walls of the mortuary itself. It is probably true that within the cemetery area are offices where the business of the cemetery association is conducted, and where sales of graves, crypts, urns, flowers, statuary, etc., are dealt in, but all such activities are carried on without the building proposed as a mortuary, and are not of concern to the present issue.

[5-7] A second ground urged for the denial of the application is that the proposed funeral establishment is situated upon land dedicated to cemetery purposes under the General Cemetery Act, and therefore the structure cannot legally be used as a mortuary. We do not believe this objection is justifiable nor is it a matter within the cognizance of respondent and does not furnish a legal reason for denying the application.

It is a well-established rule of law that a board has no powers other than those granted in the statute creating it, and hence cannot deny a license to an applicant who has complied with the statute for any reason not set forth therein. Under our Constitution, the question of what would constitute cemetery purposes vests, not in this board, but is a question that must be determined by a judicial body.

The board of funeral directors and embalmers here is interested only with the mortuary building and its fixed requirements, and is not concerned with the duty of enforcing the Cemetery Act, or has it judicial powers to determine what use may be made of property dedicated for cemetery purposes, nor to deny an application for a mortuary because it is located on land dedicated for cemetery purposes. For the board to assume such responsibilities would necessitate it passing upon title to property, covenants and restrictions in deeds, zones and zoning ordinances, contracts and defeasances, and other questions too numerous to conjecture. Such an inquiry would be unwarranted and an exercise of a judicial function not granted by law.

Petitioner argues with considerable force that the establishment of a mortuary in a cemetery is not only consistent with the purposes for which the land was dedicated, but is expressly authorized by the Cemetery Act itself.

Under the provisions of section 2 of the General Cemetery Act of 1931, cemetery business and cemetery purposes "shall mean any and all business and purposes requisite or necessary for or incident to the establishing, maintaining, managing, operating, improving and conducting a cemetery and the interring of the human dead, and the care, preservation and embellishment of cemetery property."

Petitioner reads the section as follows: "'Cemetery business' * * * shall mean any and all business and purposes * * * incident to the * * * conducting a cemetery and the interring of the human dead. * * *"

While we are not prepared to follow counsel to the full limit of his contention, it does appear a judicial question of importance is raised, and, were it necessary for the determination of the issues here presented, that question would receive serious consideration.

We believe the location and arrangement of the mortuary in question fully complies with the statute, has both a specific street address and a specific location, and, as far as appears from the record, will be used exclusively for the care and burial or transportation of the human dead.

[8] Petitioner also questions the constitutionality of the entire Funeral Directors and Embalmers Act as being violative of section 21 of article 1 of the state Constitution, and denies to petitioner the equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States. Under the provisions of section 9 of the statute, every funeral director engaged in or conducting business as a funeral director at a fixed place or establishment on the effective date of the act, who should register on or before September 1, 1929 (the act becoming a law August 14, 1929), became entitled to receive, and did receive, a license regardless of the location of his or its place of business, and regardless of whether it was devoted exclusively to the purposes specified in section 3 of the act, whereas by the provisions of sections 3 and 7 thereof (as amended by St. 1931, pp. 1737, 1739, §§ 3, 6), before petitioner can engage in the same business as those under section 9 or obtain a license as funeral director, it must conform strictly to the requirements of those sections, and, in addition, must have as its president or corresponding officer a licensed embalmer.

This contention has been similarly urged on other occasions, and the contention has been rejected. Without reviewing in detail the particular cases, reference is hereby made to Ex parte Whitley, 144 Cal. 167, 77 P. 879, 1 Ann. Cas. 13, where the court, in passing upon the constitutionality of the Dental Law, held such a provision was not unconstitutional as conferring special privileges and immunities upon certain practitioners, upon the theory probably that the fact they had been engaged in the practice of this calling within the state was sufficient evidence of their proficiency in their profession or business. A somewhat similar question has been decided in regard to the exercise of the police power in regulation of business under the Zoning Law. In Jones v. City of Los Angeles, 211 Cal. 308, 295 P. 14, 18, this question is discussed in some detail as follows:

"In response to the charge that exemption of existing nonconforming uses would be discriminatory, the courts have very generally held the exemption to be valid and necessary. * * * As the court said in City of Aurora v. Burns, 319 Ill. 84, 149 N. E. 784, 788: 'The building zone ordinance * * * permits lawful uses of buildings at the time of the passage of the ordinance, although not in conformity with its provisions, to continue thereafter. This exception is made so that the ordinance shall not have a retroactive operation. It would be manifestly unjust to deprive the owner of property of the use to which it was lawfully devoted when the ordinance became effective.' In Spector v. Building Inspector, 250 Mass. 63, 145 N. E. 265, 268, the same conclusion is reached: 'To exempt buildings already devoted to a use from a prohibition of such use of other buildings or buildings thereafter erected in a specified area is not unequal but lawful.' This court has also spoken to the same effect in Zahn v. Board of Public Works, 195 Cal. 497, where it is said on page 512, 234 P. 388, 394: 'As to the objection that the ordinance was not retrospective, but permitted the continuance of existing uses, it will suffice to say that for the purpose of zoning it is not necessary that existing uses shall be removed. * * *' See, also, A. C. Blumenthal & Co., Inc., v. Cryer, 71 Cal. App. 668, 236 P. 216."

There can be no question but what the provisions in the act now under consideration applied to all alike and are valid exercises of police power.

Petitioner also contends that it has heretofore changed its original dedication of certain property lying within the original confines of Forest Lawn Memorial Park by eliminating from the area dedicated to burial purposes the lands upon which the mortuary is erected, but the conclusions we have reached on other points make it unnecessary to pass upon this, as well as certain other points urged by petitioner in its brief.

We believe enough has been said, however, to make clear the views of this court on the material issues presented, and, for the reasons given, respondent board is hereby directed to grant and issue to petitioner a funeral director's license as prayed for in its petition.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

133 Cal.App. 744

## BEEKS v. W. ROSS CAMPBELL CO.

Civ. 4633.

District Court of Appeal, Third District, California.

Aug. 17, 1933.

**Customs and usages ⟹15(1).**

Evidence of custom in real estate office, whereby salesman could obtain assistance of executive of employer in closing deal, *held* admissible as showing subsequent oral supplement to salesman's written contract with employer.

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Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Action by Herbert S. Beeks against the W. Ross Campbell Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Roy V. Rhodes, of Los Angeles, for appellant.

Chandler, Wright & Ward, of Los Angeles, for respondent.

KING, Justice pro tem., delivered the opinion of the court.

This is an action by a real estate salesman against his broker employer for one-half of the commission paid the employer on the sale of real property. Plaintiff had judgment, and defendant appeals.

The defendant W. Ross Campbell Company is a large concern engaged in handling real estate in Los Angeles, employing some thirty-five or forty salesmen. Plaintiff was one of these salesmen, employed under a written contract originally dated December 4, 1922, and reciting that his remuneration shall consist entirely of commissions, and that on sales "personally closed by Beeks" after certain deductions he "shall receive fifty per cent of the gross commissions, the balance to go to W. Ross Campbell Company."

The defendant had for sale what is referred to as the "Stith Property" situate on South Hope street in Los Angeles.

This property was sold for $264,000, a deposit of $5,000, represented by a check of Lee A. Phillips being received by Mr. McCourt, vice president of the defendant corporation, dated August 17, 1925. The "Sales Deposit Receipt" was dated August 19, 1925, G. M. Anderson being named as the purchaser. Later the deed was executed to G. M. Anderson, who was secretary for Lee A. Phillips. She eventually conveyed to Pioneer Securities Company, a corporation controlled by and used for Phillips.

The W. Ross Campbell Company had a custom whereby a salesman endeavoring to make a sale would obtain the assistance of an executive of the company in closing a deal, and in such a case the salesman still was entitled to the commission. Plaintiff claims that this was such a case, and that he consulted Mr. McCourt in regard to contacting Mr. Phillips; that McCourt, as a result of this consultation, phoned to the office of Mr. Phillips and made an appointment and told Beeks that he had the appointment, but preferred to talk to Mr. Phillips along general lines first, and would make an appointment for Beeks to see Phillips the following day; that later that day Mr. McCourt told Beeks that he had put the property up to Mr. Phillips, but that Phillips was not interested, and that he, McCourt, had interested a woman in the property; that at a sales meeting of the W. Ross Campbell Company on August 19th (his consultation with McCourt having been on August 17th), Mr. McCourt announced to the sales organization that the property had been sold. Beeks asked to whom the sale was made and McCourt told him it was sold to a woman. This woman to whom the conveyance was made was G. M. Anderson, a secretary of Mr. Phillips.

Plaintiff had judgment in the lower court, and defendant appeals.

Appellant makes seven points:

First, that the action is based on a written contract which is clear and unambiguous in its terms, and parol evidence is not admissible to vary the terms thereof, especially in the absence of appropriate pleading.

The other six "points" respectively attack findings I, III, IV, V, VI, and VII, alleging that said findings respectively are "not supported by the evidence and is not responsive to the issues joined by the pleadings."

The first count of the complaint is for the reasonable value of services, but upon this no evidence was offered. The second count is for money had and received, and the third pleads the employment of plaintiff by defendant; that plaintiff was to receive half the commission received by defendant upon a sale of any property made by defendant by or through the efforts of plaintiff; that plaintiff should have the exclusive right to the half of a commission "on any sale made to any purchaser listed by plaintiff with defendant as one of plaintiff's prospects, provided that no other salesman of defendant had, within fifteen days prior to such listing, listed the same prospect for the purchase or sale of the same property." It is then alleged that the Stith property had been listed by its owner with defendant; that plaintiff had collected the data necessary regarding the property and determined to try to sell it to Lee A. Phillips, and on August 13, 1925, plaintiff listed Phillips as a prospective purchaser; that on this last-mentioned date plaintiff tried to contact Phillips, calling at Phillips' office; that on August 17th, plaintiff reported to Robert L. McCourt his inability to contact Phillips and asked McCourt's co-operation in meeting Phillips and making the sale; that McCourt agreed to do this, interviewed Phillips, and made an agreement of sale for the Stith property; that McCourt reported to plaintiff that Phillips was not interested in the property and that McCourt had sold it to a woman; on plaintiff's demanding half the commission defendant refused.

Defendant strenuously objects to any evidence of a custom or practice in the office of defendant such as before stated, but the court received the evidence and found that such a custom existed and was practiced in the office of the defendant.

As to the first "point" raised by appellant, it appears to us that under the pleadings the evidence of the custom of defendant's office was admissible as showing a subsequent oral supplement to the original written contract and the making of new promises and arrangements added to the written contract. In such view of the case, it follows that the point is not well taken.

The six other points or objections are objections to the findings of the court, and in view of our holding that this evidence of the custom and practice in the office of the defendant was properly admitted, the holding must be that the findings have ample support in the evidence, and are responsive to the issues joined by the pleadings.

Plaintiff is fairly entitled to the judgment as rendered by the trial court. The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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133 Cal.App. 664

## OSBORNE et ux. v. WINTER.

Civ. 8575.

District Court of Appeal, Second District, Division 2, California.

Aug. 11, 1933.

Hearing Denied by Supreme Court Oct. 9, 1933.

**1. Negligence ⚷108(1).**

Complaint *held* to state cause of action under statute authorizing treble damages for negligently setting fire or suffering such fire to spread, as against contention that complaint did not state more than common-law cause of action (Civ. Code, § 3346a; Pol. Code, § 3344).

The first cause of action stated in the complaint alleged the setting of a fire, the second allowing the same to escape, and the third and fourth alleged violations of municipal ordinances.

**2. Negligence ⚷21.**

Under statute respecting persons who "suffer" any fire to extend beyond their lands, "suffer" means to allow, admit, or permit, implies approval of or acquiescence in act, and denotes knowledge and intention (Civ. Code, § 3346a; Pol. Code, § 3344).

[Ed. Note.—For other definitions of "Suffer," see Words & Phrases.]

**3. Negligence ⚷21.**

Degree of care corresponding to danger of starting fire without compliance with law is required, and due care requires circumspection.

**4. Negligence ⚷21.**

Legal basis for action for starting or spreading fire does not imply demand for proof of more than mere disregard of due care, and does not arise solely under provisions of Forestry Act (Civ. Code, § 3346a).

**5. Damages ⚷208(1).**

Under evidence, it was for court to determine whether case for starting and permitting spread of fire warranted recovery of treble damages (Civ. Code, § 3346a; Pol. Code, § 3344).

**6. Damages ⚷227.**

Proof of negligence alone may warrant imposition of treble damages for starting and permitting spread of fire (Civ. Code, § 3346a; Pol. Code, § 3344).

**7. Negligence ⚷21.**

Burning of grass, weeds, and rubbish other than in "woods" is within scope of statute prohibiting negligent setting of fire or suffering it to spread (Civ. Code, § 3346a; Pol. Code, § 3344).

**8. Municipal corporations ⚷122(1).**

In pleading municipal ordinance or right derived therefrom, it is sufficient to refer to such ordinance by title and day of passage (Code Civ. Proc. § 459).

Appeal from Superior Court, Los Angeles County; James H. Pope, Judge.

Action for damages for negligence in permitting the spread of fire brought by Ernst R. Osborne and wife against Henry Winter, sometimes known as Henry Winters. From an adverse judgment, defendant appeals.

Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

S. C. Schaefer, of Los Angeles, for respondents.

CRAIG, Justice.

Certain property of the respondents having been destroyed by fire communicated to their premises from that of the appellant, an action for damages based upon alleged negligence and the violation of a county ordinance by the latter was commenced. Judgment having been rendered in favor of the plaintiffs, the defendant appealed from the same, and from an order denying his motion for a new trial.

[1] Following the reception of evidence the trial court rendered findings and a judgment in treble the amount of damages found to have been sustained by the plaintiffs from a conflagration which had destroyed their premises after crossing the party line from an adjoining lot of the defendant. The sufficiency of the complaint to state more than a common-law cause of action, and of the evidence to support said judgment, are challenged upon appeal. By four separate causes of action the plaintiffs alleged: (1) That the defendant intentionally kindled a fire on his own land and so negligently watched and attended the same that it extended upon that of the plaintiffs, and wholly consumed their dwelling and its contents; (2) that the defendant intentionally kindled a fire on his own land, that he had charge thereof, and that he negligently and without proper precaution allowed the same to escape from his control and to spread, as a result of which it came upon the plaintiffs' premises and destroyed said dwelling and personal property; (3) that the defendant lighted a fire and used the same to burn brush and grass upon land within 500 feet of brush and grass-covered land containing inflammable material, without first having obtained a permit from the state or county fire warden, and less than 40 feet therefrom, in violation of a certain ordinance of the county, by reason of which the same came upon the plaintiffs' premises and destroyed valuable property; (4) that the defendant allowed a fire built out of doors to spread into and upon the plaintiffs' real property and to consume and destroy said dwelling and contents, contrary to the provisions of an ordinance of said county. In each such instance, the ordinance relied upon was alleged only by title and date of enactment. In brief, the first cause of action alleged the setting of a fire, the second allowing the same to escape, and the third and fourth alleged violations of municipal ordinances. As to the first two it was provided by statute: "Damages for Firing Woods. Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured." Civ. Code, § 3346a; Pol. Code, § 3344.

[2-7] The appellant strenuously denied any knowledge as to the origin of the brush fire, and there was no direct testimony of any eyewitness as to its origin or cause. It is contended that the complaint did not state a cause of action with the intent of the statute as it then existed, and that the evidence was not sufficient to establish a charge that the appellant intentionally or negligently caused or permitted the same to be communicated to the lands of the respondents, nor that he "*suffered* any fire to extend beyond his own land." One of the meanings of the term "suffer to occur" is to allow, to admit, or to permit. Gregory v. Marks, 10 Fed. Cas. 1194, No. 5,802; Adams v. Nichols, 1 Aikens (Vt.) 316; City of Ft. Wayne v. De Witt, 47 Ind. 391; Dunseath v. Pittsburg, A. & M. T. Co., 161 Pa. 124, 28 A. 1021. It implies an approval of or acquiescence in an act, and more than nonresistance. Purinton v. Jamrock, 195 Mass. 187, 80 N. E. 802, 18 L. R. A. (N. S.) 926. And denotes knowledge and intention. Bunnell v. Commonwealth (Ky.) 99 S. W. 237. Since the defining of the term as above, section 1113 of our Civil Code, which declares that a grant insures among other things that an estate is at the time of conveyance free from incumbrances done, made or suffered by the grantor, has been construed. Crist v. Fife, 41 Cal. App. 509, 183 P. 197. As there said: " 'Suffered,' as used in the statute, implies reasonable control, and it cannot be held to apply to an incumbrance not caused by the act of the party nor within his power to prevent." And in Block v. Citizens' Trust & Savings Bank, 57 Cal. App. 518, 207 P. 510, it was held that condemnation proceedings could not be said to constitute an incumbrance "made, done, or suffered by the vendor." That "suffer," in this connection, implies responsible control; and it cannot be held to apply to a thing not caused by the act of the party nor within his power to prevent. Crist v. Fife, supra; Smith v. Eigerman, 5 Ind. App. 269, 31 N. E. 862, 51 Am. St. Rep. 281. It appeared that the defendant was alone, and was raking dead grass from his premises to a roadway; one Wood had delivered a load of stones to said property, and upon his return with a second load a fire was burning in front of the defendant's house, between 25 and 30 feet from the plaintiffs' property; Winter attempted to extinguish it with his rake when it began to spread, but there was no hose nor water on the premises, and water was obtained from the premises of the plaintiffs. Wood inquired if he was gathering the grass to haul the same away, the defendant replying, "Maybe—probably." He stated that the fire had gotten away from him, and when asked by Wood if he raked it together to destroy it, he said that "that did not matter." When examined by the trial judge, the defendant was asked where the first flame was, to which he replied:

"Right in front, where I stood with my rake, where it is marked 'A' there.

"Q. Was it right by you? A. Yes.

"Q. How far away from you in feet was the first flame you saw? A. Why, it was all about the same as between you and me.

"Q. Three or four feet? A. Yes; or two feet."

Previously he had sworn that it started underneath his house, that it started in a nearby ravine, and that he did not know where it started. Further quotation from the record is unnecessary to indicate the conflicting evidence upon which the trial court based its conclusion that the defendant had intentionally put in motion the element of cause. It was not contended that he had first obtained a permit therefor as required, and it plainly was shown by other evidence that the fire had started "right where he was raking," and that there was "plenty of wind." A degree of care corresponding to the danger both as to time and place of starting a fire without compliance with the law, is required in such a case, and due care requires circumspection. Galvin v. Gualala Mill Co., 98 Cal. 268, 33 P. 93; McVay v. Central Cal. Investment Co., 6 Cal. App. 184, 91 P. 745. The contention that the legal basis for such an action implies a demand for proof of more than the mere disregard of due care, and that it arises solely under the provisions of the Forestry Act, is untenable. Paiva v. California Door Co., 75 Cal. App. 323, 242 P. 887; Kennedy v. Minarets & W. R. Co., 90 Cal. App. 563, 266 P. 353; Whalen v. Yank, 94 Cal. App. 157, 270 P. 729. It lay with the trial court to determine whether the case warranted a recovery of treble damages under said sections, or of actual damages under general provisions of law. Whalen v. Yank, supra. The proof of negligence alone may warrant the imposition of treble damages. And such burning of grass, weeds and rubbish other than in "woods" as argued by the appellant has been recognized as within the scope of said sections. Paiva v. California Door Co., supra.

[8] The remaining counts or causes of action alleged the acts recited contrary to a certain ordinance entitled, "An Ordinance regulating the use of fire by any and all persons in the County of Los Angeles, State of California, passed July 1st, 1925, and as amended by an ordinance of said county of Los Angeles entitled, 'An ordinance amending sections I, II and V of Ordinance No. 1315, New Series,' passed March 30, 1927," etc. In pleading a municipal ordinance or a right derived therefrom, it is sufficient to refer to such ordinance by its title and by the day of its passage. Code Civ. Proc., § 459. It must be said of the appellants' contention in this respect that the complaint was sufficiently complete. However, it may not be assumed that the trial court was otherwise in doubt as to the provisions of the ordinances mentioned and so pleaded, since they were introduced in evidence as a whole.

Prejudicial error not appearing, the judgment is affirmed. The appeal from the order denying a new trial is dismissed, for the reason that such right in section 963 of the Code of Civil Procedure was repealed in 1915 (St. 1915, p. 209).

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

## YOUNG v. THREE FOR ONE OIL ROYALTIES et al.*

Civ. 7642.

District Court of Appeal, Second District, Division 1, California.

Aug. 22, 1933.

Hearing Granted by Supreme Court Oct. 20, 1933.

**1. Licenses** ⟹39.

Sale of certificates of beneficial interest in oil leases impliedly represents issuance of statutory permit; hence purchaser, unaware of falsity of representation or of facts imposing duty of inquiry, may sue for appropriate relief.

This is true, even though vendors of such certificates have acted in good faith in reliance on opinion of Commissioner of Corporations that no permit authorizing sale of such certificates is necessary.

**2. Limitation of actions** ⟹96(2), 100(6).

Action for money paid for certificates, issued without permit, of beneficial interest in oil leases *held* not barred where brought within three years after purchasers discovered fraud or mistake (Code Civ. Proc. § 338, subd. 4).

**3. Licenses** ⟹39.

Where certificates of beneficial interest in oil leases were assigned to national bank as trustee, bank *held* subject to state statute requiring permit to sell certificates (St. 1917, p. 673, § 2, subd. 3).

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Harry T. Young, trustee for Ralph R. Martin and others, against the Three For One Oil Royalties, and others. Judgment for defendants, and plaintiff appeals.

Reversed.

W. C. Dalzell, of Los Angeles, for appellant.

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⟹For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 36 P.2d 1065.

Haas & Dunnigan, Walter F. Haas, and H. C. Johnston, all of Los Angeles, and McCaughan & McCaughan and Phil N. McCaughan, all of Long Beach, for respondents.

CONREY, Presiding Justice.

This action was commenced by complaint filed May 10, 1929. It was tried upon the amended complaint filed August 29, 1929, and the answers thereto. The action is brought by the plaintiff as trustee for Ralph R. Martin, Albert H. Bailey, and C. P. Wiand (assignee of E. D. Lindley) to recover moneys paid by the plaintiff trustee's said beneficiaries to R. G. Welch as agent for the other defendants and for the Long Beach National Bank, in consideration of the issuance by said bank to said purchasers, of certain certificates of beneficial interest in three oil leases which had been assigned to the bank as trustee by the lessees, who were Dallas, Boland, McKie, and R. G. Welch. In the certificates the trust was described as "Three For One Oil Royalties." The plaintiff appeals from the judgment.

As found by the court, the Martin purchase was made on February 10, 1923; the Bailey purchase on March 1, 1923; and the Lindley purchase on April 12, 1923. It thus appears that this action was not commenced until a date more than six years subsequent to the time of the said purchases; the same being the times when the moneys were paid therefor. The court decided that the statute of limitations had run against each and all of the alleged causes of action prior to the date of commencement of the action.

As the record on appeal consists of the clerk's transcript and reporter's transcript, we have no specifications of error other than those set forth in the brief of appellant. In the specifications there found, we find no objection to the first three findings of fact, and therefore we may assume without question that those findings are sustained by the evidence. The first of these findings is: "That the Three For One Oil Royalties was a common-law trust and was known to be such by the plaintiffs Ralph R. Martin, Albert H. Bailey and E. D. Lindley at the time each of them purchased his certificate of beneficial interest therein, and each of them knew at that time that he was buying a beneficial interest or unit in the proceeds and avails arising and growing out of said trust." The second finding states the dates of the several purchases of certificates. The third finding is as follows: "That at the time each of said plaintiffs purchased his said certificate, neither the said Three For One Oil Royalties, nor the trustee, nor any one of these defendants, nor any one acting for or in behalf of them, or either of them, had obtained from the Commissioner of Corporations of the state of California a permit authorizing the sale of said certificates, and that because of the failure to so obtain such permit the certificates issued to plaintiffs Ralph R. Martin, Albert H. Bailey and E. D. Lindley respectively were void and invalid." And it is conceded, without any contention to the contrary, that no permit had been obtained, and that for that reason the certificates were void. In re Girard, 186 Cal. 718, 200 P. 593.

We have no doubt that this action is barred by limitation, unless the facts bring it within the terms of the exception stated in section 338, subd. 4, of the Code of Civil Procedure. According to that section, the period prescribed is three years, for "an action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." In this case there is persuasive evidence that the purchasers did not discover such facts until a time less than three years before the complaint was filed, although the court made no finding on this point. It does not appear that the vendors of the certificates made any statement to the purchasers that a permit had been issued by the commissioner. In fact, the vendors had been advised by the commissioner, in accordance with the opinion held by him at that time, that such certificates might be issued lawfully without obtaining any "permit" from the Commissioner of Corporations. But appellant contends that even upon the basis of these facts, the sale of the certificates was fraudulent.

In Boss v. Silent Drama Syndicate, 82 Cal. App. 109, 255 P. 225, 227, the plaintiff was the purchaser of a certificate of stock in an unincorporated association. It was held by the court that the fact that the sale had been made in good faith, and in reliance upon a statement made by the Commissioner of Corporations that no permit was necessary, was not a defense to an action brought by the purchaser as an action to recover damages arising out of fraud and deceit of the defendant in issuing the certificates of stock. The court declared that in such case the defendants are legally responsible for their acts, even though those acts were done through mistake and without any fraudulent intent. This was so, because the sale carried with it an implied representation that the certificate was genuine, and since the certificate was void, the purchase was made "on what in law amounted to a false representation." In that case, however, the action was brought within two years from the date of the transaction. No question of limitation of time was there presented, and there is nothing to indicate that the court was considering or attempting to determine the point of time when the right of action accrued to the plaintiff.

[1, 2] In the case at bar it was not found, and apparently it is not true, that there was any false representation actually made, or any concealment of the facts, or that there was any confidential relation between the parties. By reason of a mistake of law, honestly lodged in the minds of the vendors, they sold and issued these certificates, which by reason of the terms of the statute were void. Nevertheless, the fact remains that the sale of the certificates, and their issuance, constituted a representation that the bank was authorized to issue the certificates. This necessarily included an implied representation that the Commissioner of Corporations had issued a permit for the issuance of such certificates. In accordance with decisions directly in point, it follows that in such case an innocent purchaser, unaware of the fact that the representation was false, and without knowledge of facts which would impose the duty of inquiry, may sue for the appropriate relief. Further, with reference to section 338, subd. 4, Code of Civil Procedure: "It appears to be settled in this state that, if fraud enters into a cause of action, the latter clause of this subdivision will apply and the cause of action will not be deemed to have accrued until the facts are discovered, regardless of the form or character of the action." Lightner Mining Co. v. Lane, 161 Cal. 689, 702, 120 P. 771, 777, Ann. Cas. 1913C, 1093. In MacDonald v. Reich & Lievre, Inc., 100 Cal. App. 736, 281 P. 106, where the facts were very much like those of the case at bar, the same rule, and for the same reason, was approved. We conclude that the causes of action herein were not barred by limitation of time.

[3] It is contended by respondents that the Long Beach National Bank, being a banking corporation organized under the laws of the United States, was not subject to regulation by state laws, and that all national banking associations are specifically excepted from the provisions of the Corporate Securities Act of California by the terms of subdivision 3 of section 2 of that act. It is true that said section of the Corporate Securities Act, at the time when the certificates in question here were issued, excepted from its definition of the word "company," "all national banking associations and other corporations organized and existing under and by virtue of the acts of the congress of the United States." Stats. 1917, p. 673. The decisions cited by respondents as bearing upon this question apparently are confined to cases relating to stocks or securities of national banks, or rights of depositors, or other direct obligations, all of which are held to be free from state legislative interference. We have not been directed to any decisions which hold that when a national bank undertakes to assume the responsibilities of a trust, it does not thereby subject itself to state laws governing the subject-matter of the trust. Probably it was in recognition of the need of a better definition that the exception found in section 2 of the Corporate Securities Act with respect to national banks has been amended to read as follows: "Any security issued by and representing an interest in or a direct obligation of a national bank," etc. Corporate Securities Act, § 2 (b), subd. 3, Deering's Gen. Laws, 1931 Ed., Act 3814, p. 1927. We think that the contention of respondents that in the instant case the trustee, before issuing said "certificates of beneficial interest," was not obligated to procure a permit therefor, is without merit.

Since, in our opinion, the judgment should be reversed, and since in the event of a new trial the record may be different in some respects from the present record, we deem it unnecessary to discuss the various other questions presented in the briefs of counsel.

The judgment is reversed.

We concur: HOUSER, J.; YORK, J.

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134 Cal.App. 161

## EXCAVATING EQUIPMENT DEALERS, Inc., v. ÆTNA CASUALTY & SURETY CO. et al.

Civ. 8831.

District Court of Appeal, First District, Division 2, California.

Sept. 13, 1933.

**1. Appeal and error 🔑930(4).**

In action on bond of highway contractor for use of shovel by subcontractor, verdict for plaintiff implied that plaintiff was not negligent in failing to notify contractor of subcontractor's first default in rent.

**2. Highways 🔑113(5).**

Owner of shovel *held* not estopped to recover on highway contractor's bond for use of shovel by subcontractor, where subcontractor represented to contractor that he owned shovel, evidence conflicted as to owner's knowledge of representations, and contractor had negligently failed to require bond of subcontractor (St. 1925, p. 538; Civ. Code § 3543).

**3. Highways 🔑113(5).**

In action on highway contractor's bond for rent of shovel leased to subcontractor, verdict of $2,250 *held* not excessive (St. 1925, p. 538).

**4. Trial 🔑267(3).**

Instruction that value of use of rented shovel must be reasonable value "as determined by the time it actually worked on said job" *held* properly modified by striking out quoted words.

**5. Highways 🔑113(5).**

In action on highway contractor's bond for use of shovel by subcontractor, evidence that subcontractor was reputed owner of shovel *held* immaterial (St. 1925, p. 538).

**6. Trial 🔑260(5).**

Refusal of instruction on estoppel *held* not error, where covered by other instructions.

**7. Trial 🔑244(3).**

In action for rent of shovel, re-reading of instruction on reasonable value among instructions on estoppel re-read at request of juror *held* not error as emphasizing case for plaintiff.

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Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Excavating Equipment Dealers, Inc., against the Ætna Casualty & Surety Company and others. Judgment for plaintiff, and the Ætna Casualty & Surety Company and others appeal.

Affirmed.

Roland J. White, of San Francisco, H. B. Wolfe, of Quincy, and Keyes & Erskine, of San Francisco (J. Benton Tulley, of San Francisco, of counsel), for appellants.

Clyde C. Sherwood, of Oakland, for respondent.

STURTEVANT, Justice.

This is an appeal from a judgment in favor of the plaintiff in an action on a surety bond.

On September 29, 1930, the state of California, acting through the department of public works, awarded to H. H. Boomer a contract to grade and construct a certain road in Trinity county. The contract covered several parcels. After the award was made, Mr. Boomer, as principal, and the Ætna Casualty & Surety Company, as surety, executed in due form the bond required by the provisions of the statute. Chapter 321, p. 538, Stats. 1925. At about the same time Mr. Boomer employed Bruce Markle as subcontractor to do the excavating on one parcel. About October 31, 1930, Mr. Markle had in place on the job a power shovel and commenced to execute the contract. That power shovel was owned by the plaintiff and was turned over to Mr. Markle under a written lease. Before the award was made to Mr. Boomer, in expectation of the business, Mr. Markle had entered into oral negotiations for the rental of the shovel, and, after the award was made, the written lease was executed October 14, 1930. Before employing Mr. Markle, Mr. Boomer had a conversation with him regarding his equipment, finances, and ability to execute the contract if a subcontract was awarded to him. Mr. Markle stated that he had a shovel and two trucks. In reply to Mr. Boomer's question, he stated that he was the owner of the shovel, but that it was not wholly paid for. Mr. Boomer made no inquiry as to who was Mr. Markle's creditor or the amount of the indebtedness. By its terms the lease covered a term of six months, and the rental provided was $600 per month to commence from the time the machine was loaded and to continue until the machine was returned to lessor's place of business. The rent was payable on the 10th day of each calendar month, but the plaintiff consented in a letter of even date that the first month's rent might be postponed for thirty days. When the first rent became payable, the plaintiff rendered its bill therefor to Mr. Markle and monthly thereafter. The excavation under the main contract was completed by the end of December or the first part of January. Some extra work was ordered by the state officials which Mr. Boomer turned over to the subcontractor, and the extra work was done by him. All work was completed in February, 1931. A stop notice in due form was served by the plaintiff on March 6, 1931. In that notice the plaintiff claimed rental at $500 per month for four and one-half months in the total sum of $2,250. Thereafter the plaintiff commenced this action. The defendants answered separately. The action was tried before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiff, and from the judgment thereon the defendants have appealed.

[1, 2] It is contended that the plaintiff is estopped. That claim is based on two theories. The first theory is as follows: The defendants assert that, when Mr. Markle negotiated for his contract, he told Mr. Boomer that he owned the shovel, but it was not wholly paid for; and that his creditor would not make any claim against Mr. Boomer. The defendants also state that Mr. Markle had a sign attached to the cab on the shovel, and that the sign had printed thereon in large letters words indicating that it belonged to Mr. Markle; that the plaintiff knew all of these facts, but took no steps to inform the defendant Boomer of its claim of ownership. In reply, the plaintiff cites passages from the record showing that there was a conflict in the evidence as to what statements were made by Mr. Markle, and that there was evidence to the effect that the plaintiff was not informed that Mr. Markle had made the statements charged to him or that Mr. Markle had attached to the shovel the sign above mentioned. The second theory presented by the defendants is based on the provisions of section 3543 of the Civil Code, which provides: "Where

one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." This theory was not presented during the trial, and is advanced for the first time in this court. In making this contention, the defendants assert that the plaintiff was negligent because it did not, on Mr. Markle's first default in payment of his rent, notify Mr. Boomer. The plaintiff replies that the second theory is not applicable to the facts of this case because it must be assumed from the verdict returned by the jury that it made the implied finding that the plaintiff was not negligent. That is true. Furthermore, it is perfectly clear that under the authorities there can be no doubt but that Mr. Markle could have been required by Mr. Boomer to execute to him the bond provided for in chapter 321 of the Statutes of 1925, and that Mr. Boomer was negligent in not making the request. It follows that under the facts it may not be said as a matter of law that the plaintiff was estopped. The defendants cite and rely on MacDermot v. Hayes, 175 Cal. 95, 170 P. 616, and Carter v. Rowley, 59 Cal. App. 486, 211 P. 267. An examination will disclose that neither case is pertinent to the facts before us.

[3] It is earnestly contended that the verdict was excessive. The defendants concede that the evidence was conflicting as to the value of the shovel, and that there was evidence to the effect that the value per month was as much as $500. However, they earnestly contend that the shovel started to work on November 4, 1930, and it continued to work until December 23, 1930, when the work stopped for the holidays. It is then asserted that the work again started on December 26, and was finished on January 3, 1931. While it is true that such evidence was given, there was evidence that the rental value was as high as $600 per month. There was also evidence that the work commenced October 27, 1930, and continued until February 27, 1931. Again, there was evidence that, working in certain formations, the shovel would excavate only about fifty yards per day, and that it would have taken one hundred and sixty days, or nearly five months. In other words, there was evidence to the effect that the use of the shovel for a period of five months was reasonably necessary, and, at $600 per month, the damage proved amounted to $3,000. The verdict of the jury was for the sum of $2,250. Applying the rule stated in Burr v. Gardella, 53 Cal. App. 377, 396, 397, 200 P. 493, the verdict was not excessive. It is also claimed that some of the work was extra work. Whether all of the work was done under Mr. Markle's first contract, or whether some was extra work, all of it was done by him for Mr. Boomer under the latter's contract with the state.

[4] The defendants complain because the trial court modified an instruction which they requested. The instruction purported to define the rule for ascertaining damages. The closing part of the instruction was: "* * * And their only right of action is one made under good faith for the use of said machinery only, and the value of this use must be a reasonable value *as determined by the time it actually worked on said job*, and the reasonable value for such time as may be determined by you regardless of the amount of rental mentioned in the lease agreement between plaintiff and defendant Markle." The modification consisted in striking out the words which we have emphasized. We think the trial court did not err in striking them out. Whether the shovel stood idle on Sundays, holidays, and stormy weather was immaterial to the issue on trial. Williamson v. Egan, 209 Cal. 343, 349, 287 P. 503.

[5] The defendants offered evidence which the trial court refused to receive to the effect that Mr. Markle was the reputed owner of the shovel. The evidence was properly rejected. Ownership was involved, but reputed ownership was immaterial.

[6] The defendants requested an instruction regarding the law of estoppel. It was refused, and they assert the refusal was error. We think they are mistaken. The law on that subject as applicable to the case on trial was fully covered by other instructions.

[7] After the trial court had instructed the jury, one of the jurors stated that he would like to hear a restatement of the law of estoppel. Thereupon the court re-read the instructions on estoppel. In doing so, a paragraph regarding reasonable value was also read. The defendants complain that the effect of reading the latter paragraph was to emphasize the case for the plaintiff as against the defendants. It will suffice to state that the record discloses nothing tending to show that the trial court in any manner expressed its opinion on the facts. It confined its attention solely to reading again instructions that had already been read.

The judgment is affirmed.

We concur: NOURSE, P. J.; OGDEN, Justice pro tem.

134 Cal.App. 109

## TEEL v. JUSTICE'S COURT OF SIGNAL HILL TP., LOS ANGELES COUNTY, et al.

Civ. 7961.

District Court of Appeal, Second District, Division 2, California.

Sept. 6, 1933.

**Justices of the peace** ⚷133.

Statute permitting enforcement of judgment after five years *held* not applicable to judgment of justice court (Code Civ. Proc. § 685).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Application by J. A. Teel for writ of mandamus to compel the Justice's Court of Signal Hill Township, County of Los Angeles, to issue writ of execution. From a judgment denying the application, petitioner appeals.

Affirmed.

Sparling & Teel, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and Robert A. Cushman, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Appeal from a judgment denying appellant's petition for a peremptory writ of mandamus to compel respondent justice's court and the justice of the peace thereof to issue a writ of execution to enforce a judgment of said court more than five years after the entry thereof.

Appellant contends that section 685 of the Code of Civil Procedure, permitting a judgment to be enforced after the lapse of five years, applies to all judgments, including those of a justice's court.

The case of White v. Clark, 8 Cal. 512, decided in 1857, arose under the Practice Act, section 214 of which, so far as material here, provided that "after a lapse of five years from the entry of judgment, an execution shall be issued only by leave of court, on motion." In that case an execution was issued in a justice's court more than five years after its entry. The Supreme Court held that section 214 referred "only to executions issued by the clerk of a Court of record having a seal, and not to executions issued by justices of the peace," and, the execution therein having been issued without authority, that "the sheriff was not justified in enforcing it." Then, as now with our Code of Civil Procedure, a separate chapter of the Practice Act dealt with the subject of judgments and executions in the justices' courts. In 1866 such section was amended to read: "In all cases other than for the recovery of money, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion. * * *" Stats. 1865–66, p. 704. The amendment limited the application of the section to judgments other than those for the recovery of money. In 1872 such section became section 685 of our Code of Civil Procedure, and was amended in 1895 (St. 1895, p. 38), so far as material here, by striking out the words "other than for the recovery of money," making it applicable to all judgments, as before the first amendment.

Appellant urges that by the use of the words "in all cases," in the amendment after the case of White v. Clark, supra, the Legislature intended to broaden the section to apply to cases arising in justices' courts. The history of the section, however, shows that the amendment by which such words were introduced into its provisions actually narrowed its application, and did not change in any way, in our opinion, the situation which led the Supreme Court to rule that it did not apply to justices' courts. The section still appeared in connection with the subject-matter of executions in superior courts, and when the exceptions applying to money judgments were stricken by amendment it left the section applying to all judgments, as it had originally, and it still came within the rule of White v. Clark. While we are of the opinion that there is nothing in section 925, Code of Civil Procedure, which would prevent the application of section 685 to judgments of the justices' courts, even though no special provision makes it applicable, still we believe we are bound by the decision of the case above cited.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

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134 Cal.App. 88

## ZEIGLER v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 9243.

District Court of Appeal, First District, Division 1, California.

Aug. 30, 1933.

**Habeas corpus** ⚷48.

San Francisco superior court is not required to entertain habeas corpus proceeding where prisoner at time of filing petition was in custody of state prison at Folsom (Const. art. 6, § 5).

Application by George Zeigler, in propria persona, for mandate prayed to be directed to the superior court, city and county of San Francisco, to compel the judge to hear and determine petition for writ of habeas corpus claimed to have been filed therein.

Writ denied.

George Zeigler, in pro. per.

KNIGHT, Justice.

Petitioner, a prisoner in the state prison at Folsom, has made application in propria persona to this court for a writ of mandate to compel the superior court in and for the city and county of San Francisco to hear and determine a petition for a writ of habeas corpus which he claims was heretofore filed by him in said court. It appears from the present application, however, that, at the time petitioner claims to have instituted said habeas corpus proceeding in the city and county of San Francisco, he was imprisoned in the state prison at Folsom, Sacramento county; and the Constitution provides that superior courts have jurisdiction to issue writs of habeas corpus on behalf of any person in actual custody, "in their respective counties." Article 6, § 5, Const. of Calif. It is evident, therefore, that there was no legal duty imposed upon the superior court in and for the city and county of San Francisco to entertain said proceeding; and upon that ground the application for a writ of mandate is denied.

We concur: TYLER, P. J.; CASHIN, J.

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133 Cal.App. 720

## SHELLEY v. CASA DE ORO, Limited, et al.

Civ. 1045.

District Court of Appeal, Fourth District, California.

Aug. 15, 1933.

Hearing Denied by Supreme Court Oct. 13, 1933.

**1. Judgment ⚷518.**

Motion to set aside judgment in court where rendered is direct and not collateral attack upon judgment, notwithstanding consideration of evidence dehors the record.

**2. Judgment ⚷379(1).**

Judgment may be set aside without a showing as to merits, where application is promptly made and where court has not acquired jurisdiction through service of summons or through voluntary appearance.

**3. Appearance ⚷9(8).**

Defendant, by filing motion to set aside judgment on ground that defendant neither had been served with summons nor made appearance, and that judgment against it was not sustained by findings, thereby made a "general appearance" and waived objection to jurisdiction.

[Ed. Note.—For other definitions of "General Appearance," see Words & Phrases.]

**4. Appearance ⚷9(8).**

Inclusion in motion to set aside judgment of ground inconsistent with sole claim that judgment is void for want of jurisdiction of person converts attempted special appearance into general appearance.

**5. Mechanics' liens ⚷304(1).**

Where complaint to foreclose mechanic's lien alleged and court found that plaintiff contracted with one owner to install sprinkling system on land, second owner *held* not estopped from denying validity of personal judgment against it, whether its appearance was special or general.

**6. Judgment ⚷346.**

Where inspection of judgment roll is sufficient to disclose invalidity of judgment, it may be set aside on motion.

**7. Mechanics' liens ⚷304(1).**

If corporation was purchasing land from second corporation, latter was not personally liable in action to foreclose mechanic's lien on land on which plaintiff installed sprinkling system under contract between plaintiff and purchasing corporation only.

**8. Tenancy in common ⚷51.**

If two corporations were cotenants, one could not bind the other personally by contract with third party to install sprinkling system on land.

Appeal from Superior Court, San Diego County; Benjamin C. Jones, Judge.

Action by Sam Shelley, doing business under the name and style of the Sam Shelley Pipe Supply House, against Casa De Oro, Limited, a corporation, the Malesa Development Company, and another. Judgment in favor of plaintiff against named defendants. From an order granting a motion of the second named defendant to vacate and set aside the judgment, plaintiff appeals.

Affirmed.

Sanders & Jacques, of San Diego, for appellant.

Hamilton, Lindley & Higgins, of San Diego, for respondent.

BARNARD, Presiding Justice.

In this action to foreclose a mechanic's lien, the complaint alleged that the plaintiff entered into a written contract with Casa De Oro, Limited, for the installation of a sprinkling system on certain described land. Malesa Development Company and a third corporation were joined as defendants, it being alleged that all three defendants were the owners of the land. An attorney entered an appearance for "the defendants," and later the action was dismissed as to the third corporation. After a trial, the court entered a judgment on May 21, 1932, denying the claim of a mechanic's lien on the ground that notice had been filed too late, but giving a personal judgment for the amount claimed against the two remaining defendants.

On June 22, 1932, the Malesa Development Company gave notice of a motion to vacate and set aside this judgment upon the ground that no summons had been served upon it, that no appearance had been made by it or by any one authorized by it to appear, and that the purported appearance by the attorney referred to was entirely without its authorization and without its knowledge or consent. After a hearing upon the records and files in the action and upon certain affidavits, the court granted the motion and vacated and set aside the judgment referred to. From that order this appeal is taken.

It was stipulated and is conceded that the respondent was never served with summons, and, while the appellant maintains that the evidence produced upon the hearing was not sufficient to overcome certain recitals in the judgment to the effect that the "defendants" appeared by an attorney, the affidavits contain ample proof that the attorney referred to was never authorized to appear for the respondent, including an affidavit by him admitting that he was not authorized to so appear and stating the reasons why the mistake was made.

[1] It is urged by the appellant that this evidence was improperly received, that this was a collateral and not a direct attack upon the judgment and, for that reason, no facts dehors the record could be received. It is well settled that such a motion as this is a direct and not a collateral attack upon the judgment, notwithstanding the consideration of other evidence. Merced County v. Hicks, 67 Cal. 108, 7 P. 179; Norton v. Atchison, etc., Ry. Co., 97 Cal. 388, 30 P. 585, 32 P. 452, 33 Am. St. Rep. 198; People v. Thomas, 101 Cal. 571, 36 P. 9; People v. Western Meat Co., 13 Cal. App. 539, 110 P. 338; Sharp v. Eagle Lake Co., 60 Cal. App. 386, 212 P. 933; In re Dahnke, 64 Cal. App. 555, 222 P. 381.

[2] It is further urged that a judgment may not be set aside under these circumstances in the absence of an affidavit of merits. The motion was made in part upon the record and files in the action, and not only does a sufficient showing of merits appear therefrom, but it is well settled that a judgment may be set aside without a showing as to the merits, where application is promptly made and where the court has not acquired jurisdiction through the service of summons or through voluntary appearance. Norton v. Atchison, etc., Ry. Co., supra; Crescent Canal Company v. Montgomery, 124 Cal. 134, 56 P. 797; Toy v. Haskell, 128 Cal. 558, 61 P. 89, 79 Am. St. Rep. 70; German Savings, etc., v. Bien, 18 Cal. App. 267, 122 P. 1096.

[3, 4] It is next urged that the respondent waived any objection as to jurisdiction by making, in fact, a general appearance, and we think this contention must be sustained. The notice of motion to set aside the judgment states six grounds or reasons upon which it was based. The first five relate entirely to the facts that the respondent had not been served, had not appeared, and had authorized no one to appear for it. The sixth ground is as follows: "For the reason and upon the ground that said judgment is not sustained by the Findings of the Court in said action, but is contrary thereto." It seems to be settled in this state that the inclusion in the motion of any ground inconsistent with the sole claim that the judgment is entirely void for want of jurisdiction of the person is sufficient to convert the attempted special appearance into a general appearance. Security Loan & Trust Co. v. Boston, etc., 126 Cal. 418, 58 P. 941, 59 P. 296; Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317; Taylor v. Superior Court, 93 Cal. App. 445, 269 P. 727.

[5-8] Finally, it is urged that the respondent is estopped to deny the validity of the judgment originally entered in this case because it is a joint owner of the real property on which a lien was sought to be established and, therefore, a trial could avail the respondent nothing. Neither reason nor authority is given why a party should be estopped from denying the validity of a personal judgment when it appears from the judgment roll alone that no personal judgment should have been entered against him. In other words, it matters not whether the appearance be special or general if it appears that the judgment should not have been entered and was properly set aside. The complaint is one to foreclose a mechanic's lien. It alleges that the plaintiff entered into a written contract with Casa De Oro, Limited, to furnish certain labor and material for the installation of a sprinkling system on certain land; that the plaintiff installed the equipment; that, under the terms of the agreement, Casa De Oro, Limited, agreed to pay to the plaintiff a certain sum; and that this amount was still owing and unpaid. It is alleged that the three defendants "were owners and/or reputed owners of the lands hereinbefore described." Judgment is prayed against "the

defendants" for the sum named; that this amount "be adjudged a lien upon the land and premises hereinbefore described"; and that the lands be sold and the plaintiff have execution for any deficiency. The court found that the plaintiff entered into a written contract with Casa De Oro, Limited, for the installation of this sprinkling system; that more than ninety days elapsed between the completion of the system and the recording of the mechanic's lien notice; that the claim of lien was barred; and that Casa De Oro, Limited, and this respondent were the owners of the land. Based upon these findings, a personal judgment was entered against Casa De Oro, Limited, and the respondent. It thus appears that neither the findings nor the complaint are sufficient to support a personal judgment against the respondent, since nothing therein shows or even indicates any personal liability upon its part. Where an inspection of the judgment roll is sufficient to disclose the invalidity of a judgment, the same may be set aside on motion. In re Dahnke, supra. It does not appear from the record just how or in what manner the two corporations named were "owners" of the land referred to. If Casa De Oro, Limited, was purchasing the land from the respondent, the latter would not be personally liable, not having joined in the contract. Pilstrand v. Greenamyre, 34 Cal. App. 799, 168 P. 1161. If the two owners were cotenants, the one had no power to bind the other by contract. Wagoner v. Silva, 139 Cal. 559, 73 P. 433; Nielson v. Gross, 17 Cal. App. 74, 118 P. 725; Sarina v. Pedrotti, 103 Cal. App. 203, 284 P. 472.

In a mechanic's lien action, a personal judgment against an owner where there is no contractual liability between such owner and the claimant is erroneous. Roberts v. Security T. & S. Bank, 196 Cal. 557, 238 P. 673; Beard v. Lancaster Midway Oil Co., 72 Cal. App. 148, 236 P. 970. While it has been held that an owner may be personally liable in such a case, where the party contracting for the improvement is merely his agent (Ridens v. Economy Home Builders, Inc., 104 Cal. App. 677, 286 P. 481), nothing in either the complaint or the findings hints of such a situation here. This complaint is based solely on a written contract with one of the owners, and nothing appears to in any way indicate the existence of any express or implied contract with the respondent. Under such circumstances the judgment was erroneous and was properly set aside. Giant Powder Co. v. Flume Co., 78 Cal. 193, 20 P. 419; Golden Gate B. M. Co. v. Fireman, 205 Cal. 174, 270 P. 214.

The order appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

134 Cal.App. 29

## SHRODE v. SAVOY AUTO PARKS et al.

**Civ. 9090.**

District Court of Appeal, Second District, Division 1, California.

Aug. 24, 1933.

**1. Appeal and error ⟹799.**

Opposition to motion to dismiss appeal *held* too late when presented for filing on morning of day noticed for hearing (District Court of Appeal Rule 20, § 3).

**2. Appeal and error ⟹627(2).**

Motion to dismiss appeal, filed after expiration of time for completing record on appeal, was granted; no legal justification for delay being properly presented.

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Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by John Shrode against the Savoy Auto Parks and Andrew Pansini, doing business under the name and style of the Savoy Auto Park. From the judgment, the last-named defendant and others appeal. Motion by respondent to dismiss the appeal. Motion by appellants to vacate the order of submission of the motion to dismiss the appeal, and to permit the filing of certain affidavits.

Appellants' motion denied, and respondent's motion to dismiss the appeal granted.

Burke, Hickson & Burke, of Los Angeles, for appellants.

Elbert E. Hensley, of Los Angeles, for respondent.

HOUSER, Justice.

This is a motion to dismiss an appeal on the ground that the appellants "have failed to complete their record on appeal within the time required by law."

[1] Although the appellants were given twenty-five days' notice of the date of the hearing of said motion, they failed to file, or to offer to file, any opposition thereto until the morning of the day on which said motion had been noticed for hearing, at which time they offered to the clerk of this court for filing herein an affidavit and certain authorities which purported to relate to and be in opposition to the granting of said motion. Under the provisions of section 3 of rule XX of this court, in the absence of an order by which the time of serving and filing "opposition to the motion" may be shortened, the said affidavit and authorities offered by the appellants in said matter were presented too late, and consequently were properly refused filing by the clerk of this court. Nor does

the record herein disclose either that any motion by appellants to be relieved from their default in that particular was ever presented to this court, or even the existence of any extenuating fact or circumstance which might tend to excuse the said dereliction of the appellants.

On the date when the motion to dismiss the appeal was noticed for hearing, it was ordered submitted for decision by this court. However, four days later appellants gave notice of the hearing of a motion to vacate said order of submission and to permit the filing, not only of the said affidavit which previously appellants had been denied the right to file, but as well additional affidavits which related principally to facts which had occurred subsequent to the date on which the motion to dismiss the appeal came on for hearing in this court. No grounds for the said motion presented by appellants are set forth in their notice of motion; nor are any legal grounds therefor apparent. As far as concerns the original affidavit which, as hereinbefore indicated, was properly refused filing, its physical attachment to, and its incorporation into, the motion made by appellants would appear to be but an attempt by them to evade the consequences of their failure to timely present opposition to the motion to dismiss the appeal. As to the facts set forth in the remaining affidavits which accompanied appellants' motion, it is clear that in no way could they affect the propriety of the order by which the motion to dismiss the appeal was submitted for decision.

Regarding the motion to dismiss the appeal, by the "certificate of the clerk of the court below" (rule VI), among other essential particulars required by the rule of this court, the following facts appear: "That notice of order denying the defendants' motion for a new trial was filed and served on the 31st day of May, 1932; that no proposed bill of exceptions has been filed by the said defendants or either of them herein; that no bill of exceptions has been settled; that there has been no request made to the clerk to prepare a transcript under the provisions of section 953a of the Code of Civil Procedure of the State of California; that no proceedings are pending for the settlement of the transcript under the provisions of section 953a of the Code of Civil Procedure of the State of California. * * *"

[2] Since the motion to dismiss the appeal was not filed until long after the regulatory period had expired within which the appellants were entitled "to complete their record on appeal," nor until after many months had elapsed following the date of the service upon appellants and the filing with the clerk of the trial court of the notice of the "order denying defendants' motion for a new trial," and since no legal reason or justification for such delay has been properly presented to this court, a ruling that the said motion should be granted becomes imperative.

It is ordered that the motion to vacate the order of submission of the motion to dismiss the appeal, etc., be, and it is, denied. It is further ordered that the motion to dismiss the appeal be, and it is granted.

We concur: CONREY, P. J.; YORK, J.

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134 Cal.App. 27

## INGALLS v. OLYMPIC REALTY CORPORATION et al.

Civ. 8950.

District Court of Appeal, Second District, Division 1, California.

Aug. 24, 1933.

**Fraud** ⚷58(1).

Judgment for plaintiff in action for fraud in sale of realty was *held* not sustainable, where no evidence showed what value of property would have been had alleged false representations been true, and record failed to disclose method trial court employed in determining plaintiff's damages.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Sarah Ingalls against the Olympic Realty Corporation, W. A. Cory, the Fidelity & Casualty Company of New York and others. From a judgment for plaintiff, the Fidelity & Casualty Company of New York appeals.

Reversed and remanded for a new trial.

Jennings & Belcher and Louis E. Kearney, all of Los Angeles, for appellant.

M. C. Spicer and Fred Pearce, both of Los Angeles, for respondent Ingalls.

Lewis Cruickshank and Donald Armstrong, both of Los Angeles, for respondents Olympic Realty Corporation and W. A. Cory.

DESMOND, Justice pro tem.

This appeal was placed upon the calendar of this court upon an order to show cause why the judgment herein should not be reversed, and the cause remanded to the trial court for a new trial, or such other order made as might be meet in the premises. At the time of the entry of such order to show cause, it appeared that appellant's brief had been filed herein, but that no brief on behalf of respondent had been filed; further, that the time for filing such brief had long since expired. Upon the calling of such calendar, counsel for respondent appeared and consented that the judgment appealed from be reversed and a new trial ordered. We have examined the transcript and have noted the points raised by appellant in his brief. We observe that the complaint alleges that certain of the defendants induced the plaintiff through fraudulent representations to buy, under four separate executory agreements, four parcels of land for the aggregate price of $8,690; that a total of $3,490.70 was paid thereon, including the sum of $293.10, as interest; that no rescission is claimed to have been effected or attempted, but damages are claimed in the amount paid, namely, $3,490.70, payment of that sum having been demanded from the Fidelity & Casualty Company of New York, surety upon bonds furnished under the law to the state real estate commission by the broker and salesman who made the sales to the plaintiff. We observe that by the answer filed by defendants, an offer is made to convey all the property mentioned upon payment of the amounts still due on account of principal and interest under the terms of the contracts. The only evidence relating to the value of the lots in question was given by two witnesses, one appearing for the plaintiff, the other for the defendants. The plaintiff's witness, a deputy county assessor, testified that the respective parcels were appraised by his office at approximately one-fifth to one-tenth of the selling prices fixed in the agreements of sale, and that in the office of the county assessor appraised values are "about 50% of what we consider to be the sales value of lots." This witness gave no testimony as to the actual value of the lots. A salesman, employed by some of the defendants, appeared as their witness on values, and testified that, in his opinion, the lots were worth at or within a few months of the selling dates approximately $1,000 to $1,500 more in the aggregate than the plaintiff undertook to pay for them. No evidence was offered by either party as to what the value of the lots or any of them would have been if the allegedly false representations had been true, and the record fails to disclose, either in the evidence or findings of fact, the method employed by the court in determining that the plaintiff was entitled to damages in the sums of $300, $400, $500, and $650, on the respective contracts, a total judgment of $1,850. It cannot be ascertained from the record whether in assessing these damages the court took into account the balance due upon the contracts, allowing for the respective payments thereon in the sums of $646.50, $902.74, $729.50, and $918.75. It is felt that under these circumstances counsel for respondent acts advisedly in consenting to the granting of the motion.

It is ordered that the judgment appealed from be, and the same is hereby, reversed, and the cause remanded for a new trial. Remittitur to issue forthwith.

We concur: CONREY, P. J.; YORK, J.

134 Cal.App. 26

## PEOPLE v. PACHECO.

Cr. 1743.

District Court of Appeal, First District, Division 2, California.

Aug. 24, 1933.

**Criminal law** ⚷1182.

Judgment and order denying new trial were affirmed, where appellant filed no brief and time granted for filing brief had expired (Pen. Code, § 1253).

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Joe Pacheco was convicted of robbery in the first degree, and he appeals.

Affirmed.

Thomas T. Califro, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant and appellant was convicted in the superior court in the county of Alameda of a felony, to wit, robbery. A jury trial was waived and the trial court found the crime as of the first degree.

Judgment was duly entered April 12, 1933, and the transcript on appeal was filed in this court on May 4, 1933. The cause was regularly placed on the calendar for oral argument on June 12, 1933. No appearance was made for appellant at the time the cause was called for hearing other than a request for additional time to file a brief. No brief has been filed in his behalf and the time granted for that purpose has long since expired.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order denying a new trial are affirmed.

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

134 Cal.App. 61

## PEOPLE v. FRANK.

Cr. 2404.

District Court of Appeal, Second District, Division 2, California.

Aug. 26, 1933.

Rehearing Denied Sept. 8, 1933.

Hearing Denied by Supreme Court Sept. 25, 1933.

**1. Criminal law 🔑598(5).**

Denial of continuance *held* not error as denying accused opportunity to produce material witness who left state, where no showing was made as to diligence in attempting to locate or communicate with witness, and trial had been continued over a period of more than a month.

**2. Criminal law 🔑1202(7).**

Weight of evidence that pardon had been granted to defendant charged with prior conviction was for trial court.

**3. Criminal law 🔑195(1), 1209.**

In prosecution for robbery and burglary, proof of prior conviction in foreign state did not place accused in double jeopardy nor assess double penalty for same offense (Pen. Code, §§ 644, 668).

**4. Criminal law 🔑1202(1).**

Where prior conviction was properly charged in information and admitted by accused, trial court *held* not to have abused its discretion in disallowing accused to withdraw plea and deny same (Pen. Code, §§ 644, 668).

**5. Criminal law 🔑656(8).**

Remarks of trial judge and curtailment of examination of witnesses upon immaterial matters *held* not erroneous as influencing jury, where jurors were instructed to disregard expressions by trial judge indicating opinion (Pen. Code, § 681a).

**6. Criminal law 🔑1144(8).**

Reviewing court could not consider alleged disqualification of jurors who may have been present in court during another prosecution of accused, since reviewing court could not presume that jurors in subsequent trial falsely testified as to their qualification, or that accused was deprived of opportunity to examine them fully, in absence of such showing.

**7. Robbery 🔑24(1).**

Evidence supported conviction of robbery and burglary (Pen. Code, §§ 644, 668, 955).

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Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

George E. Frank was convicted of robbery and burglary under information also alleging prior conviction of felony in another state, and he appeals.

Affirmed.

See, also, 19 P.(2d) 850.

George E. Frank, in pro. per.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CRAIG, Justice.

Upon charges by information of robbery and burglary, and the allegation of a prior conviction of felony in another state, verdicts of guilty were returned by the jury, and the defendant appealed from the judgments entered accordingly.

It was alleged, and the prosecuting witness testified, that the offense was committed on or about the 2d day of February, 1932. The defendant swore that he was not at the scene of the robbery on that date. However, said witness was not positive, as to the exact date thereof, and police records proved by the people showed the same offense to have been committed on the 13th day of February, 1932. "The precise time at which the offense was committed need not be stated in the indictment or information, but it may be alleged to have been committed at any time before the * * * filing thereof, except where the time is a material ingredient in the offense." Pen. Code, § 955.

[1] It is contended that the trial court abused its discretion in denying a motion for a continuance, and that the appellant was deprived of an opportunity to produce a material witness. It was shown by affidavit that said witness had left the state, but no showing was made as to diligence in attempting to locate or communicate with him, nor as to the date of his departure, the date of his expected return, or where he might be found. The trial had been continued from various dates over a period of more than a month. Affirmative proof of facts tending to show that the ends of justice required a further continuance not having been offered, it cannot be said that it was error to deny the same.

[2-4] The information charged a prior conviction of a felony in another state for which the defendant had served a term in the penitentiary. Motions were interposed to dismiss said charge, based upon an affidavit that the defendant had been pardoned, which motions were denied. A form of pardon naming another person or the defendant by a different name appears in the appellant's brief, but it does not appear to have been signed nor offered in evidence upon the trial. The weight to be given such evidence, if it really was offered, was for the trial court to determine, and it cannot be afforded greater weight on appeal than it can be said to have received

below. Nor did the allegation and proof of a prior conviction place the defendant again in jeopardy therefor, nor amount to assessing for the same offense a double penalty therefor, as contended. Section 668 of the Penal Code provides that, in case of a conviction outside this state, a person thereafter convicted in this state is punishable for the subsequent offense in the manner prescribed in section 644, which requires imprisonment for life and forbids release on parole for at least twelve years. The prior conviction having been properly charged by information, and admitted by the defendant, the trial court cannot, in view of the foregoing, be held to have abused its discretion in refusing to permit him to withdraw his plea and to deny the same.

[5] The contention that the jury might have been influenced by remarks of the trial judge and the curtailment of examination of witnesses upon matters which appeared to be immaterial is also untenable. It was the duty of the court to expedite the hearing and determination of the proceedings in a manner commensurate with the serving of the ends of justice. Pen. Code, § 681a. The jury were instructed to disregard any expressions by the trial judge which might indicate an opinion in the matters before them, and examination of the record fails to reveal any instance wherein the defendant was deprived of the right to evidence which was material to the issues. He does not show how he was prejudiced by the procedure to which he would take exception.

[6] Further, it is insisted that certain of the jurors may have been present in the courtroom during the trial of another case in which the appellant here was being tried for assault with a deadly weapon with intent to commit murder, and have been prejudiced by the evidence therein. We cannot presume that jurors in the subsequent trial falsely testified as to their qualifications, nor that the defendant was deprived of an opportunity to examine them fully, in the absence of such showing. The record contains no evidence of unfairness. Objection to the jurors was overruled by the statement of the court that no juror who sat in the former trial was a juror in the second. In the absence of showing to the contrary it must be presumed that they were not disqualified. People v. Gilmore, 17 Cal. App. 737, 121 P. 697.

[7] The defendant was positively identified by the prosecuting witness, and a watch which she testified he had taken at the time of the robbery was identified by description and number. It is contended that such identification was insufficient, but we are furnished with no suggestion of more complete evidence that might have been demanded. Other points raised by the appellant's brief are covered by what has been said herein.

The judgment and order denying a new trial are affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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133 Cal.App. 711

## KING et al. v. HARTFORD ACCIDENT & INDEMNITY CO.

Civ. 797.

District Court of Appeal, Fourth District, California.

Aug. 15, 1933.

Rehearing Denied Sept. 8, 1933.
Hearing Denied by Supreme Court Oct. 13, 1933.

1. **Subrogation 🔑7(9).**

General rule is that surety on supersedeas bond will not, on paying judgment rendered against principal, be subrogated to creditors' remedies against sureties on prior bond of same debtor, in absence of special circumstances rendering his equities equal or superior to theirs.

2. **Principal and surety 🔑191.**

Successive sureties on judicial bonds are liable to each other in inverse order in which they became sureties.

3. **Subrogation 🔑7(9).**

Sureties on supersedeas bond who were compelled to pay judgment on affirmance *held* not entitled to recover from surety on release of attachment bond, when stay bond was executed solely at request of judgment debtor without knowledge or consent of surety on prior bond (Code Civ. Proc. § 1059; Civ. Code, §§ 2848, 2849).

4. **Principal and surety 🔑192.**

Sureties on supersedeas bond who were compelled to pay judgment on affirmance were not entitled to recover from surety on release of attachment bond under equitable doctrine of contribution on theory that parties were cosureties.

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Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by E. W. King and another against Hartford Accident & Indemnity Company. From an adverse judgment, defendant appeals.

Reversed, with directions.

Conron & Conron, of Bakersfield, and Jesse H. Steinhart and John J. Goldberg, both of San Francisco, for appellant.

Alfred Siemon, of Bakersfield, for respondents.

JENNINGS, Justice.

This action was instituted by the sureties on an appeal bond to recover from the surety on an undertaking given to secure redelivery of property seized by virtue of a writ of attachment. Upon the conclusion of the trial the court rendered judgment in favor of plaintiffs for the full value of the property attached. From the judgment thus rendered the defendant has prosecuted this appeal.

The action which gave rise to the present action was entitled McClintick v. Leonards, 103 Cal. App. 768, 285 P. 351. In it the plaintiff sought to recover from the defendant the sum of $1,300, together with interest and costs. Upon the filing of the complaint therein a writ of attachment issued directing the sheriff to attach any property of the defendant in the county wherein the action was commenced as security for the satisfaction of any judgment that might subsequently be rendered in plaintiff's favor. Pursuant to such writ of attachment the sheriff seized and took into his possession the sum of $761 which was the property of Leonards, defendant in said action. Thereupon an undertaking was executed by the Hartford Accident & Indemnity Company, defendant in the present action, whereby the said surety agreed to redeliver the money attached to the sheriff "to be applied to the judgment, or in default thereof, that defendant (Leonards) will, on demand, pay the plaintiff (McClintick) the full value of the property released." Upon the filing of this undertaking the money which had been seized was ordered released.

Upon the trial of the action in McClintick v. Leonards, judgment was rendered in plaintiff's favor for the sum of $1,423.53. Thereafter, Leonards, the defendant in said action, appealed from the judgment thus rendered against him and for the purpose of securing a stay of execution pending the appeal executed an undertaking upon which the plaintiffs herein, E. W. King and Edward Weit, were sureties. This undertaking, which was executed pursuant to the provisions of section 942 of the Code of Civil Procedure of the state of California, provided that the said sureties are "jointly and severally bound in double the amount named in said judgment, and that if said judgment or order appealed from or any part thereof is affirmed, or the appeal dismissed, the appellant will pay the amount directed to be paid by said judgment and all damages and costs awarded against the appellant upon said appeal not to exceed the amount of the bond." Subsequently the judgment rendered in said prior action in favor of the plaintiff McClintick was affirmed. McClintick v. Leonards, 103 Cal. App. 768, 285 P. 351. Thereafter McClintick applied to the trial court for judgment against the sureties on the supersedeas bond and after proceedings regularly taken the court entered judgment against said sureties, plaintiffs herein, for the sum of $1,737.64. Thereupon a writ of execution issued on the judgment thus rendered and the sureties, E. W. King and Edward Weit, paid to McClintick the sum of $1,719.64, in full satisfaction of the judgment which had been rendered against them.

During the pendency of the appeal in the case of McClintick v. Leonards the judgment debtor died and the executrix of his will was substituted as defendant in said action. A claim against the estate of Leonards for the amount of the judgment was filed, but, as alleged in the complaint in the present action, the claim was unpaid and "said estate is insolvent and * * * the assets thereof were exhausted and wholly paid out and expended in the satisfaction and discharge of the costs and expenses of administration and claims having a priority over the claim of said McClintick."

Following the affirmation of the judgment in McClintick v. Leonards, a demand was made upon the defendant in the present action that it pay over and deliver to the plaintiffs herein the property attached in the former action. Upon the failure and refusal of said defendant to comply with the demand thus made, the present action was instituted resulting as aforesaid in the rendition of a judgment in favor of plaintiffs, sureties on the supersedeas bond, against the defendant, surety on the release of attachment bond, for the full value of the property seized under the writ of attachment. It should here be observed that the court found that all of the allegations contained in paragraph 5 of plaintiff's amended complaint are true. One of the allegations therein contained which is of importance in the present appeal is the following: "These plaintiffs, *at the instance and request of said Leonards* (italics ours) and for the purpose of securing a stay of execution pending said appeal, made, executed and delivered to the clerk of said court their certain written undertaking on appeal." From the aforesaid finding we are warranted in concluding that the trial court found that the stay bond was executed solely at the request of Leonards and that the defendant herein, surety on the release of attachment undertaking, neither concurred in the request of the judgment debtor nor consented thereto. We understand that there is no dispute between counsel upon this point, and it may be remarked that the record herein fails to disclose that the defendant had any knowledge of the execution of the stay bond.

[1-3] The single problem which is here presented is therefore whether the sureties on a supersedeas bond who have been compelled to pay the judgment upon its affirmation are entitled to recover from the surety on a release of attachment bond when the stay bond

was executed solely at the request of the judgment debtor and without the knowledge or consent of the surety on the prior bond.

It is immediately apparent that if recovery may be had in such a situation as is here presented, it must be by virtue of the equitable doctrine of subrogation. In re Estate of Whitney, 124 Cal. App. 109, 118, 11 P.(2d) 1107, 1110, the following language from Southern Surety Co. v. Tessum, 178 Minn. 495, 228 N. W. 326, 329, 66 A. L. R. 1136, is quoted with approval: "Subrogation is equity's method of compelling the ultimate payment by the one who in justice and good conscience ought to make it—of putting the charge where it justly belongs. Emmert v. Thompson, 49 Minn. 386, 52 N. W. 31, 32 Am. St. Rep. 566. It is not an absolute right, but depends upon the superiority of the equities of him who asserts it over those of the one against whom it is sought. 'It will never be enforced when the equities are equal or the rights not clear.' "

The general rule with respect to the application of the equitable doctrine of subrogation as between successive sureties is stated in the note appearing in 77 A. L. R., at page 458, in the following language: "The general rule seems to be that a surety on a supersedeas bond will not, upon paying the judgment rendered against his principal, be subrogated to the creditor's remedies against the sureties on a prior bond of the same debtor, in the absence of special circumstances rendering his equities equal or superior to theirs,—such as a case in which the surety on the supersedeas bond becomes in fact a surety for the sureties on the prior bond of the same principal."

In Stearns on Suretyship (2d Ed.) § 254, the rule is stated as follows:

"The execution of a suretyship obligation in the course of a legal proceeding for the collection of a debt for which another is already bound as a surety, or where bonds are given in the prosecution of legal remedies in the appellate courts in which successive undertakings are required, generally results in placing the ultimate liability upon the last surety, through whose agency the litigation has been prolonged, and while as between such surety and the creditor he may be properly termed a surety for the prior promisor, yet if his contract is solely in the interest of the principal, and without the assent of the prior surety, he is regarded as debtor of all the prior parties, and not entitled to subrogation to the remedies of the creditor against the prior sureties; but on the contrary if the prior surety pays he will recover by subrogation from the later surety. * * *

"This rule is usually put upon the ground that the successive surety by prolonging the litigation makes himself an obstacle to the prior promisor by preventing an adjustment of the controversy, wherein the prior surety might have had immediate subrogation to the rights of the creditor against the principal, and this conclusion seems to be reached without requiring any showing that the prior surety has in fact been injured."

The rule is often declared in brief form in the following language: Successive sureties on judicial bonds are liable to each other in the inverse order in which they became sureties. Southwestern Surety Ins. Co. v. King et al., 68 Okl. 100, 172 P. 74, L. R. A. 1918D, 1188; Chrisman v. Jones, 34 Ark. 73.

The application of the above-stated rule to the situation here presented would indicate that the trial court erred in permitting the sureties on the supersedeas bond to recover from the surety on the release of attachment bond and that the judgment should be reversed. Respondents contend, however, that, because of certain statutes of California, the court's action in permitting recovery was correct and that the judgment should be affirmed.

The statutes upon which particular reliance is placed by respondents in support of the judgment are section 1059, Code of Civil Procedure, and section 2849, Civil Code. The former of these sections is in the following language: "Surety on appeal substituted to rights of judgment creditor. Whenever any surety on an undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment, either with or without action, after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor, and is entitled to control, enforce, and satisfy such judgment, in all respects as if he had recovered the same."

As was pointed out in Holmes v. Hughes, 125 Cal. App. 290, 295, 14 P.(2d) 149, this section literally covers all cases wherein an undertaking on appeal is filed irrespective of any question of privity between the parties and regardless of whether the judgment debtor knew that such an undertaking had been filed. But the right of a surety to be subrogated to the rights of the judgment creditor against the judgment debtor is not at all dependent upon the statute. It is a right long recognized and enforced in equity. Section 1059 of the Code of Civil Procedure simply gives to the surety a summary remedy of utilizing the judgment itself to enforce rights against the judgment debtor which he possesses not by virtue of the statute, but by virtue of recognized fundamental equitable principles. The statute therefore may properly be characterized, as was done in the above-cited decision as providing simply a mode of procedure based upon the doctrine of subrogation and governed by the same equitable principles.

Section 2849 of the Civil Code is in the following language: "Surety entitled to benefit of securities held by creditor. A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not." This section is found under article 3 of chapter 2 of title 13, pt. 4, div. 3, the Code. The title of chapter 2 is "Suretyship" and the heading of article 3 is "Rights of Sureties." In this article are described various rights and remedies specifically conferred by statute upon sureties. Section 2849 and the section immediately preceding deal particularly with the right of a surety who satisfies his principal's obligation to be subrogated to whatever remedy the creditor has against the principal (section 2848) and to be subrogated to the benefit of any security for the performance of the principal obligation which the creditor or a cosurety held at the time the suretyship contract was executed or which is acquired by the creditor subsequent to the execution of the suretyship contract (section 2849). However, these sections of the Code do not add anything to the recognized principles of subrogation. They are "but a re-enactment of the well-settled rules of equity on the subject of subrogation or substitution." Mr. Justice Shaw, in Martin v. De Ornelas, 139 Cal. 41, 49, 72 P. 440, 444. It was pointed out in Estate of Elizalde, 182 Cal. 427, 432, 188 P. 560, that section 2848 of the Civil Code does not exclusively measure the rights of sureties to subrogation and that thereby the Legislature did not intend to announce all the law on the subject. It seems equally evident that the Legislature did not intend by the enactment of both sections under consideration to encompass completely the entire subject of subrogation. Irrespective of the question of whether the release of attachment bond may properly be regarded as a security held by the creditor for the performance of the principal obligation, we are convinced that the great weight of authority in the United States has established the rule that the surety on a supersedeas bond is not entitled, upon paying the judgment recovered against his principal, to be subrogated to the creditor's remedies against sureties on a prior bond of the same debtor in the absence of special circumstances which operate to render the equities of the later surety superior to those of the earlier.

In the instant case it is apparent that there are no special circumstances which relieve it from the operation of the above-stated rule. As heretofore noted, the court found that the supersedeas bond was executed "at the instance and request" of the judgment debtor and there is no showing that the surety on the release of attachment bond, appellant herein, concurred in the action taken by the judgment debtor or consented thereto. The result produced by the execution of the supersedeas bond was to prevent the enforcement of present payment of the judgment debtor and thus to prolong the responsibility of the prior surety. The delay which was thus brought about through the interposition of the second sureties may have injuriously affected the position of the surety on the prior bond. In this connection, it is to be borne in mind that, pending the appeal, the judgment debtor died and that the court, by finding that the allegations of paragraph 6 of the amended complaint are true, found that the estate of the judgment debtor is insolvent. This circumstance points strongly to the fact that appellant's position was injuriously affected by the delay produced through the interposition of respondents in becoming sureties on the supersedeas bond. It is therefore apparent that the equities of respondents are not only not superior to those of appellant, but that in fact the equities in appellant's favor preponderate over those of respondents.

[4] It may be remarked in conclusion that the judgment may not be sustained on the theory that the parties to the present action were cosureties and that respondents are entitled to recover from appellant under the equitable doctrine of contribution. The record shows that the action was tried on the theory that respondents were entitled to subrogation and the judgment which was rendered was based on the principle of subrogation. No attempt was made to segregate the amount which was paid by respondents into the constituent elements of damages, interest, and costs incurred in the trial of the action in McClintick v. Leonards, and costs on the appeal in said action. On the contrary, the judgment from which this appeal is taken was for the full value of the attached property. Furthermore, respondents and appellant were not cosureties. They were bound for the same principal but for different obligations. Appellant's obligation under the redelivery bond was to redeliver the attached property or to pay its value to the proper officer on demand. No judgment had been rendered when appellant's undertaking was executed and there was no promise to pay a judgment if one should be rendered. Respondents, on the other hand, bound themselves to pay the amount of the judgment which had then been rendered and all damages and costs awarded upon appeal if the judgment should be affirmed. The obligations of the parties to this action were distinct obligations having no connection by privity or otherwise. Fidelity & Deposit Company of Maryland v. Bowen, 123 Iowa, 356, 98 N. W. 897, 6 L. R. A. (N. S.) 1021; Chrisman v. Jones, 34 Ark. 73.

It follows therefore that, in our opinion the trial court's conclusion that respondents "are entitled to judgment" against appellant was incorrect and that the judgment rendered in favor of respondents may not be sustained.

The judgment is therefore reversed, and the trial court is directed to enter judgment in appellant's favor.

We concur: BARNARD, P. J.; MARKS, J.

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134 Cal.App. 145

## LEAVITT v. LEAVITT.

Civ. 8974.

District Court of Appeal, First District, Division 1, California.

Sept. 12, 1933.

Hearing Denied by Supreme Court Nov. 8, 1933.

**1. Divorce ⚷127(4).**

Corroboration of every act sworn to by plaintiff in divorce action is not required, but evidence substantially tending to confirm plaintiff's testimony is sufficient.

**2. Divorce ⚷249(6).**

Interlocutory decree of divorce limiting to 90 days wife's occupancy of homestead awarded to husband *held* error.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action for separate maintenance by Mary S. Leavitt against Earl V. Leavitt, who filed cross-complaint for divorce. From an interlocutory decree for defendant and cross-complainant, plaintiff and cross-defendant appeals.

Modified and affirmed.

Tanner, Odell & Taft and Thurlow T. Taft, all of Los Angeles, for appellant.

Isador Morris, of Los Angeles, for respondent.

TYLER, Presiding Justice.

Plaintiff brought this action for separate maintenance. Defendant filed a cross-complaint, alleging extreme cruelty, and prayed for a divorce.

The trial court found certain personal property, consisting of household furniture, to be community property of the spouses. It further found certain real property to be the sole and separate property of the defendant and cross-complainant, upon which plaintiff and cross-defendant had placed a homestead. After awarding plaintiff certain costs and sums for her support, the court made an equal division of the community property, and decreed the real property to belong to defendant and cross-complainant, and that plaintiff and cross-defendant had no interest therein. It then decreed that defendant and cross-complainant be granted an interlocutory decree of divorce, and that plaintiff be allowed to occupy the real property for a period of ninety days.

Two points are relied upon for a reversal. It is first claimed that the finding that plaintiff and cross-defendant was guilty of extreme cruelty is not supported by the evidence, nor is the corroborative evidence offered in substantiation thereof sufficient to sustain the findings; second, that the interlocutory judgment is erroneous to the extent that it attempts to limit to a period of ninety days appellant's right to the occupancy of the homestead of the parties.

There is no merit in the first contention. We do not deem it necessary to review the evidence. Suffice it to say there was sufficient evidence to support the charge of cruelty pleaded by cross-complainant and testified to by him, and there was also sufficient corroboration substantially tending to confirm such charge.

[1] In an action for divorce, corroboration of every act sworn to by a plaintiff is not required, but evidence substantially tending to confirm plaintiff's testimony is sufficient. Percy v. Percy, 188 Cal. 765, 207 P. 369.

[2] We see no answer, however, to appellant's second contention, that the interlocutory judgment is erroneous in attempting to limit her right to the occupancy of the homestead of the parties to a period of ninety days. An interlocutory decree of divorce cannot of itself have the effect of nullifying the homestead character of the property, nor should the trial court have attempted to destroy or assign it until such time as the marriage was actually dissolved by the final decree of divorce. Radich v. Radich, 64 Cal. App. 605, 222 P. 182; Remley v. Remley, 49 Cal. App. 489, 193 P. 604. The interlocutory decree is not a decree of divorce, nor does it dissolve the marriage. The court, therefore, should not have limited appellant's right to the occupancy of the homestead until such time as the marriage shall be dissolved by the final decree. Strupelle v. Strupelle, 59 Cal. App. 526, 211 P. 248; 13 Cal. Jur. 535. This being so, the interlocutory decree must be modified by striking therefrom that portion which imposes a limitation upon the appellant's right to the occupancy of the homestead prior to the date when the divorce shall have become final.

As so modified the judgment is affirmed.

We concur: CASHIN, J.; KNIGHT, J.

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

134 Cal.App. 5

## McCUTCHEON v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9094.

District Court of Appeal, Second District, Division 1, California.

Aug. 22, 1933.

1. **Equity 🔑43.**
Where law affords remedy, equity will not assume jurisdiction.

2. **Execution 🔑358.**
Statutory proceedings supplemental to execution constitute substitute for creditor's suit with appointment of receiver, and are exclusive of remedy by creditor's suit, where such proceedings furnish adequate relief (Code Civ. Proc. § 564, subd. 4, and §§ 714–723).

3. **Execution 🔑358.**
Judgment creditor could obtain adequate relief under proceedings supplemental to execution, where debtor owned partly drilled oil well that would discharge all liabilities if put on production basis, and where creditors would receive practically nothing if property were sold at tax sale and levied on by creditors (Code Civ. Proc. §§ 714–723).

4. **Creditors' suit 🔑39(4).**
Statutory requirement of plaintiff's inability to satisfy judgment from sale of defendant's property, prerequisite to creditor's suit, *held* not complied with, where plaintiff alleged defendant owned property on which execution might have been levied and sale of which might have satisfied part of judgment (Code Civ. Proc. § 564, subd. 4).

5. **Execution 🔑344.**
Conclusion that no property of judgment debtor can be found arising from sheriff's return of execution unsatisfied, though ordinarily conclusive, cannot prevail, where person entitled to rely on conclusion sets up facts repudiating fact that judgment debtor has no property subject to execution.

6. **Creditors' suit 🔑39(4).**
Creditor's bill would not lie where complaint alleged judgment debtor owned partly completed oil well which would discharge all liabilities if put on production basis, and judgment creditor had ample remedy by supplemental proceedings (Code Civ. Proc. § 564, subd. 4, and §§ 714–723).

7. **Creditors' suit 🔑33.**
That debtor corporation consented to appointment of receiver of its assets in creditor's suit *held* immaterial on question of whether court acquired jurisdiction (Code Civ. Proc. § 564, subd. 4).

8. **Receivers 🔑36.**
Where complaint fails to state cause of action, court's order by which receiver is appointed therein is invalid.

9. **Creditors' suit 🔑33.**
Where order in creditors' suit appointing receiver was void, subsequent order based on assumed validity of former order would likewise be void.

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Application by L. T. McCutcheon for a writ of mandamus to be directed to the Superior Court in and for Los Angeles County, and Hon. Emmet H. Wilson, Judge, presiding in Department 8 thereof.

Writ discharged.

Joseph J. Rifkind and Raphael Dechter, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, for respondents.

HOUSER, Justice.

It appears that in a certain action pending in the superior court of Los Angeles county judgment was rendered in favor of the plaintiff therein and against the corporation defendant therein for the principal sum of $3,463, and that thereafter a writ of execution which was issued on said judgment was duly returned "wholly unsatisfied." Thereupon the plaintiff in that action instituted another and separate suit, termed a "creditor's bill," against the said corporation for the sole asserted purpose of having a receiver appointed to administer the assets mentioned and described in the complaint in said suit, together with the business of the corporation, to the end that the proper and legal claims of all creditors of said corporation, including that of the plaintiff, be satisfied and paid. The answer of the defendant corporation in said suit "admits all and singular the allegations of the complaint, and hereby consents to the appointment of a receiver." In due course the petitioner herein was appointed such receiver; who thereupon, and for a period of more than one year thereafter, proceeded to and did administer the affairs of said corporation and conduct its business. After the expiration of more than one year's service by petitioner as such receiver as aforesaid, a judge of the superior court, in whose department thereof the said suit was pending, "did summarily, upon his own motion as judge of the superior court, vacate the order theretofore made appointing said receiver and discharged said receiver on the ground that said court in said action had no jurisdiction to appoint a receiver"; and thereafter, on the presentation by said receiver to said court of his report, account, and petition for discharge as such receiver, the said judge sitting as said court "declined to hear such report and account, or to discharge said receiver and exonerate his bond on the ground that the court had no jurisdiction in said action to appoint said receiver." In such circumstances, on an application by petitioner, this court issued its alternative writ of mandate by which the said judge and the said court, as respondents herein, were required either to proceed with the hearing of the said report, account and petition for the discharge of said receiver, or, on a specified date, to show cause why compliance had not been made with said order.

The effect of the answer and the argument presented by the respondents herein is that in the face of the facts and the pleading, as shown by the complaint in the suit called a "creditor's bill," the superior court was without jurisdiction to appoint a receiver; that any acts performed by the receiver in the performance by him of his assumed official duty as such were in law unauthorized and void; and consequently that neither the respondent court nor the judge thereof now may be required to proceed further either in the hearing, the settlement, or the approval of the report, account, and discharge of said receiver, or otherwise, or at all.

In effect, by the terms of subdivision 4 of section 564 of the Code of Civil Procedure, a receiver may be appointed by the court in which an action is pending "after judgment * * * in aid of execution, when an execution has been returned unsatisfied. * * *"

As hereinbefore indicated, in the action which gave rise to the instant application, the procedure suggested for the purpose of inducing appropriate action for the appointment of a receiver was by means of a "creditor's bill." In section 106, volume 1, Pomeroy's Equitable Remedies, it is stated that "it has been held, in many cases, that in a judgment creditor's suit, on the return of the execution unsatisfied, it is almost a matter of course to appoint a receiver to collect and preserve the judgment debtor's property pending the litigation"—citing authorities. And, as is said in 11 California Jurisprudence, p. 146: "Under the old system of practice when a judgment creditor had exhausted the remedy by writ of execution, he had a right to invoke the jurisdiction of a court of equity by a proceeding known as a creditor's suit for the purpose of compelling a discovery of assets, tangible or intangible, and applying them to the satisfaction of his execution. And formerly this was the only method of reaching assets which could not be seized on execution. Supplementary proceedings were created to provide an easier and less expensive method of reaching the same result, and are intended as a substitute for creditors' suits. This being so, resort must be had to supplementary proceedings, unless in exceptional cases in which the legal remedies are unavailing"—citing authorities.

By the terms of sections 714 to 723, inclusive, of the Code of Civil Procedure, commonly known as proceedings supplemental to execution, a complete procedure at law is provided by which may be obtained results similar in purpose and effect to those intended by the more cumbersome method authorized by the provisions of section 564 of the Code of Civil Procedure, which, as just stated, contemplate the filing of a creditor's suit and the consequent appointment of a receiver. In each of a number of cases decided by the Supreme Court of this state it has been declared that the statutory proceeding supplemental to execution was intended as a substitute for a creditor's bill. Adams v. Hackett, 7 Cal. 187, 201; McCullough v. Clark, 41 Cal. 298, 302; Pacific Bank v. Robinson, 57 Cal. 520, 522, 40 Am. Rep. 120; Habenicht v. Lissak, 78 Cal. 351, 20 P. 874, 5 L. R. A. 713, 12 Am. St. Rep. 63; Herrlich v. Kaufmann, 99 Cal. 271, 275, 33 P. 857, 37 Am. St. Rep. 50; Matteson, etc., Co. v. Conley, 144 Cal. 483, 485, 77 P. 1042; Nordstrom v. Corona City W. Co., 155 Cal. 206, 211, 100 P. 242, 132 Am. St. Rep. 81; Travis Glass Co. v. Ibbetson, 186 Cal. 724, 727, 200 P. 595; Bonner v. Lehfeldt, 39 Cal. App. 649, 653, 179 P. 722; McKenzie v. Hill, 9 Cal. App. 78, 80, 98 P. 55.

And, although the statutory provisions may contain no express authorization for the appointment of a receiver in aid of the purpose to be effected, as early as 1864, in the case of Hathaway v. Brady, 26 Cal. 581, 593, it was ruled by the Supreme Court of this state (syllabus) that "in proceedings supplementary to execution, the Court has power, when it has all the parties before it, to appoint a receiver." That that principle has been recognized and established is attested by Professor Pomeroy in volume 1 of Pomeroy's Equitable Remedies, § 110, where it is said: "Proceedings supplementary to execution being designed to be a substitute for the equity procedure by creditors' bill, receivers are appointed in such proceedings very much as a matter of course, where it appears that the judgment creditor (debtor) has, or probably has, property that ought to be subjected to the satisfaction of the judgment, after the return of the execution unsatisfied."

But, aside from such implied equity power, the express, statutory, power of the court is ordinarily ample, and affords abundant and practicable relief in the premises in a less cumbersome and more economical manner, not only as such procedure may affect the court, but as well the litigants. Considered, then, as a full and complete substitute for a creditor's suit, the question arises as to whether the statutory remedy ordinarily supplants the remedy afforded by equity.

[1] The ordinary rule is that, where the law affords a remedy, equity will not assume jurisdiction; but in some jurisdictions, even with recognition being given to such rule, it has been held that, in the absence of statutory provision by which the pre-existing equitable jurisdiction is either expressly or impliedly denied, the equitable remedy may be invoked. Crass v. Memphis & C. R. Co., 96 Ala. 447, 11 So. 480; Greil Bros. Co. v. City of Montgomery, 182 Ala. 291, 62 So. 692, Ann. Cas. 1915D, 738; Chapman v. American Surety Co., 261 Ill. 594, 104 N. E. 247; 1 Pomeroy's Eq. Jur. 279, 280. And in one case it has been held that the statutory proceedings supplementary to execution do not exclude the equitable remedy by creditors' suit. Enright v. Grant, 5 Utah, 334, 15 P. 268. But, quite to the contrary, see MacLaury v. Hart, 121 N. Y. 636, 24 N. E. 1013, where it was said that "a court of equity is never at liberty to draw to its general jurisdiction a question remitted to a competent and sufficient authority by express command of a statute, unless under some very exceptional circumstances, which do not exist here."

As an introductory statement to section 2295, volume 5, Pomeroy's Equity Jurisprudence, it is said: "It is a necessary result from the whole theory of the creditors' suits that jurisdiction in equity will not be entertained where there is a remedy at law; but such remedy, in order to oust and prevent jurisdiction in equity, must be in all respects as satisfactory as the relief furnished by a court of equity"—citing authorities.

[2] Notwithstanding the apparent contrariety of opinion with reference to the question which exists as between various respective jurisdictions, by weight of authority therefor the rule in this state appears to be well settled that, if statutory proceedings supplemental to execution of a judgment furnish adequate relief, they are exclusive of the equitable remedy afforded by means of a creditor's suit. 7 Cal. Jur. 800 et seq. However, as indicating a contrary view, especially as applied to alleged fraudulent transfers of property by the judgment debtor, see Swift v. Arents, 4 Cal. 390.

In the case of Phillips v. Price, 153 Cal. 146, 148, 94 P. 617, 618, it is said: "That, since our statutes have provided a method of reaching such assets by supplementary proceedings, there is no longer, in cases where the statutory method is adequate, any ground for the interposition of equity." And in Herrlich v. Kaufmann, 99 Cal. 271, 276, 33 P. 857, 859, 37 Am. St. Rep. 50, in effect the rule is announced that a creditor's suit will not lie, except "in those exceptional cases in which it appears that equity must be invoked because legal remedies are unavailing." See, also, Matteson, etc., Mfg. Co. v. Conley, 144 Cal. 483, 77 P. 1042; Emmons v. Barton, 109 Cal. 662, 42 P. 303.

The allegations in the complaint of the creditor's suit upon which the plaintiff relied for the appointment of the receiver were as follows:

"That said defendant corporation is engaged in the business of drilling an oil well at Venice, California, and has drilled such oil well which is located on the following described property, Lot One (1), Block 'Q,' Ocean Strand Tract, Venice, California, to a depth of 5,765 feet; that said defendant corporation expects to obtain production at a depth of 4,500 feet; that said well of said defendant corporation is in proven territory, and is surrounded by producing oil wells; that said well, if placed on production, will have an estimated capacity of 400 barrels of oil per day; that said defendant corporation has expended to date the sum of $60,000.00 in the drilling of said well to its present depth.

"That plaintiff herein is a judgment creditor of the defendant corporation in the amount of $3,463.00; that execution has been issued on said judgment and returned unsatisfied; that plaintiff is informed and believes and therefore alleges that said defendant corporation has liabilities outstanding in the amount of $18,000.00; that if said well is placed on production it will be possible to pay and discharge all such liabilities; that if said well is permitted to be placed on production said well will have a market value of $120,000.00; that the corporation is now without any cash or liquid funds; that said property is now in the possession of the County Assessor and is advertised for sale on July 21, 1931, for the nonpayment of taxes; that there are unpaid claims of laborers who are pressing for payment and threatening attachment proceedings; that numerous creditors have threatened to cause attachments to be levied and the sheriff placed in charge of said property; that if said property is permitted to be sold at such tax sale and if such property is permitted to be levied upon by creditors through attachment and execution proceedings the assets of said defendant corporation will be dissipated and wasted and the creditors receive practically no payments on their obligations; that plaintiff is informed and believes that an arrangement can be worked out whereby the necessary money to complete said well can be borrowed if a receiver is appointed and the attachment creditors and the county assessor restrained from making any sales; that it is impossible for the defendant corporation to make such financing on account of such threatened attachment proceedings by creditors."

[3, 4] An examination of such pleading reveals the fact that the situation there pre-

sented was not one wherein adequate relief was impossible of attainment through the employment of the means made available to the plaintiff by the terms of the statutes to which reference has been had. Moreover, aside from the general allegation "that execution has been issued on said judgment and returned unsatisfied," the so-called complaint is silent as to whether at any time preceding the filing of the suit the judgment creditor availed himself of the remaining remedy or remedies afforded him by the provisions of the statutes. Specifically, and waiving the question of the assumed right of the appointment of a receiver as an ultimate implied right arising from such statutes, as hereinbefore has been indicated might accrue to the plaintiff, the complaint is destitute of any allegation of fact showing either the institution, or the pursuit, of any "proceedings supplemental to execution," as outlined in sections 714 to 723, inclusive, of the Code of Civil Procedure. But more than that, although in apparent recognition of the provision expressed in subdivision 4 of section 564 of the Code of Civil Procedure to the effect that, before a receiver may be appointed in proceedings in aid of execution, as hereinbefore set forth, the complaint contained the allegation that execution had been returned unsatisfied—the complaint contained additional allegations in substance that the judgment debtor was the owner of an oil well "in proven territory * * * surrounded by producing oil wells," which well had been drilled to a depth of 5765 feet, and "if placed on production will have an estimated capacity of 400 barrels of oil per day; * * * that said defendant corporation has expended to date the sum of $60,000 in the drilling of said well to its present depth." From the pleading itself, it thus becomes manifest that, notwithstanding the general rule regarding the conclusiveness of the return of a writ to the effect that no property can be found of which the judgment debtor is the owner, the admitted fact with regard to the actual ownership by the defendant of property upon which the writ of execution might have been levied and upon a sale of which property, at least in part the judgment might have been satisfied, should result in a conclusion that the statutory prerequisite preliminary to the filing of a creditor's suit regarding the implied inability of the plaintiff to satisfy his judgment from the sale of property belonging to the defendant, in fact had not been met or complied with by the plaintiff.

[5] It must be apparent that the ultimate purpose in placing a writ of execution in the hands of the sheriff is to realize a satisfaction of the judgment. His return to the writ "wholly unsatisfied" is at least an indication that no property belonging to the judgment debtor can be found. Ordinarily, such a return is regarded as conclusive of such fact; but manifestly, where the person who has a right to rely upon that fact sets up other independent facts which utterly repudiate the fact that the judgment debtor has no property subject to execution, it would be but a travesty to permit a conclusion arising from the sheriff's return to the writ to prevail.

[6, 7] From all the foregoing, and in the instant circumstances, it follows, not only that the "creditor's bill" was improperly brought, but as well, if not for other reasons unnecessary to be here noticed, that it failed to state a cause of action. The fact that the corporation had consented to the appointment of a receiver of its assets and business is wholly immaterial to the question of whether the court thereby acquired jurisdiction. Elliott v. Superior Court, 168 Cal. 727, 145 P. 101; 22 Cal. Jur. 458, and authorities there cited.

[8] Where a complaint fails to state a cause of action, an order by the court by which a receiver is appointed therein is of no validity. Hobson v. Pacific States Mercantile Co., 5 Cal. App. 94, 89 P. 866. See, also, Salisbury v. Wilcox, 128 Cal. 347, 60 P. 979; Lewis v. Shaw, 77 Cal. App. 99, 246 P. 86; Col Co. v. Superior Court, 196 Cal. 604, 238 P. 926.

[9] The order appointing the receiver being void, it follows that any subsequent order which might be made by the court based upon the assumed validity of its former order likewise would be invalid. Sullivan v. Gage, 145 Cal. 759, 79 P. 537; Grant v. Los Angeles, etc., Ry. Co., 116 Cal. 71, 47 P. 872.

This court has neither the authority to direct, nor the inclination to require, the lower court to perform a void act. It follows that the alternative writ heretofore issued herein should be discharged. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

## CITY OF LOS ANGELES v. AGARDY et al.*

Civ. 7785.

District Court of Appeal, Second District, Division 2, California.

Aug. 28, 1933.

Hearing Granted by Supreme Court Oct. 27, 1933.

**1. Eminent domain ⊂⇒246(3), 265(5).**

Where, after interlocutory judgment in eminent domain action, city was enjoined from proceeding under ordinance, city's failure to continue action *held* not voluntary "abandonment" so as to entitle defendants, on dismissal, to attorney's fees in addition to costs (Code Civ. Proc. § 1255a).

[Ed. Note.—For other definitions of "Abandon; Abandonment," see Words & Phrases.]

**2. Eminent domain ⊂⇒265(5).**

In eminent domain action, defendants, after dismissal of action upon involuntary abandonment by plaintiff, *held* not entitled to allowance of appraiser's fees other than ordinary witness fees (Code Civ. Proc. § 1255a).

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Eminent domain action by the City of Los Angeles against John Agardy and Mary Agardy, Jennie Riley and William L. Riley, and others. From a judgment of dismissal on motion of defendants Riley, plaintiff appeals.

Affirmed in part, and in part reversed and remanded, with directions.

Erwin P. Werner, City Atty., Frederick von Schrader, Asst. City Atty., and Arthur W. Nordstrom and C. N. Perkins, Deputy City Attys., all of Los Angeles, for appellant.

Edward Brody and A. H. Swallow, both of Los Angeles, for respondents.

STEPHENS, Justice.

This is an appeal by the plaintiff from a judgment of dismissal entered in the superior court for defendants William L. and Jennie Riley. The facts are stated in the opinion.

In an eminent domain action under the Street Opening Act of 1903 (Stats. 1903, p. 376, as amended) the question of a proper award to defendants Riley for property to be taken was heard and determined by a board of referees and subsequently by the court upon exceptions. The court made its interlocutory judgment and caused the same to be entered August 17, 1925. On August 6, 1926, an injunction was issued in Blackburn v. City of Los Angeles, superior court No. 199097, the full effect of which is in dispute in the instant case and will hereinafter be discussed. Thereafter the city attorney reported to the council in part: "This injunction prevents any further steps being taken to complete this proceeding. I would suggest that you consider the matter with reference to commencing new proceedings." The council thereupon instructed the city attorney to prepare and present to the council an ordinance abandoning the proceedings, but no further action was ever had on this resolution by the city attorney or by the city council. Thereafter, however, proceedings were had to accomplish exactly the same improvement under another ordinance. On June 14, 1930, defendants Riley filed a notice of motion to dismiss the original action on the ground that "the same has been abandoned by the plaintiff" and for judgment of dismissal with costs and attorney's fees under section 1255a, Code of Civil Procedure. The city claimed that its acts could not be construed to amount to abandonment, but, "the court held otherwise and granting said motion further adjudged that the Rileys should recover their costs and expenses, including reasonable attorney's fees hereby taxed in the sum of $4,335.00." Thereafter defendants Riley filed their cost and disbursement bill in the sum of $8,835 and a motion followed to tax costs upon the grounds, among others, that costs as contained in the bill were excessive and unlawful. The court taxed the costs at the same figure fixed in its judgment just mentioned.

[1] The only difference between the instant case and the case of City of Los Angeles v. Abbott (Cal. Sup.) 17 P.(2d) 993, is that in the instant case an interlocutory judgment was rendered by the superior court prior to the issuance of the injunction, whereas in the Abbott Case it had not been prosecuted to the point of trial when the injunction was issued. In all other respects these two cases were identical in principle, and the Abbott Case is controlling over this one. Respondents contend that there was an actual abandonment in the instant case, but we think the facts do not bear out this conclusion. They contend that under section 1255a, Code of Civil Procedure, they are entitled to attorney fees in addition to costs of suit, but their contention in this respect is negatived by the Abbott Case above cited.

[2] It is contended by appellant that the sum awarded respondents in the interlocutory judgment included appraisers' fees, and that this allowance should not have been made as an item of costs. The case of City of Los Angeles v. Clay, 126 Cal. App. 465, 14 P.(2d) 926, supports this view.

Respondents make the point that the interlocutory judgment had become final because of the lapse of more than a year before the permanent injunction was issued, and thus attempt to distinguish it from the Abbott Case, but there is evidence in the record that less

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*For subsequent opinion see 33 P.2d 834.

than a year elapsed before the injunction was issued. Respondents also claim that the interlocutory judgment became the final judgment after the expiration of the 30-day period for payment, as provided in section 1251, Code of Civil Procedure, but the vice of this claim is that the proceedings are under a special act adopted by the Legislature and approved March 24, 1923, commonly called the Improvement Act of 1923, and the provisions of this act are such that this 30-day period could not apply thereto. From all that is furnished us, the proceedings were being followed and were being pressed in the usual and ordinary manner up to the time of the issuance of the injunction, in the case hereinabove referred to, and but for such injunction would in all probability have been pressed to a conclusion. It would seem then, without question, that the doctrine of the Abbott Case applies, that is, there was no voluntary abandonment.

The point made in respondents' brief to the effect that a new assessment could have been levied is not borne out by the facts, for the judgment enjoining the city is in broad terms a prohibition against any action under the ordinance.

The facts of this case entitle the respondents to a dismissal of the action, and the judgment is to that extent affirmed, with ordinary costs of the trial, but is reversed as to the allowance of appraisers' fees other than ordinary witness fees, and reversed as to the allowance of attorneys' fees. Each side is to bear its own costs on this appeal. The cause is remanded, and the superior court is directed to enter judgment in accord herewith.

We concur: WORKS, P. J.; CRAIG, J.

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134 Cal.App. 69

## CITY OF LOS ANGELES v. AGARDY et al.

Civ. 7883.

District Court of Appeal, Second District, Division 2, California.

Aug. 28, 1933.

**Eminent domain** 🔑**265(5).**

In eminent domain action, defendants, on dismissal of action caused by cessation of proceedings because of issuance of injunction against city, *held* entitled to ordinary trial costs, but not to attorney's fees or appraisers' fees other than ordinary witness fees.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by the City of Los Angeles against John Agardy and Mary Agardy, Jennie Riley and William L. Riley, and others. The action was dismissed, and, from an order taxing costs in favor of defendant Riley, the city appeals.

Affirmed in part, and in part reversed and remanded, with directions.

Erwin P. Werner, City Atty., Frederick von Schrader, Asst. City Atty., and Arthur W. Nordstrom and C. N. Perkins, Deputy City Attys., all of Los Angeles, for appellant.

Edward Brody and A. H. Swallow, both of Los Angeles, for respondents.

STEPHENS, Justice.

The basic facts of this appeal are the same as those of City of Los Angeles v. Agardy et al. (Cal. App.) 24 P.(2d) 915, which opinion is this day filed, and the reasons for the decision herein are expressed in such opinion. This appeal is on behalf of the city of Los Angeles from an order of the court taxing costs.

Respondents are entitled to a dismissal and to the ordinary costs of the trial, and the order is to that extent affirmed, but the order is reversed as to the allowance of appraisers' fees other than ordinary witness fees, and reversed as to the allowance of attorneys' fees. Each side is to bear its own costs on this appeal. The cause is remanded, and the superior court is directed to enter judgment in accord herewith.

We concur: WORKS, P. J.; CRAIG, J.

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134 Cal.App. 54

## Ex parte SALES.

Cr. 1759.

District Court of Appeal, First District, Division 1, California.

Aug. 26, 1933.

**1. Witnesses** 🔑**297.**

Witnesses rightly claimed privilege against self-incrimination when district attorney sought to elicit from them that they were among those who took victim to place of murder, and that they knew of murder plot, and that one witness was present when victim was buried alive.

**2. Witnesses** 🔑**305(1).**

Witnesses who agreed with district attorney to testify at murder trial to facts they revealed before grand jury did not thereby contract to waive their privilege against self-incrimination.

**3. Witnesses** 🔑**21.**

One having knowledge of material facts connected with commission of crime may be compelled to testify thereto unless his testimony would incriminate him, and any agreement by him as to whether or not he would testify is void.

**4. Witnesses 🔑305(1).**

That witnesses testified before grand jury *held* not waiver of their right to claim privilege against self-incrimination at murder trial.

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Application by Eugenia Sales for a writ of habeas corpus prayed to be directed to the sheriff of Contra Costa county to secure release of petitioner from custody upon a commitment for contempt for refusal to answer questions in a criminal case.

Writ granted, and petitioner discharged.

Thomas M. Carlson, of Richmond, Wilbur S. Pierce, of Oakland, Robert Collins, of Richmond, and Marvin B. Sherwin, of Oakland, for petitioner.

James F. Hoey, Dist. Atty., of Martinez, and Lewis F. Byington, of San Francisco, for respondent.

KNIGHT, Justice.

The petitioner, Eugenia Sales, and one Pastor Santellian were produced as witnesses for the people at the trial of a criminal action in the superior court in and for Contra Costa county, and, after being sworn, refused to answer the questions propounded by the district attorney upon the ground that their answers would tend to incriminate them. The court instructed them to answer, but they still refused so to do, and thereupon they were adjudged guilty of contempt, and each was sentenced to five days' imprisonment in the county jail and to pay a fine of $400, or, in default of such payment, to be imprisoned in said county jail at the rate of one day for each $4 of the said fine until said fine was satisfied. Upon being taken into custody by the sheriff of said county in obedience to the judgment of sentence, they applied to this court for, and were granted, writs of habeas corpus, the ground urged therefor being that under the attending circumstances they were legally justified in claiming the benefit of the privilege afforded by the constitutional guaranty that no person shall be compelled in any criminal action to be a witness against himself.

The two proceedings were heard as one; and the following are the facts, as they appear from the record: The criminal action in which petitioners were called upon to testify was one wherein several persons named Leon Kintanilla, Mrs. Theresa Kintanilla, V. Kang, E. Codog, Alberta Asis, Maria Galvez, and R. Costillo were indicted jointly and being tried for the murder of a young married woman named Cecelia Novarro. All of the accused persons, many of the witnesses including petitioners, and Mrs. Novarro, were Filipinos; and all except the petitioner Santellian belonged to a lodge or society which restricted its membership to persons of that nationality. The prosecution claimed and sought to prove that at a meeting of the lodge held in Stockton on the night of November 20, 1932, Mrs. Novarro was placed on trial for certain alleged matrimonial misconduct, and that at the conclusion of the trial was taken blindfolded in an automobile, driven to an isolated spot on an island in Contra Costa county, and there thrust into an excavation and buried alive. The indictment charging these persons with the commission of the murder was founded in part at least on the testimony given before the grand jury by these petitioners, and, according to the affidavits filed herein by the district attorney, petitioners, subsequent to the finding of the indictment and prior to the commencement of the trial, confirmed the truth of the testimony given by them before the grand jury and agreed with the district attorney to again so testify at the trial. The testimony given by them before the grand jury as it is shown by the reporter's transcript thereof was substantially as follows: Eugenia Sales stated that she was a member of said lodge or society and attended the meeting thereof in Stockton on the night in question; that one of the purposes of the meeting was to investigate the alleged misconduct of Mrs. Novarro, and that petitioner was present in the lodge room part of the time the investigation was going on, but that she did not know what determination had been made thereof. However, at the close of the session, so she stated, she was told by Mrs. Kintanilla to go along with the others, including Mrs. Novarro, in an automobile driven by Kintanilla; that the other occupants of the car were Mrs. Novarro, Mrs. Kintanilla, and four other women; that they drove out to the island, and upon arriving there sat in the car for a few minutes until some one came up and said "everything is ready"; that she was then instructed to get out of the car and follow the others; that Mrs. Novarro's face was "bandaged," her body wrapped "with something," and she was crying; that after proceeding some distance they reached "the big hole in the ground there" and that she saw some of the women push Mrs. Novarro into the hole and then throw "dirt on top"; after which they returned to the automobiles and drove away.

Santellian stated that he was a resident of Pittsburg, Contra Costa county; that his wife was a member of said society but that he was not; that on the evening in question he took his wife to Stockton in an automobile to attend said meeting, and waited outside for her; that later on during the evening a number of women came down from the lodge room, among them being the defendants Mrs. Kintanilla, Mrs. Asis, and Mrs. Galvez; that they told him that they wanted him to drive some of the women in his car out to the island; that he protested against doing so, and that Mrs. Asis "pinched" him and told him to go and to follow the other car driven by Kintanilla; that although he knew "something was going to happen to Mrs. Novarro" he did not know exactly what was going to be done with her; that he pleaded with those present to forgive her, to let her go, stating that she was going back to Honolulu, but that both Mrs. Asis and Mrs. Galvez told him that they were going to punish her, and that they would not let her go; that after driving some distance Mrs. Asis told him to stop the automobile, and he did; that the women got out of the car, and that he then learned that they were going to put Mrs. Novarro "down in a hole"; that he protested again, but that Mrs. Galvez told the others to "go on, go ahead"; that Mrs. Galvez then took hold of Mrs. Novarro's arm and shoulder on one side, and Mrs. Asis took her by the arm and shoulder on the other side, and accompanied by the others they disappeared in the darkness, going toward the hole; that about half an hour afterwards they returned, but Mrs. Novarro was not with them; that they then re-entered the automobiles and drove back to Stockton.

As before stated, however, when petitioners were produced as witnesses at the trial and the district attorney sought to elicit from them the foregoing facts, they refused to testify upon the ground that their answers would tend to incriminate them.

The powers a trial court may exercise, and the rights and privileges a witness may claim under said constitutional privilege, are clearly defined in a number of cases, among them being In re Berman, 105 Cal. App. 37, 287 P. 126. Many of the earlier authorities are there cited and discussed, the most outstanding of which is the case of United States v. Burr (In re Willie), 25 Fed. Cas. page 38, No. 14,692e, wherein Chief Justice Marshall laid down certain rules for guidance which, as stated in the Berman Case, have since been followed universally in all jurisdictions. The learned Chief Justice there said: "When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims. It follows necessarily then, from this statement of things, that if the question be of such a description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact. If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath; as it is one of those cases in which the rule of law must be abandoned, or the oath of the witness be received. The counsel for the United States have also laid down this rule according to their understanding of it; but they appear to the court to have made it as much too narrow as the counsel for the witness have made it too broad. According to their statement a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description."

[1] Applying the foregoing rules to the cases of these petitioners, it becomes evident that they were entitled to the benefit of the privilege granted by the provisions of said constitutional guaranty, because manifestly the admission or confession on their part that they were among those who took the unfortunate Mrs. Novarro out to the place where it is claimed she was murdered, that they knew at the time she was removed from the automobile that she was to be done away with, and that one of the petitioners was present when Mrs. Novarro was shoved into the excavation and covered with earth, could be urged against them afterwards as strong circumstances tending to establish that they, too, were principals in the commission of the crime. True, as pointed out by the district attorney, both petitioners claimed in effect

that up to the time they arrived at the scene of the crime they were unaware of the manner in which Mrs. Novarro was to be punished, and Santellian claimed that after he learned what was to be done he protested against it; but these circumstances alone would not exculpate them from criminal responsibility; and in any event the truth of their statements in this regard would be for a jury to pass upon, in case petitioners were thereafter charged with being parties to the crime; and, if rejected, their admissions that they were present at the scene of the crime at the time it was perpetrated, together with the other admissions above mentioned, would doubtless serve as incriminating facts tending to establish their guilt. Under such circumstances, petitioners, in our opinion, were entitled to claim said privilege. As stated in People ex rel. Taylor v. Forbes, 143 N. Y. 219, 38 N. E. 303, 306, cited in the Berman Case, if to the mind of the witness the testimony he is called upon to give "may constitute a link in the chain of testimony, sufficient to convict him when other facts are shown, or to put him in jeopardy, or subject him to the hazard of a criminal charge, indictment, or trial, he may remain silent."

The district attorney contends that petitioners in seeking to invoke the aid of said constitutional privilege are doing so for a fraudulent purpose—that they did not decline to testify because of any fear that their answers would be incriminating or subject them to prosecution for the commission of the crime—that their real purpose in so refusing was to shield and protect those who were then on trial for the commission of the crime. There are doubtless good grounds for so believing; nevertheless, the attending circumstances, as they are shown by the record before us, are such as to place petitioners in the position where they may legally claim the benefit of the constitutional privilege, and, that being so, under the decision in the Berman Case, it can make no difference what other purpose they may have sought to serve by their silence.

[2-4] The district attorney also cites authorities to the effect that a person may enter into a contract to waive said constitutional privilege, in which event he may be thereafter estopped from claiming the same; and in this connection it is contended that petitioners' agreement to testify at the trial to the same state of facts revealed by them before the grand jury constituted such a contract. We are unable to sustain this view. The action is one instituted and prosecuted by and in the name of the people of the state for the alleged commission of a crime; and consequently there can be no contractual relationships with the witnesses. In other words, any person having knowledge of material facts connected with the commission of a crime may be compelled to testify thereto, regardless of his personal inclinations, unless, as here, his testimony would tend to incriminate him; and any agreement attempted to be made by him as to whether or not he would testify would be wholly void and no rights whatever would be created thereunder. Nor did the fact that petitioners testified before the grand jury constitute a waiver of their right to claim the privilege at the trial of the action. Overend v. Superior Court, 131 Cal. 280, 63 P. 372; In re Berman, supra.

For the reasons stated, it is our opinion that the imprisonment of the petitioner Eugenia Sales pursuant to said judgment of contempt is illegal; and therefore, so far as her commitment thereunder is concerned, she is discharged from custody.

We concur: TYLER, P. J.; CASHIN, J.

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134 Cal.App. 784

## In the Matter of the Petition of Pastor SANTELLIAN for a Writ of Habeas Corpus.

Cr. 1758.

District Court of Appeal, First District,
Division 1, California.
Aug. 26, 1933.

Application for writ of habeas corpus prayed to be directed to the sheriff of Contra Costa county to secure release of petitioner from custody upon a commitment for contempt for refusal to answer questions in a criminal case.

Writ granted; petitioner discharged.

Thomas M. Carlson, of Richmond, Wilbur S. Pierce, of Oakland, Robert Collins, of Richmond, and Marvin B. Sherwin, of Oakland, for petitioner.

James F. Hoey, Dist. Atty., of Martinez, and Lewis F. Byington, of San Francisco, for respondent.

KNIGHT, Justice.

This is a proceeding in habeas corpus, whereby the petitioner, Pastor Santellian, seeks to be discharged from the custody of the sheriff of Contra Costa county, after commitment issued pursuant to a judgment of contempt for refusing to testify as a witness for the prosecution in a criminal case then on trial in the superior court in and for said county, upon the ground that his answers to the questions would tend to incriminate him. It is a companion proceeding to one, this day decided, entitled: In the Matter of the Petition of Eugenia Sales for a Writ of Habeas Corpus, 24 P.(2d) 916. All of the facts and circumstances involved in the present proceeding are set forth and considered in the opinion filed therein; and for the reasons and upon the grounds there stated it is ordered that, so far as the commitment here involved is concerned, the petitioner be, and he is, hereby discharged from custody.

We concur: TYLER, P. J.; CASHIN, J.

## GRIFFITH v. SUPERIOR COURT IN AND FOR MENDOCINO COUNTY et al.*

Civ. 4963.

District Court of Appeal, Third District, California.

Sept. 1, 1933.

Hearing Granted by Supreme Court Oct. 30, 1933.

**1. Divorce 🔑156.**

Interlocutory divorce decree, dealing with parties' status and property rights, becomes final as to such rights, if not vacated in mode prescribed by law.

**2. Divorce 🔑243.**

Order, entered in court's minutes by clerk after husband's default in divorce suit, that interlocutory divorce decree was granted wife, property agreement confirmed, and wife awarded monthly sum for support until court's further order, constituted court's order, though formal decree, embodying property agreement, but not referring to support allowance, was subsequently signed by court and filed; no findings being required.

**3. Judgment 🔑191.**

Clerk's entry of court's decision in court's minutes constitutes rendition of judgment, where findings are not required.

**4. Divorce 🔑243.**

Court's formal divorce decree, embodying parties' property agreement, whereby wife waived all claim to support, but not referring to allowance therefor until court's further order by interlocutory decree, entered in minutes by clerk, *held* not in irreconcilable conflict with such entry.

**5. Divorce 🔑200, 245(1).**

Court granting wife interlocutory divorce decree had jurisdiction to order monthly payments for her support by husband and to modify such order by subsequent formal decree.

Application by Helen Griffith for a writ of certiorari to review an order of the Superior Court in and for Mendocino County, W. D. L. Held, Judge, modifying the terms of an interlocutory divorce decree.

Writ discharged.

Charles Kasch, of Ukiah, for petitioner.

Taft & Spurr, of Ukiah, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Petitioner herein seeks by this writ to review an order of the superior court modifying the terms of an interlocutory decree of divorce.

Pending the divorce trial, the parties entered into an agreement for a settlement of their property rights. This agreement, among other provisions, contained the following: "It is mutually agreed between the parties hereto that the wife in consideration of the premises and in consideration of the payment to her of $75.00, and $20.00 per month as hereinafter set forth, does by these presents, grant and convey unto the husband all the right, title and interest in and to all property now owned by the said husband and wife as community property; and in consideration for such release and conveyance by the said wife the said husband agrees to pay to the wife the sum of $75.00 plus the further sum of $20.00 per month in advance on the 10th. day of each calendar month commencing with the date hereof, and the wife hereby acknowledges receipt of the payment of said sum of $75.00, together with the further sum of $80.00 for said monthly payments otherwise due on the 10th. days of July, August, September and October, 1930." And "It is further agreed that in the event of the remarriage or death of the wife, that the aforesaid monthly payments of $20.00 shall terminate as of the date of such remarriage or death."

Upon her part the wife released the husband from any debts or liabilities owing by each to the other except the payments above set forth, released any right, interest, or title as heir at law or otherwise to any property of the husband, and waived any claim to contest or oppose the will of the husband or right to homestead allowance, and agreed that in any divorce proceedings pending or hereafter to be brought she would not have the right to recover costs, counsel fees, alimony, support or maintenance, thereby waiving all claims thereto and any claim for future maintenance or support; the agreement being intended as a complete adjustment of all property rights.

At the trial the defendant failed to appear, and his default was entered. Judgment was ordered for plaintiff, and the following was entered in the minutes of the court: "An interlocutory decree of divorce was granted

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*For subsequent opinion see 35 P.2d 317.

plaintiff, property agreement confirmed. Plaintiff was awarded $20.00 per month for support beginning August 1, 1930, until the further order of the court."

Subsequently a formal decree was signed by the court and filed in the records thereof, which decree embodied in full the agreement hereinbefore referred to between the parties, but made no reference to an allowance until further order of the court, as appeared in the minutes above.

A final decree was entered at the expiration of one year, which by reference adopted the terms of the interlocutory decree. Defendant continued to make payments of $20 monthly as provided in the agreement, but in May, 1933, moved the respondent court to modify the interlocutory decree by reducing the amount of $20 per month allowed therein as permanent support and maintenance, to nothing. This motion was based upon the terms of the minute order, which as will be noted, provided that payments should continue until terminated by order of court. Upon the hearing thereof the motion was granted, and petitioner, being dissatisfied, seeks here to review the order so made, contending that the formal decree submitted to the court and signed by the judge was the order of the court, and that the time had expired within which defendant could move to modify the same.

[1-3] The motion was properly directed to the interlocutory decree, for where, as here, the interlocutory decree deals with the status of the parties and also with their property rights, that decree, if not vacated in the mode prescribed by law, becomes a final decree as to such property rights. Abbott v. Superior Court, 69 Cal. App. 660, 232 P. 154; Sullivan v. Superior Court, 72 Cal. App. 531, 237 P. 782. The question urged by counsel is, What constitute the judgment and decree of the court, whether the minute order as entered by the clerk or the formal decree signed by the judge and filed in the case? There seems to be no doubt under the circumstances of this case the order as noted and entered by the clerk constitutes the order of the court. The defendant had defaulted and no findings were necessary nor required and none were made (Waldecker v. Waldecker, 178 Cal. 566, 174 P. 36), and, where findings are not required, the entry of its decision in the minutes of the court constitute a rendition of judgment. Crim v. Kessing, 89 Cal. 488, 26 P. 1074, 23 Am. St. Rep. 491; Aspegren, etc., Co. v. Sherwood, etc., Co., 199 Cal. 532, 250 P. 400; Azadian v. Superior Court, 88 Cal. App. 296, 263 P. 298; In re Cook, 83 Cal. 415, 23 P. 392; Collins v. Belland, 37 Cal. App. 139, 173 P. 601; Brown v. Superior Court, 70 Cal. App. 734, 234 P. 409, 411, which says: "Nor is it necessary that the judgment be signed by the judge. The judge's signature gives it no additional validity. 14 Cal. Jur. p. 914; Crim v. Kessing, supra. The principal object of the judge's signature is to afford the clerk a surer means of correctly entering what the court has adjudged." There are instances where the order should contain sufficient information on its face to apprise the parties of the scope and limit of the rights determined. This is particularly true in cases where injunctive relief is granted, for an injunction should contain sufficient information on its face to apprise the party upon whom it is served of what he is restrained from doing. Wheeler v. Superior Court, 82 Cal. App. 202, 255 P. 275. We do not believe, however, the decree necessary in the instant case is so complicated as to bring it within the foregoing rule. The entry in the minutes sets forth the interlocutory decree was granted, the confirmation of the property settlement, the amount of support, the amount and period of its duration, which seems complete in all its essential elements.

[4] Neither do we find any irreconcilable conflict between the minute entry of the clerk and the formal order filed in this proceeding. The wife in her agreement waived all claim she might have to support and maintenance, which agreement was confirmed by the interlocutory decree and spread upon the minutes of the court.

The court, however, acting within the scope of its authority, saw fit to award to the wife $20 per month for support until modified by further order; when the matter of continuing the payments thereof was again brought to the attention of the court, an order was made terminating the same. Such an order does not, nor does it appear that it was the purpose of the court in any way to, change or modify the written agreement of the parties and ratified by the court.

We must assume that petitioner meant to comply with her agreement when she executed the following: "The wife hereby waives, yields up any and all claims that she may have to support and maintenance from the said husband," and, "neither of the parties shall in any divorce proceeding now pending * * * have the right to recover therein any * * * support or maintenance."

[5] The court had jurisdiction to make the original order directing the payment of support to the plaintiff in the divorce action and had authority to modify such order. Nothing is here said as to the validity of the property agreement between the parties which is not affected hereby; our attention being confined solely to the order of the court.

The writ is discharged.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

## McCALL v. SUPERIOR COURT IN AND FOR IMPERIAL COUNTY.*

Civ. 1074.

District Court of Appeal, Fourth District, California.

Sept. 7, 1933.

Hearing Granted by Supreme Court Nov. 6, 1933.

**1. Mandamus** ⚷172.

Court's erroneous determination that court made oral ruling constituting order denying motion to discharge attachment did not foreclose application for writ of mandate to enter order granting subsequent motion for same relief; being conclusion of law, not fact finding on conflicting evidence (Code Civ. Proc. §§ 182, 951, 1003, and § 963, subd. 2).

**2. Mandamus** ⚷172.

Trial court's erroneous conclusion on law question must be disregarded by reviewing tribunal.

**3. Attachment** ⚷7.

Complaint alleging that consideration for purchase of land failed in material respects and that land was not adapted to growth of grapefruit, as defendants represented, stated cause of action in tort for fraud, so as to entitle defendant to writ of mandate requiring court to discharge attachment (Code Civ. Proc. § 537).

**4. Attachment** ⚷7.

Allegations of complaint, in action for fraudulent misrepresentations of quality of land, that defendants failed to perform covenants of lease from plaintiff, did not indicate that cause of action was for breach of contract so as to authorize attachment (Code Civ. Proc. § 537).

Application by Thaddeus D. McCall for a writ of mandate to the Superior Court of the State of California in and for the County of Imperial.

Application granted, and issuance of writ ordered.

M. W. Conkling, of San Diego, for petitioner.

Harry W. Horton and S. L. McCrory, both of El Centro, for respondent.

JENNINGS, Justice.

The petitioner has made application to this court for the issuance of a writ of mandate to compel the respondent superior court to make and enter its order granting petitioner's motion to discharge an attachment issued in an action pending in said court entitled Harry E. Griffin and Almeda H. Griffin, Husband and Wife, Plaintiffs, v. Thaddeus D. McCall et al., Defendants.

The complaint of the plaintiffs in said action was set forth in three counts. In the first count it was alleged that plaintiffs had been induced to enter into an agreement to purchase certain land from the defendants and to pay therefor a specified sum of money in conformity with said agreement through certain alleged false and fraudulent representations regarding the quality of the land and its adaptability to the growth of grapefruit trees, which representations were made by the defendants with intent to deceive and defraud plaintiffs; that the said land was not suitable for the growth of said fruit trees; that upon discovery of the fraud plaintiffs had given notice of rescission and had demanded that the defendants return to them all moneys paid by plaintiffs on account of the purchase price of said land; that plaintiffs offered to return and redeliver possession of said land to the defendants.

The second count of the complaint was in the form of an action to recover the money paid by plaintiffs to defendants pursuant to the agreement for the sale of the land which, by reason of failure of consideration, it was alleged was held by the defendants for the use and benefit of plaintiffs.

The third count of the complaint was in the form of an action for money had and received. It is evident that the causes of action set forth in the three counts arose out of the same transaction and that they are in reality identical.

Upon the filing of the complaint in said action, the plaintiffs sought and obtained a writ of attachment and caused the same to be levied upon certain property of the defendants. The defendants thereupon moved the court to release from attachment all property in excess of that required to satisfy the demands of plaintiffs. This motion was granted and the court ordered all property released from attachment except the sum of $6,455 on deposit in a certain bank in the city of Los Angeles. Subsequently, the defendants filed an undertaking for the release of attachment, whereupon the court ordered that the property remaining under attachment be released. In the meantime the defendants in said action moved the court to dissolve the writ of attachment on the ground that it had been improperly issued. The record herein discloses the absence of any written order of court granting or denying the motion. It also appears that no entry was made in the minutes of the court indicating that the court took any action with respect to the motion. The cause later proceeded to trial and a judgment was finally rendered in favor of the plaintiffs for the amount which they had paid on account of the purchase price of the land, together with interest on said sum. On March 7, 1933, ten days after the rendition of the aforesaid judgment, the defendant T. D. McCall, petitioner herein,

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 36 P.2d 642.

moved the court to discharge the writ of attachment originally issued in the action of Griffin v. McCall on the ground that it had been improperly issued. On May 5, 1933, the respondent court on motion of the plaintiffs made its order striking from the files of the action the notice of motion to discharge the attachment filed by petitioner, T. D. McCall, on March 7, 1933, together with the affidavit of said T. D. McCall filed in support of the motion. This last order which constitutes the basis for the present proceeding was evidently made on the ground that the respondent court had in the year 1930 passed upon and determined adversely to petitioner the prior motion to discharge the attachment in said action and that the motion of petitioner to discharge the attachment made on March 7, 1933, was subject to the inhibition contained in section 182, Code of Civil Procedure, as this section then provided.

[1, 2] The first contention advanced by respondent is that the order of May 5, 1933, striking from the files the second motion to discharge the attachment and its supporting affidavit was necessarily based upon a finding that the court in 1930 had passed upon and refused a motion of the same tenor. In other words, it is urged that the respondent court made a finding upon a disputed question of fact, and that in accordance with the familiar rule a reviewing court may not disturb a finding of fact when it appears that the evidence respecting the fact is conflicting. It may be observed that there is no doubt that the evidence bearing upon the question of whether the court had passed upon and determined the first motion to discharge the attachment was conflicting. Affidavits alleging that the court had acted upon the prior motion and had denied it were presented by plaintiffs and a number of counter affidavits were filed by petitioner. Among the counter affidavits was one made by the judge before whom the action was pending in which affiant declares positively that he "made no ruling whatever upon the (prior) motion to dissolve the attachment."

There is, however, no doubt that whether or not the court passed upon the prior motion and orally announced his decision thereon, no written direction denying the motion was ever made and no entry appears in the court's minutes indicating that the court passed upon the motion. Section 1003 of the Code of Civil Procedure provides that every direction of a court or judge, made or entered in writing and not included in a judgment, is denominated an order and that an application for an order is a motion. Petitioner's original motion for dissolution of the attachment was therefore an application for an order. Since the court made no written direction granting or denying the application, it follows that no order with respect to the application was ever made. That this must be true is further apparent, since subdivision 2 of section 963, Code of Civil Procedure, specifically provides that an order dissolving or refusing to dissolve an attachment is an appealable order and section 951 of the Code of Civil Procedure provides that on an appeal from an order the appellant must furnish the reviewing court with a copy of the order from which the appeal is taken. If the court could orally direct that a motion for discharge of attachment be denied and this could be regarded as an order, it would follow that the defendant could appeal therefrom; but since he could not furnish to the reviewing court a copy of the order his appeal would manifestly be unsuccessful.

Respondent's order striking from the files petitioner's motion to dissolve the attachment amounted to a refusal to entertain the motion, and it is alleged that the order was made on the ground that the prior motion for discharge of the attachment had been denied. However, in order that the court should have found that there was a denial of the prior motion it must have determined that its oral decision denying the motion was an order. The court's determination that there was an oral ruling denying the prior motion and that this oral ruling was an order amounts, not to a finding of fact, but to a conclusion upon a question of law, and as we think the court's conclusion in this regard was erroneous, we entertain the opinion that petitioner is not foreclosed from making application for a writ of mandate. An erroneous conclusion upon a question of law drawn by a trial court must be disregarded by a reviewing tribunal. Dufton v. Daniels, 190 Cal. 577, 581, 213 P. 949.

[3] The disposition of respondent's preliminary contention that the court's order striking petitioner's motion for dissolution of the attachment was based upon a finding of fact upon conflicting evidence leaves for consideration respondent's principal contention which is that the writ of attachment properly issued and that petitioner's application for the issuance of a writ of mandate requiring respondent to discharge the attachment should not be granted.

In this connection, it is urged that the complaint in Griffin v. McCall alleges that there was an entire failure of consideration, and that under such circumstances the law implies a promise to return the money paid on account of the contract. It is further pointed out that the complaint alleges a rescission of the contract by the vendees on the ground that the consideration had entirely failed and a demand in the prayer of the complaint, not for damages occasioned to the plaintiffs through the fraud of the defendants, but for the return of the money paid on the purchase price. It is argued that these circumstances show that the cause of action alleged in Griffin v. McCall was not one sounding in tort, but that it was in reality a cause of action sounding in contract based on the implied contract of the vendors to return the money paid on the purchase price after it had become evident that the consideration for the promise of the vendees to pay the agreed price for the land had entirely failed. It is contended that these facts show that the action was one based upon an implied contract for the direct payment of money, and that it therefore came strictly within the provisions of section 537 of the Code of Civil Procedure, and that the writ of attachment properly issued, and that petitioner is not entitled to have the attachment dissolved as having been improperly issued.

We think that respondent's contention in this regard may not be sustained. The carefully worded allegation of the complaint with respect to failure of consideration is that "the consideration running to these plaintiffs for the making and entering into said contract has failed *in all material respects.*" (Italics ours.) It is significant that the findings of the trial court were to the same effect, viz.: "That the consideration * * * has failed in material respects." We think that an allegation that the consideration has failed in all material respects is not equivalent to an allegation of total failure of consideration. It is further to be noted that the complaint contains no allegation that the land which was sold to plaintiffs was valueless, the allegations in this regard being confined to statements that the land, because of the quality of its soil and climatic conditions, was not adapted or suited to the growth of grapefruit. It is also admitted in the complaint that the plaintiffs had received the sum of $86.43 from the sale of grapefruit produced on the land.

These circumstances strongly indicate that the gravamen of the action in Griffin v. McCall was fraud and that the cause of action was therefore one which sounded in tort rather than in contract. We think therefore that the reasoning of the Supreme Court in Stone v. Superior Court, 214 Cal. 272, 4 P.(2d) 777, 77 A. L. R. 743, is directly applicable to the problem here presented and that on the authority of the aforesaid decision petitioner's application should be granted. Respondent contends that Stone v. Superior Court, supra, has in effect been overruled by the recent decision of the Supreme Court in Bennett v. Superior Court (Cal. Sup.) 21 P.(2d) 946. We do not so understand it. It is clearly stated in the later decision that no element of fraud entered into the transaction which constituted the foundation for the cause of action therein and that the entire transaction sounded in contract. It is pointed out that the Stone Case held strictly to the rule that an action based on fraud is ex delicto and that no implied contract for the direct payment of money, or any other honest implication could possibly be ingrafted upon a transaction that was fraudulent ab initio. The decisions in Hallidie v. Enginger, 175 Cal. 505, 166 P. 1, San Francisco Iron & Metal Co. v. Abraham et al., 211 Cal. 552, 296 P. 82, and Powers v. Freeland, 114 Cal. App. 146, 299 P. 736, are in line with the decision in Stone v. Superior Court, and confirm our opinion that petitioner's motion for discharge of the attachment in Griffin v. McCall should have been granted.

[4] Petitioner endeavors to make some point of the fact that the complaint in Griffin v. McCall contained allegations that in a certain lease agreement executed by plaintiffs as lessors and the McCall Brothers Company, a corporation, as lessee, the lessee agreed to farm the land and to irrigate, cultivate, and fertilize the same and prune the trees and to develop the land into a mature and profitable grapefruit grove, and that the defendants in said action did not properly perform their contract in this regard. These allegations are said to indicate that the cause of action in Griffin v. McCall was not entirely one ex delicto and that bound up in it and forming a part of it is an alleged breach of contract by the defendants in said action sufficient to support the issuance of the writ of attachment. The contention thus presented may not be sustained. The allegations with respect to the execution of the lease and the failure of defendants to perform their covenants to cultivate, irrigate, and fertilize the land are entirely incidental to the cause of action set out in the first count, which is unmistakably one based solely and entirely on the alleged fraud perpetrated by defendants and therefore a cause of action sounding purely in tort. There is no contention that the causes of action for money had and received and for money held for the benefit of plaintiffs in the action are different in any respect from the cause of action set forth in the first count. The decisions in Stone v. Superior Court, supra, and Powers v. Freeland, supra, are therefore directly in point and furnish ample authority for the issuance of a writ of mandate requiring the superior court, respondent herein, to discharge the writ of attachment illegally issued by it in the case of Griffin v. McCall et al.

Petitioner's application is therefore granted, and it is ordered that the writ issue as prayed for.

I concur: MARKS, Acting P. J.

BARNARD, J., being absent, does not participate in this opinion.

134 Cal.App. 126

## NICHOLLS GRAIN & MILLING CO. v. JERSEY FARM DAIRY CO. et al.

Civ. 7896.

District Court of Appeal, Second District, Division 2, California.

Sept. 8, 1933.

**1. Appeal and error 🔑201(1), 1046(1).**

In action on guaranty, trial of case on amended complaint before different judge *held* not prejudicial, where no objection was made, evidence on second trial supported judgment, and had no relation to that on first trial.

**2. Pleading 🔑248(4).**

Amendment of complaint in action on guaranty to allege that agent executed guaranty for principal without believing in good faith he had such authority *held* proper since not changing nature of action (Civ. Code, § 2343).

**3. Principal and agent 🔑190(3).**

In action against agent signing as principal guaranty contract to pay for hay, evidence *held* to support finding that agent executed contract without believing in good faith he had authority to do so (Civ. Code, § 2343).

**4. Limitation of actions 🔑46(10).**

Action on guaranty for price of hay delivered to buyer within three years of filing of amended complaint *held* not barred by three or four year limitation statutes, since liability did not accrue until hay was delivered and buyer failed to pay (Code Civ. Proc. § 338, subds. 1, 4).

**5. Limitation of actions 🔑24(1).**

Action to recover from agent, signing guaranty to pay for hay without authority, as principal, being founded on written contract, four-year limitation statute was applicable (Code Civ. Proc. § 337, subd. 1).

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Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Nicholls Grain & Milling Company against the Jersey Farm Dairy Company, George Masters, and others. From a judgment against second named defendant, he appeals.

Affirmed.

Freston & Files, of Los Angeles (James A. McLaughlin, of Los Angeles, of counsel), for appellant.

Louis M. Lissner, of Los Angeles (Isadore H. Prinzmetal, of Los Angeles, of counsel), for respondent.

ARCHBALD, Justice pro tem.

From a judgment rendered against him as principal upon a writing signed by him as agent for one Robert Gardiner, president of defendant Jersey Farm Dairy Company, a corporation, defendant Masters has appealed.

The writing upon which the action is based is in the form of a letter on the stationery of Jersey Farm Dairy Company, addressed to plaintiff, which in effect guarantees "future purchases of Mr. Pete Deghi" from plaintiff for feeding his cows. The letter was signed, "Robert Gardiner, By Geo. Masters." The original complaint was filed April 29, 1929, against defendant Jersey Farm Dairy Company, Golden State Milk Products Company, Robert Gardiner, George Masters, and Pete Ciabarri, and sets forth eight deliveries of hay to Deghi, sold solely by reason of said guaranty. The case was tried before the Honorable Raglan Tuttle, who filed an opinion in writing in which he found that the written guaranty had been executed by defendant Masters without any authorization from the other defendants and without belief on his part that he had authority to so act. The court ordered briefs to be filed on the question of amendment of the complaint. After considering the briefs submitted it then made an order granting leave to plaintiff to file its proposed amended complaint, which in effect alleged, in addition to the allegations of the original complaint, excluding allegations referring to the other defendants, that Masters executed said writing without believing in good faith that he had authority so to do. The court also ordered that all defendants except Masters have judgment against plaintiff. The amended complaint was filed June 10, 1930. The eight alleged sales and deliveries of hay to Deghi occurred on different dates from December 19, 1927, to February 14, 1928. An answer to the amended complaint was filed by defendant Masters on June 20, 1930, which among other defenses pleaded the statute of limitations, and the cause came on for trial on the issues raised by the amended complaint and answer before the Honorable Thomas C. Gould, on September 26, 1930, who found in substance that the writing was executed and delivered by Masters without any belief in good faith or at all that he had authority to sign the same; that he did not have authority so to do; that plaintiff sold and delivered said hay relying upon said guaranty; and that Masters had notice of such deliveries and of the amount thereof. Judgment was entered on such findings for $2,658.35 against Masters.

Appellant contends (1) that he was deprived of a fair trial in that neither judge heard and weighed the entire testimony taken; (2) that the trial court erred in permitting the amendment of the complaint as it did and changing the complaint from an ex contractu liability to one ex delicto; (3) that no bad faith is shown by the evidence on Masters' part; and (4) that the action is barred by the statute.

[1] 1. The record shows that at the trial before Judge Gould both sides stipulated that the hay was sold and delivered to Deghi as alleged in the amended complaint, that it had not been paid for, and that Deghi was at all times a shipper of the Jersey Farm Dairy Company, which was a condition of the continuing guaranty. Evidence was then introduced by plaintiff proving the execution of the writing by Masters and that Deghi's financial condition was such that plaintiff would not sell him without a guaranty of his account and would not have delivered him any hay except for such guaranty. Defendant Masters, who was the auditor of Jersey Farm Dairy Company and who also kept Deghi's books, testified that he had no authority from any one to execute the writing, and that he knew Gardiner, defendant company's president, would not sign any such letter because he had frequently so told him.

So far as the record shows, no objection was made to proceeding before the second judge, but it apparently shows a perfect willingness to so proceed on the part of both parties. So far as the record shows there was no necessity to resort to any of the evidence produced at the first trial, and that produced before Judge Gould amply supports the judgment. As far as the evidence is concerned, the second trial had no relation to the first, and appellant had the benefit of a trial before a judge who had not already found against him on the material point involved. We fail to see where he was prejudiced in any way.

[2] 2. There has been some confusion in the past as to the nature of the liability upon which this action is based. Some of the decisions hold that to treat it as a liability on the contract, which did not have apt language to charge the agent personally, would result in making a new contract for the parties (Hall v. Crandall, 29 Cal. 567, 89 Am. Dec. 64), and that the only remedy against an agent so acting is either for damages for breach of his warranty of authority to execute the contract or for deceit. Section 2343 of the Civil Code makes one who assumes to act as agent "responsible to third persons as a principal for his acts" when he enters into a written contract in the name of his principal without believing, in good faith that he has authority so to do. Whatever the doubt may have been in the past as to such liability, in our opinion it is now set at rest by the well-reasoned case of Borton v. Barnes, 48 Cal. App. 589, 192 P. 307, 309, in which the Supreme Court refused to grant a hearing. In that case the defendant, an officer of a corporation, without authority so to do, entered into a written contract in the name of the company employing a broker to sell certain real estate belonging to the corporation. The first count of the complaint, as in the complaint here, charged that defendant entered into the contract without believing in good faith that he had the authority to do so, and the court so found. It was contended on appeal that plaintiff's only right of action was under the second and third counts, which had been dismissed, and some of the same cases are cited as are cited by appellant here on his contention that the action is one ex delicto and not on the contract. The court, after discussing the cases holding otherwise and also section 2343 of the Civil Code, held that the plaintiff was entitled to recover "in the same manner as he could have done had the defendant been the real principal in the transaction." The court quotes with approval from the case of Kennedy v. Stonehouse, 13 N. D. 232, 241, 100 N. W. 258, 260, 3 Ann. Cas. 217, 219. In the latter case the court decided that, whatever the modern rule might be, the Legislature, in taking from the proposed Field Code the provisions from which our own sections 2342 and 2343 of the Civil Code are copied in toto, which codified the law of New York as announced in the earlier decisions in that state, adopted the rule of liability announced in such cases, saying: "It does not admit of doubt that plaintiff has a right of action *upon the contract* against the defendant as principal therein, for the statute just quoted declares in express language that 'one who enters into a written contract in the name of his principal without believing in good faith that he has authority to do so'—and that is this case—'is responsible to third persons as a principal.'" (Italics ours.) We are of the opinion that there was no change in the nature of the action by the amendment, and that it was properly made.

[3] 3. Appellant's own testimony amply supports the finding that he entered into the contract in the name of the principal without believing in good faith that he had authority so to do, and that is all the statute requires.

[4, 5] 4. It is urged that the cause of action is barred by subsections 1 or 4 of section 338, Code of Civil Procedure. The liability under the guaranty did not accrue until the sales were made and Deghi had failed to pay. Assuming that the price was to be paid in cash on delivery, no liability could accrue until the date of delivery at the earliest. All of the deliveries appear to be within three years from the date the amended complaint was filed, so there seems to be no merit in appellant's contention, even assuming that it is a liability created by statute. Under the cases cited, however, the liability being that of the principal, who is not bound by the unauthorized contract, would, as we have said, seem to be one founded upon an instrument

in writing, action on which is barred if not brought within four years from its accrual. Section 337 (1), Code Civ. Proc.

Appellant also urges that section 2343 of the Civil Code should be literally construed if in derogation of the common law. The section does not seem to need any construction, as its language is clear and definite.

Judgment affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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133 Cal.App. 775

## PEOPLE v. WAGNER.

**Cr. 251.**

District Court of Appeal, Fourth District, California.

Aug. 21, 1933.

Rehearing Denied Aug. 25, 1933.

Second Petition for Rehearing Denied Aug. 30, 1933.

Hearing Denied by Supreme Court Sept. 19, 1933.

**1. Criminal law 🔑511(3).**

Evidence corroborating accomplice must tend in some degree to implicate defendant, but it need not be by direct evidence (Pen. Code, § 1111).

**2. Criminal law 🔑511(1).**

Evidence corroborating accomplice *held* sufficient to support conviction for kidnapping (Pen. Code, § 1111).

The sheriff who arrested defendant testified to statements made by defendant implicating himself in kidnapping, and testimony of accomplice was also corroborated by persons who were kidnapped.

**3. Criminal law 🔑369(1).**

Ordinarily, evidence of commission of other independent offenses by defendant is inadmissible.

**4. Criminal law 🔑369(2).**

Evidence that other independent offenses were committed by codefendant *held* not inadmissible in kidnapping prosecution.

**5. Criminal law 🔑369(2).**

Testimony respecting collection by kidnappers of money offered by victims as price of release *held* not inadmissible as evidence of other offense committed subsequent to consummation of object of conspiracy (Pen. Code, § 209).

As regards admissibility of evidence of other offenses committed by codefendant after object of conspiracy was consummated, crime of kidnapping for purpose of extortion and robbery was not complete when victims were released from enforced confinement.

**6. Kidnapping 🔑5.**

Evidence showing attempted destruction of defendant's clothing by accomplice in kidnapping before payment of final installment of money demanded of victim *held* admissible (Pen. Code, § 209).

**7. Criminal law 🔑1186(4).**

In kidnapping prosecution, admitting evidence showing burning of house, where victims had been confined, if error, *held* harmless, where other evidence would require conviction (Pen. Code, § 1258).

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Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Ray Wagner was convicted of kidnapping, and he appeals.

Affirmed.

Joseph Rosenthal, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

JENNINGS, Justice.

The defendant and seven other persons, including James Doolen, were jointly accused by an indictment returned by the grand jury of Los Angeles county of the crime of kidnapping for the purposes of extortion and robbery. Upon arraignment the defendant entered a plea of not guilty and a plea of former jeopardy. The trial of the cause resulted in a verdict of conviction of the charge of kidnapping and a verdict in favor of the people upon defendant's plea of former jeopardy. The defendant then presented to the trial court a motion for a new trial, which was denied. The court thereupon pronounced judgment upon the defendant whereby it was ordered that he be imprisoned in the state prison at Folsom. From the judgment thus rendered, and from the court's order denying his motion for a new trial, the defendant has prosecuted this appeal.

Appellant specifies three alleged errors committed by the trial court which he contends entitle him to a reversal of the judgment. These are, first, that the court erred in denying his motion to dismiss the indictment on the ground that there was not sufficient evidence to corroborate the testimony of the alleged accomplice, James Doolen, regarding the participation of appellant in the commission of the offense; second, that the court improperly admitted evidence of other crimes and offenses over appellant's objection; third, that the court erroneously admitted evidence of acts and transactions which occurred and declarations that were made subsequent to the consummation of the object of the conspiracy.

[1, 2] With reference to the first of the aforesaid errors allegedly committed by the trial court, it may be remarked that the record shows that the witness James Doolen was an accomplice of appellant in the commission of the offense of which appellant was convicted, and that the testimony of this accomplice which detailed appellant's participation in the offense undoubtedly contributed largely to appellant's conviction.

No useful purpose can be subserved by indulging in an extended discussion of the legal principles involved in the subject of corroboration of accomplices. Section 1111 of the Penal Code of California provides that a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by other evidence which tends to connect the defendant with the commission of the offense.

The defense of noncorroboration is a most common defense in cases of the character of that in which this appeal is presented, particularly when, as here appears, the prosecution relies most strongly upon the accomplice's testimony to establish a defendant's guilt. The following language from the decision in People v. Yeager, 194 Cal. 452, 473, 229 P. 40, 49, contains a correct statement of the rule applicable to the problem which is here presented: "It has been held that to corroborate an accomplice the evidence need not establish the actual commission of the offense, nor extend to every fact and detail covered by the statements of the accomplice, or to all the elements of the offense, nor prove that the accomplice has told the truth. The corroborative evidence must tend in some slight degree, at least, to implicate the defendant. While it need not be strong, more is required by way of corroboration than a mere suspicion. It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight. It is not necessary to corroborate the accomplice by direct evidence. If the connection of the accused with the alleged crime may be inferred from the corroborating evidence in the case, it is sufficient."

The record herein shows that the testimony of the accomplice was corroborated in many essential features by the testimony of other witnesses who appeared during the trial of the action. In particular, it was corroborated by the testimony of the witness Thomas F. Donaldson. This witness, who was the sheriff of Dunclin county in the state of Missouri, arrested appellant near Malden, Mo., on October 9, 1932. During the course of his testimony he related a conversation which he had with appellant subsequent to the latter's arrest. During this conversation appellant made certain statements relative to the commission of the offense and in particular made the following statement: "It is just a case of one racket playing on another; if we had kidnapped a legitimate business man we should have deserved punishment. * * * The amount was demanded of him, he would make in a month." He also stated the name of the victim of the plot which was described in detail in the accomplice's testimony. The details of the kidnapping were related fully in the testimony of the witnesses E. L. Caress and Mrs. E. L. Caress and fully corroborated the testimony of the accomplice with regard to this feature of the case except that the last-named witnesses did not identify any of the persons who held them up and kept them prisoners for more than 24 hours. Another witness, C. A. Jenks, a police officer of the city of Long Beach, testified that he was present at a shooting affray which took place at Long Beach on the evening of December 21, 1930, between a number of men who were in a Dodge automobile and two police officers, and that appellant was one of the men who were in the rear seat of the automobile at that time. This latter testimony is corroborative of the testimony of the accomplice regarding the affray and of appellant's presence at the time of its occurrence.

Reference might be made to the testimony of othere witnesses produced by the prosecution which in certain particulars corroborated the accomplice's testimony. We think that no useful purpose would be served by thus amplifying the opinion herein. From that portion of the testimony which is specifically noted it is obvious that there was sufficient corroboration of the accomplice's testimony to meet the requirements of the statute, and that the court's action in refusing to dismiss the accusation against appellant was amply justified. It follows likewise that the judgment may not be disturbed as being one based upon a verdict which lacks evidentiary support.

[3, 4] In support of his contention that the trial court committed reversible error in admitting evidence of other offenses, appellant cites certain evidence which was admitted over his objection which tended to show the commission of other crimes by individuals other than appellant who had been jointly indicted with appellant for the commission of the crime of kidnapping. To support his contention that the admission of such evidence constituted reversible error, appellant relies on the well-established rule that evidence of the commission of other independent offenses by a defendant in a criminal action is not admissible to prove the commission of the particular crime of which he is accused and for which he is being tried. Subject to certain exceptions which it is not here necessary to discuss, the existence of the rule is conceded. The reasons which support the rule are that the commission of offenses other than that

charged does not constitute a necessary link in the evidentiary chain; that it tends to divert the attention of the fact triers from the main issue in the case which is the defendant's guilt or innocence of the particular crime charged; that the admission of such evidence is highly prejudicial to the defendant. People v. Gibson, 107 Cal. App. 76, 289 P. 937; People v. King, 23 Cal. App. 259, 261, 137 P. 1076..

It is apparent, however, that the rule is not here applicable. The evidence of which he complains was evidence which tended to prove that certain independent offenses were committed by certain of his codefendants. Our attention has not been called to any evidence which tended in any way to connect appellant with the commission of these independent crimes. The record herein indicates that appellant was tried separately from his codefendants. We are not therefore warranted in indulging in the violent assumption that appellant was in the least prejudiced by the admission of evidence tending to prove that certain individuals indicted jointly with him for the commission of a specified offense had committed other independent offenses.

**[5, 6]** Appellant's third specification of error is that the court improperly admitted evidence of other offenses which were committed and other transactions which occurred subsequent to the consummation of the object of the conspiracy. Reliance is placed upon the general rule that acts and declarations of a confederate which are admissible against a defendant in a criminal action may be only those which were performed and made during the pendency of the criminal enterprise and in furtherance of its objects, and that acts and declarations of a coconspirator done and made subsequent to the accomplishment of the object of the conspiracy are not to be regarded as contributing to the execution of the original common design. People v. Aleck, 61 Cal. 138.

The evidence which was admitted of which appellant here complains consists of the testimony of the accomplice Doolen which related to the burning by Doolen and Frank of the house in which the victims of the kidnapping were confined after their seizure, the attempted destruction of appellant's clothing by Doolen, and the repeated demands for money made by Doolen of Caress and the payment of certain sums of money by Caress to Doolen subsequent to the release of Caress and his wife by appellant and those who were jointly indicted with him. It is evidently appellant's view that, after the release of the victims from their enforced confinement, the object of the conspiracy was fully consummated, and that although, as here appears, no money or property had then been secured, no evidence relating to the performance of any act by any one of the conspirators which occurred subsequent to such release is admissible in evidence. This contention is carried to the point that it is urged that testimony relating to the collection by one of the conspirators of the identical sum of money which was originally offered by the victim as the price of the release of himself and his wife was inadmissible, and that its reception constituted reversible error. The statement of this naive contention carries its own refutation. Appellant and his confederates were charged with the crime of kidnapping for the purposes of extortion and robbery, an offense denounced by section 209 of the Penal Code. We take it to be self-evident that kidnapping in the general acceptation of the term is no childish pastime indulged in merely for the sake of the sport. The very language of the statute denounces kidnapping as a crime when it is practiced "for purposes of extortion or robbery." It is therefore evident that the object of kidnapping which is made an offense by the statute is not primarily the seizure and restraint of the victim, but the mulcting him or his relatives or friends of money or other property through coercion. The record herein shows that the attempted destruction of appellant's clothing by the accomplice Doolen took place prior to the payment to the accomplice of the final installment of money demanded of the victim Caress. The evidence relating to this fact was therefore, in our opinion, relevant and competent, and the trial court properly admitted it.

**[7]** It does appear from the record that the burning of the house occurred shortly after the payment of the final installment of money by Caress. The accomplice testified that he and a codefendant set fire to the house where the victims of the kidnapping were confined because it was feared that fingerprints of some of the persons engaged in the plot might be discovered about the premises. It nowhere appears in the record that appellant participated in the firing of the house or that he knew of it or was in any way connected with it. Frankness impels the declaration that, if this evidence had been excluded, the jury nevertheless could have entertained no reasonable doubt as to the commission of the offense charged or of appellant's active participation in its accomplishment. This being true, no substantial rights of appellant were affected by the admission of the evidence and, even if it be assumed that error was committed by its reception, the error was harmless and must be disregarded. Pen. Code, § 1258; People v. Stokes, 5 Cal. App. 205, 213, 89 P. 997; People v. Lorraine, 90 Cal. App. 317, 334, 265 P. 893.

The judgment and order from which this appeal has been taken are therefore affirmed.

I concur: MARKS, Acting P. J.

BARNARD, P. J., being absent, does not participate in this opinion.

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## WALTER et al. v. ENGLAND.

Civ. 4828.

District Court of Appeal, Third District, California.

Aug. 14, 1933.

Rehearing Denied Sept. 13, 1933.

Hearing Denied by Supreme Court Oct. 11, 1933.

**1. Physicians and surgeons 🔑14(4).**

Dentist is required to use only that degree of learning and skill ordinarily possessed by dentists of good professional reputation in locality.

**2. Physicians and surgeons 🔑14(1).**

Dentist does not guarantee results of his professional services, but impliedly contracts that he possesses reasonable degree of skill and learning possessed by others of profession in locality, and that he will use reasonable and ordinary care and skill.

**3. Physicians and surgeons 🔑18(8).**

Cases depending on knowledge of scientific effect of medicine or result of surgery must ordinarily be established by expert testimony, but such rule does not apply to facts which may be ascertained by ordinary use of senses of nonexpert.

**4. Appeal and error 🔑1001(1).**

Appellate court cannot disturb verdict for lack of evidentiary support, unless it is without substantial support in evidence.

**5. Physicians and surgeons 🔑18(8).**

Evidence *held* to support verdict against dentist for malpractice, where hypodermic needle broke in patient's gum.

**6. Physicians and surgeons 🔑16.**

Doctor is not liable for honest mistake of judgment, unless negligently made.

**7. Trial 🔑133(6).**

In malpractice case, general rule is that reference to fact that defendant is insured is prejudicial error, evil which cannot be cured by striking out testimony, nor by admonition to jury not to consider it.

**8. Trial 🔑127.**

In malpractice action, evidence showing defendant was insured was proper, where conversation showing it involved admission of responsibility by defendant.

**9. Appeal and error 🔑1060(1).**

Evidence in malpractice action showing defendant was insured having been properly admitted, reference thereto in argument to jury *held* not prejudicial error.

**10. Witnesses 🔑275(5).**

In malpractice action against dentist limiting cross-examination of plaintiff *held* not error (Code Civ. Proc. § 2044).

The record showed a lengthy cross-examination, but defendant claimed court erred in not permitting him to cross-examine plaintiff as to her social and club activities following accident, during which period she claimed to have been suffering severe pain from effect of needle imbedded in her gum.

**11. Evidence 🔑477(2, 4).**

In malpractice action, nonexpert witness could testify concerning plaintiff's health and pain suffered by her, where opinion was derived from observation and was received in connection with statement of facts on which it was based.

**12. Physicians and surgeons 🔑18(10).**

In malpractice action, instruction requiring that presumption of skill and learning of defendant and his exercise thereof must be overcome by testimony of expert witnesses was properly refused.

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Appeal from Superior Court, Merced County; H. Z. Austin, Judge.

Action for malpractice by Mae G. Walter and husband against A. F. England. From an order denying a motion for judgment notwithstanding the verdict and from an adverse judgment, defendant appeals.

Affirmed.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Conley, Conley & Conley, of Fresno, for appellant.

F. M. Ostrander and C. Ray Robinson, both of Merced, for respondents.

BURROUGHS, Justice pro tem., delivered the opinion of the court.

This is an action for damages for malpractice. The defendant is a dentist. A jury awarded the plaintiffs the sum of $12,000. On motion for a new trial, the court made its order that said motion would be denied on condition that the plaintiffs remit $4,500 of the judgment. The plaintiffs conformed to the condition, and the motion was thereupon denied.

This is an appeal by the defendant from the judgment, and also from an order of the court denying his motion for a judgment in his favor, notwithstanding the verdict.

The first assignment of error is that the verdict is not supported by the evidence. Before examining the evidence, it is well to state a few of the settled principles of law, relative to this class of actions, which, in our opinion, control the question of the sufficiency of the evidence adduced on the trial to sustain the verdict and the judgment.

[1] Barham v. Widing, 210 Cal. 206–213, 291 P. 173, 176, is authority for the rule "that a dentist, like a physician, is required to have and use only the degree of learning and skill which is ordinarily possessed by

dentists of good professional reputation in that locality. This is the rule with respect to physicians. Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654. Undoubtedly the same rule applies to dentists."

[2] In Roberts v. Parker, 121 Cal. App. 264–267, 8 P.(2d) 908, 909, after citing with approval the above rule, it is held that it is also well settled that neither physician nor dentist can be held to guarantee the results of his professional services. "However, it is equally well settled that in undertaking the treatment of a patient the practitioner impliedly contracts and represents not only that he possesses the reasonable degree of skill and learning possessed by others of his profession in the locality, but that he will use reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he is employed; and that, if injury is caused by a want of such skill or care on his part, he is liable for the consequences which follow. Houghton v. Dickson, 29 Cal. App. 321, 155 P. 128; Nelson v. Painless Parker, 104 Cal. App. 770, 286 P. 1078; Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654; Ley v. Bishopp, 88 Cal. App. 313, 263 P. 369; Patterson v. Marcus, 203 Cal. 550, 265 P. 222."

[3] A settled principle of law is stated in Barham v. Widing, supra, 210 Cal. 214, 291 P. 173, 176, as follows: "It is equally true that cases which depend upon knowledge of the scientific effect of medicine, or the result of surgery, must ordinarily be established by expert testimony of physicians and surgeons. Perkins v. Trueblood, 180 Cal. 437, 181 P. 642. This rule, however, applies only to such facts as are peculiarly within the knowledge of such professional experts, and not to facts which may be ascertained by the ordinary use of the senses of a nonexpert." The foregoing doctrine is also sustained in Roberts v. Parker, supra; Patterson v. Marcus, supra; Nelson v. Painless Parker, supra.

[4] We must also keep in mind the well-settled rule of law, that the appellate court cannot disturb a finding of the trial court or the verdict of a jury, for lack of evidentiary support, unless such finding or verdict is without substantial support in the evidence. 10 Cal. Jur. 1165, § 378; Jacobson v. N. W. P. R. R. Co., 175 Cal. 468, 166 P. 3; Perera v. Panama-Pacific Int. Exp. Co., 179 Cal. 63, 175 P. 454.

In the light of these recognized principles of law, we will examine the evidence for the purpose of ascertaining whether the verdict is sustained by any substantial evidence.

[5] On the morning of March 5, 1929, the appellant, Dr. A. F. England, who was a duly licensed dentist, practicing his profession in the city of Merced, was performing certain dental work for the plaintiff, Mrs. Mae G. Walter. (The latter's husband is joined herein as plaintiff because of the marital relation.) Preliminary to the extraction of two of Mrs. Walter's teeth, Dr. England selected a hypodermic needle and syringe for the purpose of giving a local anæsthetic of novocaine, and inserted the needle in the fibrous tissue of the gum on the right side of the lower jaw. The needle thus inserted broke, and about one inch of it remained in the internal pterygoid muscle of the patient's jaw. Although there have been operations to remove the needle, they have been unsuccessful, and, according to Mrs. Walter, the embedded needle causes her to suffer severe pain, headaches, and nervousness.

E. L. Walter accompanied his wife to the office of Dr. England, and was present when the needle was broken. He testified in substance that upon entering the office he said, "Good morning, Doctor; how are you feeling? Something to that effect"; to which the doctor said he felt like hell. "Well, he said he had been up to Stockton the night before at a dental meeting; that he felt terrible; that he had a very severe attack of hay fever; that particular morning it had been bothering him." The witness stated further that during the time the doctor was operating upon his wife he (the witness) was "standing right along * * * right beside the chair. * * *" "He worked on the tooth that he was going to extract. He took this needle or bone, or whatever they call it, and he injected it into her right jaw and when he did he let out an oath and said we were in an awful mess * * *. He said, 'Jesus Christ, we are in for a hell of a mess.' I said, 'What is the matter, doctor; what did you do?' 'Well,' he said, 'this needle is broke off; we've got to get it out in a hurry.'" In answer to a question as to the time that it took after he started to inject the needle, and such time as he made the statement, the witness said, "Well, I would say it was momentarily * * * well, he turned, he got this injection, this needle, and naturally opened her mouth, and I saw him making the injection, and he turned and made that remark."

"Q. How much time elapsed from the time that you saw him make the injection until he turned and made the remark, if you know? A. Oh, I don't imagine it was more than a second or two.

"Q. Now, then, after he had made this remark and stated that he had to get the needle out right away, then what did he do, if anything? A. Why, he put the * * * he brought the end of the thing down that he had in his hand, and proceeded to lance the gum; went in to try and get the needle out.

"Q. And during the time of that operation, did he say anything to you or show you anything in regard to the needle? A. Well, when he lanced it, he worked quite a little while probing, and so forth, and when he lanced clear in, I don't know what you would call it, but nevertheless, it was way in the back of the jaw. I was standing right there and he showed me; I would say there was a hole in the gum in the back where the two jaws come together; it appeared to be probably half an inch in diameter, or something of that sort, and I observed a—I called it a strap hinge, it was a little piece, it looked to me like a little pink strip of cartilage, and he took his probe and he said, 'Well, here's where the thing went in,' and he said, 'I made the mistake of not putting it on either side'; he said, 'I shoved it right through the center of it, and that is the cartilage and gristly and very tough,' and he says, 'that is what caused it to break.' Inasmuch as it is broken and closed over the needle, he couldn't cut that or she would lose the use of her jaw, so he stopped cutting at that time; didn't try to lance any further."

"Q. And when he showed you that point, and stated that he made a mistake, that he ought to go on either side, did he say anything in regard to what caused the needle to break? A. Yes, that shoving through that cartilage, that tough part.

"Q. Did he say anything else in reference to that, other than what you have related as to where the needle should have been placed? A. On either side of it."

The witness further testified that at another time he called at Dr. England's office and asked him if, when the doctor went to San Francisco, he would not call on his insurance company and tell them that he had made a mistake on a friend and reimburse him for the expense. At which request the doctor broke down and cried and said: " 'I will. It is very decent of you to come in here and take the attitude that you have taken,' and he said, 'I'll go down to my insurance company when I am in San Francisco and will tell them that I have made a mistake, and I'll be back either tomorrow or the next day and will come in and let you know what the results have been.' " He further stated that the doctor did not come in to see him on his return from San Francisco, and he had not spoken to him since.

Plaintiff Mae E. Walter testified that she and her husband and Dr. and Mrs. England had been on terms of social intimacy and friendship over a long period of time; that on the morning of March 5, 1927, she and her husband visited Dr. England by appointment to have some dental work done for her. She said, "Hello, Doc, how are you?" and he said he felt like hell. She asked him the trouble and he said he was out till the wee hours of the morning, and had a terrible case of hay fever. She got into the dentist's chair and he looked over her teeth and did some cleaning and put some iodine in her mouth. He looked at the tooth that had been aching and said it had to come out, and also a wisdom tooth needed to be extracted. Then he started to inject the hypodermic needle. In answer to a question she said, "Well, it seemed to me that it went in all at one time—just went right straight in; it went in just very quickly."

"Q. Then, did Dr. England say anything to you in regard to the needle? A. Yes, he uttered an oath; said we were in for an awful mess."

The witness further testified in response to a question that from the time he first injected the needle, that is, from the time she first felt the point of it in contact with her gum, until he said they were in an awful mess, the time that elapsed was—"A. Well, just as quick as that, I don't know; a few seconds." (Mr. Ostrander: For the record, indicating by a snap of his fingers.)

"Q. Then, after the needle broke off, what did he do? A. Well, he showed Mr. Walter where it went in; he first began to carve and try and get the needle, because he could see, he said, where it was, and carved for quite some time before he took an X-ray; then he lost it and could not see it; he took X-rays.

"Q. And, do you remember what he said to Mr. Walter? A. Yes, he said that 'I have made a mistake—this is where I made my mistake,' he said, 'I should have—I put it through the cartilage and it should have been put on the side.' "

On January 3, 1930, the witness again visited Dr. England's office in company with a Mrs. Wayne, and the doctor took X-rays, and the witness testified she asked him if the needle had moved and he said, "Yes, possibly a quarter of an inch."

Mrs. L. A. Wayne, called as a witness, testified that she was present with Mrs. Walter in the office of Dr. England when an X-ray picture was taken, and, after the doctor had examined the pictures, heard him say the needle had moved a little.

Anne Johnson, who was the nurse in the office of Dr. England, and who was present at the time of the accident, testified that the length of time that elapsed from the time that Dr. England began the operation until the needle broke was from thirty to forty-five seconds.

Dr. England testified that he intended to pull the six year old molar and the wisdom tooth on the lower right jaw of the patient; that he was using a Cook's carpule syringe of the cartridge type; that the anæsthesia to be given was a block anæsthesia with novocaine, which, in the language of the witness, "It means that we inject back into the mandible, the ramus of the mandible, blocking the inferior dental nerve which supplies all the teeth of the lower jaw on that side." He further testified that the time that elapsed from the time he first inserted the needle in the tissue until it broke was fifteen, thirty, or forty-five seconds. He did not time himself in the injection. Dr. England further testified as to the entire course pursued by him in the treatment of the patient, which included calling in another dentist, consulting an oral surgeon living in Oakland, and various other steps, including the taking of X-ray pictures. Dr. England denied the statements which were attributed to him by the plaintiffs. After the testimony of defendant had been given, his counsel propounded to experts a hypothetical question based upon the testimony of the doctor, and, in answering the question, the experts stated that in their opinion the procedure followed by Dr. England, using the language of one of them, "would do justice to any community in the United States." Included in the question last adverted to was the following: "That the doctor placed the syringe in the right hand, resting his thumb on the plunger, and that prior to the injection, or the commencing of the injection of the anæsthetic, the doctor determined the internal oblique line by palpation with the left index finger, along the lower right jaw, and determined the point for the injection as approximately one centimeter above the occlusal surface of the plane of the lower molar teeth, the distance being measured with the eye; assuming that there was no inflammation visible about the area in which the injection was to be made, and that the doctor began the insertion of the needle at the point of selection, using the center of his left index fingernail as a guide, and gradually inserted the needle, commencing to inject the solution immediately after the entrance of the needle and continuing as the needle moved farther into the tissue; that the doctor did not change the angle of the needle after making the puncture of the tissue and felt no obstacle or resistance other than the normal resistance of the tissue; that the needle broke suddenly and without warning near the hub of the syringe, but the hub of the syringe did not touch the gum, it being about an eighth of an inch from the gum at the time the needle broke; that the broken end of the needle completely disappeared in the tissue * * and that the needle broke about thirty or forty-five seconds after the commencement of the injection of the novocaine."

The foregoing portion of the hypothetical question is consistent with the testimony of Dr. England, but it is inconsistent with the testimony of Mr. and Mrs. Walter, wherein the latter witnesses testified that the length of time that elapsed from the time of the first insertion of the needle to the time it broke was not more than a second or two, and that, when he injected the needle into her jaw, he let out an oath and said, "We are in for a hell of a mess." It is inconsistent with the statements of Dr. England, made to Walter at the time, that he had made a mistake; that he shoved the needle right through the cartilage, which is gristly and very tough; that he should have put it on either side; and that is what caused it to break. This, coupled with his further statement to Mr. Walter, that he would tell the insurance company he had made a mistake, merely raised a conflict in the evidence. It is true that all of these statements were denied by the doctor, but, in spite of the fact that questions of method and procedure in cases of this kind can be passed upon only by experts, still the matters testified to by the plaintiffs are not technical matters, but purely questions which may be evidenced by nonexpert witnesses. It is said in Barham v. Widing, supra, in speaking of the necessity of expert testimony to establish the result of surgery: "This rule, however, applies only to such facts as are peculiarly within the knowledge of such professional experts, and not to facts which may be ascertained by the ordinary use of the senses of a nonexpert."

In Nelson v. Painless Parker, 104 Cal. App. 770–774, 286 P. 1078, 1080, it is said: "Appellants' next contention is that in an action of this kind expert evidence is necessary to establish the negligence, and that there being none, the judgment should be reversed. We will agree with the first part of this proposition partially only, for reasons which will later be more particularly referred to. But as has been said heretofore, there was some testimony of experts relative to what should have been done by the operating dentist, and it was for the jury to determine the facts. They saw and heard the witnesses and saw the gestures which illustrated the proper thing to be done, and were in a better position to resolve the conflict than is an appellate court. It is true that the evidence of negligence in the instant case was slight, and its probative value may not be great, but we may not interfere with the finding of the jury on that account. As has been said by the Supreme Court in a recent case, 'Where the verdict of the jury and the judgment based thereon may be sustained on any reasonable theory, it will not be disturbed by an appellate court.' Rocha v. Garcia, 203 Cal. 167, 263 P. 238, 240."

Under these authorities we have in the record the evidence of Dr. England as to his procedure in the case at bar. We have the evidence of other experts that such procedure was proper, but we also have the evidence of the plaintiffs on the lay matters that he did not follow such procedure. As an example, instead of taking thirty to forty-five seconds to insert the needle and inject the novocaine, he did so in one or two seconds. Dr. England is certainly an expert, and, according to the testimony of the plaintiffs, he admitted that he shoved the needle into the cartilage, which was very tough, and which he said was the cause of the needle breaking, and he said that he should have injected it on either side. This evidence, if the jury believed it, was sufficient to sustain the verdict. As said in Roberts v. Parker, 121 Cal. App. 264–270, 8 P.(2d) 908, 910: "In other words, after the verdict of the jury has been fairly rendered, all the circumstances of the case, together with any reasonable inference which may be drawn therefrom, will be marshaled in support of the judgment. Barham v. Widing, supra. Measured by the foregoing rules, the circumstances of the present case are legally sufficient to sustain the jury's verdict." Dimock v. Miller, 202 Cal. 668, 262 P. 311, 312; Ley v. Bishopp, supra.

In Dimock v. Miller, supra, in speaking of the weight to be given to evidence, it is said: "If the rule of law is as contended for by defendant and appellant, and it is necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science." We think the evidence in the present case is sufficient to sustain the verdict of the jury.

[6] It is also contended that the statements claimed by Mr. and Mrs. Walter to have been made to them by the appellant, even if made, do not constitute evidence of fault or negligence on the part of Dr. England; that there is a broad distinction between an admission of negligence and an admission of mistake. Donahoo v. Lovas, 105 Cal. App. 705, 288 P. 698; Markart v. Zeimer, 67 Cal. App. 363, 227 P. 683; Patterson v. Marcus, 203 Cal. 550, 265 P. 222; Rising v. Veatch, 117 Cal. App. 404, 3 P.(2d) 1023, cited in support of appellant's claim, are all cases wherein it was charged that the doctor had made a mistake, but it was a mistake in diagnosis. It is the law that a doctor is not responsible for such error. In other words, a doctor is not liable for an honest mistake of judgment in making a diagnosis of his patient's ailment, unless it was negligently made. Patterson v. Marcus, supra.

In the case of Phillips v. Powell, 210 Cal. 39, 290 P. 441, it was held that certain admissions made by the defendants were not admissions of negligence, and therefore an instruction that the standard of learning and skill could be determined by such admissions was prejudicial. However, in the instant case, we have the hypothetical question propounded by the defendant to experts, from which it appears that one of the necessary elements in giving an anæsthetic in a case such as this is that the needle requires from thirty to forty-five seconds from the commencement of the injection until finally completed, at least that is a fair inference to be drawn from such question and the answers thereto. The testimony of the plaintiffs is that the insertion took a second or two. As said in Barham v. Widing, supra, 210 Cal. 215, 291 P. 173, 177: "The jurors were entitled to accept the solution to which these circumstances led them in preference, even, to the positive statements of the defendant and his nurse to the contrary." See, also, Roberts v. Parker, 121 Cal. App. 264, 8 P.(2d) 908; Scott v. Sciaroni, 66 Cal. App. 577, 226 P. 827. We are satisfied that, as used by the defendant, the word "mistake" was synonymous with the word "negligence." The evidence also supports the verdict, in that the plaintiff, Mrs. Walter, suffered, and still suffers, from the effect of the broken needle in her jaw.

If we are right in our conclusions as aforesaid, the court was justified in denying defendant's motion for a judgment notwithstanding the verdict.

[7-9] It is further claimed that certain remarks of counsel for respondent, and certain testimony of the witness E. L. Walter, constituted such grievous error that the court should have granted appellant's motion for a mistrial; that such misconduct could not be cured by any admonition given by the court to the jury. During the progress of the trial, at the instance of his counsel, E. L. Walter testified that before the action was commenced he visited the office of the appellant and said to him: "'Doctor, you and I and your wife and my wife have been friends and I don't want to do anything that is going to hurt you by any action on our part, because I know that if suit is brought it is going to hurt you,' and I said, 'I came to see you knowing that you are going to San Francisco, and ask you if you won't be man enough to go down there and tell your insurance company, whom I know you are insured with, that you did make a mistake on a friend of yours and all that friend asks is to be reimbursed for the expense (that we couldn't afford in the first place) and to be taken care of afterwards, getting that needle out and the necessary expenses that must accrue.'" At this point counsel for appellant assigned the asking of the question as to the conversation as prejudicial misconduct, and the giving of the answer an attempt and a successful attempt, by improper methods, to draw into the case the question of insurance. Reserving a ruling on the motion, the trial court permitted the witness to finish his answer, as follows: "Well, Dr. England at that point broke down and tears came to his eyes and he said, 'I will. It is very decent of you to come in here and take that attitude that you have taken;' and he said, 'I'll do down to my insurance company when I am in San Francisco and will tell them that I have made a mistake and I'll be back either tomorrow or the next day

and will come in and let you know what the results have been.'" The court denied the motion and stated: "The court does, however, wish to instruct the jury that reference to the insurance companies in this class of cases is not proper, except as they appear incidentally, and they should and are instructed to disregard all such evidence."

It is a general rule that in this class of cases reference to the fact that a defendant is indemnified by a policy of insurance is prejudicial error, and the evil effect upon the jury of such a reference cannot be cured by striking out the testimony, nor by an admonition to the jury not to consider it in any way. Rising v. Veatch, supra; Squires v. Riffe, 211 Cal. 370, 295 P. 517; Citti v. Bava, 204 Cal. 136, 266 P. 954. This rule, however, does not prevent such evidence being proper where the conversation involves an admission of responsibility. King v. Wilson, 116 Cal. App. 191, 2 P.(2d) 833; Harju v. Market St. Ry. Co., 114 Cal. App. 138, 299 P. 788; McPhee v. Lavin, 183 Cal. 264, 191 P. 23; Lahti v. McMenamin, 204 Cal. 415, 268 P. 644. In the case before us, the conversation amounted to an admission that the appellant had made a mistake. We have heretofore held that this admission, when considered with all the testimony in the case, is subject to interpretation as an admission of negligence, and the jury were the judges of its effect.

The evidence having been properly admitted, we find no prejudicial error in referring to it in the argument to the jury.

[10] Appellant also claims the court erred in not permitting him to cross-examine Mrs. Walter as to her social and club activities immediately following the accident, during which period she claimed to have been suffering severe pain from the effect of the embedded needle. The court in effect stated that counsel had fully examined the witness on that subject, to which counsel replied: "Well I think so, your Honor, but I don't know what the jury will think about it." An examination of the record discloses a very lengthy cross-examination. Under the circumstances, there was no error in limiting it. Section 2044, Code Civ. Proc.; People v. Tou Jue, 66 Cal. App. 235, 225 P. 759.

[11] It is further contended that the court permitted lay witnesses to testify concerning medical matters which could only be testified to by experts. The plaintiff E. L. Walter was permitted, over objection, to testify that after the accident he was awakened night after night by his wife lying in bed crying with pain in her jaw; that before the accident she was in good health physically and mentally. Objection is also taken to the evidence of other witnesses claimed to be in the same category. But none of this evidence is, in our opinion, subject to the objection. It is said in 10 California Jurisprudence, p. 978: "Under one of the exceptions to the general ruling excluding the opinion of nonexperts, the opinion of such a witness derived from observation may be received in connection with his statement of the facts upon which it is based. It is said that this exception applies to questions of * * * sickness and health."

Complaint is made that the court erred in giving two instructions offered by the plaintiffs. One of these relates to evidence of negligence as a matter of common knowledge. The other, as to the necessity of following expert testimony in the absence of evidence of facts constituting common knowledge. Both instructions were approved in Nelson v. Painless Parker, 104 Cal. App. 770–775, 286 P. 1078, which, like the instant case, included both classes of evidence. They were properly given.

[12] The court refused to give the jury a number of instructions offered by the defendant. The principal complaint in this behalf rests upon the failure of the court to give an instruction "* * * that a licensed dentist is presumed to have that degree of skill and learning required by law, and to exercise that degree of care and judgment in his treatment of and attention to the case. This presumption of law may be refuted by testimony on behalf of the plaintiffs, and as I have instructed you, by the testimony of competent witnesses, that is, dentists, or physicians and surgeons. If this presumption has not been overcome or dispelled, it is your duty to bring in a verdict for the defendant." It will be observed that this instruction requires that the presumption of skill and learning and their exercise must be overcome by the testimony of expert witnesses, thus ignoring the right of the jury to consider the testimony of lay witnesses on matters of common knowledge which the jury have a right to consider, and which are present in this case in determining the question of negligence of the defendant. Therefore, the refusal of the proposed instruction was warranted by the state of the record. Furthermore, an examination of all of the instructions contained in the transcript on appeal discloses that the jury were fully and fairly instructed upon all phases of the case, including the application of expert testimony. There is no error in refusing to give the instruction. We deem it unnecessary to discuss any other questions. The defendant was accorded a fair and impartial trial. The jury decided the case upon competent and sufficient evidence, and under well-settled principles of law we cannot disturb their verdict.

The order denying the motion for a judgment notwithstanding the verdict and the judgment are both affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

## EDWARDS et al. v. MULLIN.*

Civ. 7914.

District Court of Appeal, Second District, Division 2, California.

Sept. 5, 1933.

Hearing Granted by Supreme Court Nov. 2, 1933.

**1. Contracts** ⚿137(1).

When contract can be separated into illegal agreement and legal one, latter may be enforced, but, where indivisible, contract must stand or fall as entirety.

**2. Contracts** ⚿137(4).

Where partners were engaged in tourist brokerage business in California, and upon dissolution agreed that plaintiffs should retain entire business in Northern California in consideration of defendant's retaining entire business in Southern California, contract *held* indivisible as to territory and void as in restraint of trade (Civ. Code, §§ 1673–1675).

**3. Contracts** ⚿137(1).

If part of consideration for plaintiff's promise is unlawful and part of defendant's also, entire contract is void (Civ. Code, § 1608).

**4. Contracts** ⚿138(1).

Contract which is void as against public policy or against statute cannot be maintained in law or equity.

**5. Contracts** ⚿138(5).

Under contract void because it restrained trade, action could not be brought on theory of trust as to commissions obtained by defendant from business originating in territory allotted to plaintiffs (Civ. Code, §§ 1673–1675, 1608).

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Thomas Stanley Edwards and another, individually and as copartners doing business under the firm name and style of Edwards & Vickery, against John Joseph Mullin, individually and as doing business under the firm name and style of Mullin Travel Service. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, Nat Schmulowitz, and George B. Harris, all of San Francisco, and Loyd Wright and Charles E. Millikan, both of Los Angeles, for appellants.

Finlayson, Bennett & Morrow and Henry L. Knoop, all of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Appeal from a judgment in favor of defendant, entered after the sustaining of an objection of defendant to the introduction of any evidence under plaintiffs' second amended complaint on the ground that it failed to state facts sufficient to constitute a cause of action, in that the contract upon which the action was based is contrary to sections 1673, 1674 and 1675 of the Civil Code, and therefore unlawful and void.

The agreement involved, dated April 15, 1927, recites: "That whereas the parties hereto for several years last past have been and still are copartners, engaged as such in the tourist brokerage business *in the State of California*" (italics ours); and, in substance, dissolves such partnership theretofore existing between plaintiffs and defendant under which they "conducted an office in the City and County of San Francisco, at No. 582 Market Street, and an office in the City of Los Angeles, at No. 756 South Broadway." It recites that the parties owned "certain agency rights or agreements in connection with the following firms, to-wit: Franco-Belgique Tours Company, Ltd.," and other similar concerns; that taking effect July 30, 1927, defendant, "as party of the second part," assigned and delivered to plaintiffs, as "parties of the first part," all his "right, title and interest in and to the aforesaid rights or agreements with Franco-Belgique Tours Company, Ltd.," and said other firms, "in and for that territory in the northern portion of the State of California generally designated as the San Francisco territory, commencing immediately north of Bakersfield, Kern County, California, and extending * * * to the northernmost border of said state," together with all business and good will of said copartnership "in the said above named territory," including the furnishings and equipment of said San Francisco office. Said first parties likewise assigned all their interest in said contracts "in all that territory in the southern part of the State of California designated as the Los Angeles territory," commencing at and including the city of Bakersfield and extending to the southernmost border of said state, together with all "business and good will of said copartnership in said Los Angeles territory" and the furnishings and equipment of the Los Angeles office. Having so divided the rights, business, and property of the copartnership, said first parties covenanted that neither of them would "directly or indirectly engage in any tourist brokerage business in said Los Angeles territory above described" in connection with said general agencies "for a period of twenty-five (25) years"; "nor shall the second party engage in any tourist brokerage business in the said San Francisco territory above described, either directly or indirectly," in connection with said agencies for the same period of time.

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 30 P.2d 997.

The action was brought by plaintiffs to recover damages alleged to have been caused by defendant accepting business through said Franco-Belgique Tours Company, Ltd., originating in the city and county of San Francisco, contrary to his agreement not to do so.

Appellants urge that said agreement is neither illegal nor unlawful, as claimed by respondent, and that the court erred in sustaining the objection to evidence on that ground.

Section 1673 of the Civil Code provides that: "Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void." Section 1675 of the same Code, which applies here in particular, provides: "Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof." Appellants urge that under the cases cited by them the territory mentioned in the contract here involved is divisible, so that the writing would apply to the city and county of San Francisco, even though invalid as to the balance of Northern California. As authority, the case of Fleckenstein Bros. Co. v. Fleckenstein, 76 N. J. Law, 613, 71 A. 265, 266, 24 L. R. A. (N. S.) 913, is cited among others. There the defendant had agreed not to engage in the business sold to plaintiff "within five hundred miles from the city of Jersey City." The court there held in effect that under the contract the parties themselves, by a reasonable construction of the agreement, had divided the territory into two parcels, viz., "either in the city of Jersey City or within five hundred miles from that city," and that so reading it the territory embraced "not one whole area, but two areas disjunctively described," one valid and within the contemplation of the parties, the other within the contemplation of the parties but not valid; and so the contract was sustained.

[1, 2] We fail to see, however, how such reasoning can be applied to the contract here, much as we would like to. Under the plain reading of the instrument the partners for several years prior thereto were "engaged as such in the tourist brokerage business *in the State of California*." It is true they had offices in San Francisco and Los Angeles, but the entire state was the scene of their operations; and, while we may presume that a large part of their business may have originated in the two cities where the offices were maintained, it is equally true that some of the suburbs of such cities, being the residences, as they are, of many wealthy and travel loving people, might have furnished an almost equally lucrative business. It is clear from a reading of the contract that the parties were not dividing the business of the two large cities alone, but that of the entire state. The use of the words "San Francisco territory" and "Los Angeles territory" have reference only to the district embraced within the descriptions "the northern portion of the state of California" and the "southern part of the state of California," respectively, "commencing immediately north of Bakersfield, Kern county, Cal., and extending northerly to the northernmost border of said state" and "commencing at and including the city of Bakersfield, Kern County, California, and extending southerly to the southernmost border of said state," respectively. We are here forced to the same conclusion reached by the court in the case of Consumers' Oil Company v. Nunnemaker, 142 Ind. 560, 41 N. E. 1048, 1051, 51 Am. St. Rep. 193, as to the contract there involved, viz.: "It is a recognized principle that when a contract is or can be so separated in parts as to constitute two agreements, one illegal and the other legal, the latter may be enforced, and the transaction pro tanto sustained. But it is otherwise where the contract in its nature is not divisible. * * * The contract before us is not of this character, and does not come within the provisions of the rule stated, and it must either stand or fall as an entirety." The contract before us, being indivisible as to territory, in our opinion, and covering more territory than sections 1674 and 1675 of the Civil Code permit, comes within the prohibition of section 1673 thereof and is void so far as the covenant sought to be enforced here is concerned.

[3] Another very important distinction between the contract in the instant case and those involved in the cases cited by appellants is that the businesses were largely local in their nature in such cases, while here, judging from the contract and the careful division of the state therein made, it was statewide. In those cases, too, a party sold his business or interest in it to some third person, presumably for a valuable consideration. Here the only consideration was the mutual agreements of the parties. The assignment of appellants' rights in San Diego, Bakersfield, and many rich and populous suburbs of Los Angeles and their agreement not to do business therein was as much a part of the consideration moving to respondent as were his assignment of his rights in Fresno, Oakland, and the rich and populous suburban cities of San Francisco and his agreement not to do business therein; and, if part of the consideration for respondent's promise is unlawful and part of appellants' also, the entire contract is void. Section 1608, Civ. Code. See, also, Haas v.

Greenwald, 196 Cal. 236, 237 P. 38, 59 A. L. R. 1493, applying said section.

[4, 5] Appellants urge that the contract dividing the state of California, as it does, between the partners for business purposes is neither illegal nor unlawful, although it is declared unenforceable and void to the extent that it exceeds the permissive provisions of sections 1673 and 1675, supra. The Supreme Court says, in the case of Grogan v. Chaffee, 156 Cal. 611, 615, 105 P. 745, 747, 27 L. R. A. (N. S.) 395: "Section 1673 of the Civil Code makes void every contract by which one is restrained from 'exercising a lawful profession, trade or business,' except in certain instances." The contract before us, not being one of the instances excepted, is void as to its attempt to fix the rights of the parties to do business in California; and "a void contract, a contract against public policy or against the mandate of the statute, may not be made the foundation of any action, either in law or in equity." Morey v. Paladini, 187 Cal. 727, 733, 203 P. 760, 762. We fail, therefore, to see how plaintiffs' second cause of action, based on the theory of a trust as to the commissions obtained by defendant from business originating in San Francisco, the right to which he had assigned under a void contract, can be maintained.

Judgment affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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## KING v. MOORE et al.*

Civ. 7938.

District Court of Appeal, Second District, Division 2, California.

Sept. 5, 1933.

Rehearing Denied Oct. 5, 1933.

Hearing Granted by Supreme Court Nov. 2, 1933.

**Appeal and error** ⟹1050(1).

Where plaintiff suing for commissions alleged defendant agreed to split commissions on sales to persons that plaintiff introduced to defendant, and evidence conflicted whether plaintiff introduced specified purchasers, admitting evidence as to other persons plaintiff introduced *held* prejudicial error (Code Civ. Proc. § 1870 (15).

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by J. E. King against J. Earlton Moore and others, copartners, under the firm name and style of J. Earlton Moore & Sons. From a judgment for plaintiff, defendants appeal.

Reversed.

Walter R. Leeds and Dockweiler & Dockweiler & Finch, all of Los Angeles, for appellants.

Kaye & Johnstone, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Appeal by defendants from a judgment against them for one-half of certain commissions and profits earned by them in effecting certain sales of real estate.

The amended complaint alleges substantially that on or about the 15th day of September, 1928, defendants as real estate brokers entered into an agreement with plaintiff to pay him one-half "of the gross commission, compensation or profits" which they might receive from sales made of properties then held by them or which might thereafter be held by them for sale to "anyone interested" by plaintiff therein or to whom plaintiff "would introduce" them. The pleading contains three counts. The first alleges the sale of the estate of "Frances Marion, widow of Fred Thomson, deceased," on or about April 2, 1929, to "a prospective purchaser" whom the plaintiff, "relying on his said agreement with defendants, had theretofore procured or caused to be introduced to the said defendants," on which sale the latter received a total commission of $38,000. The second count alleges a similar sale on April 20, 1929, of property held by defendants on an option procured from Frank Muller and Walter Muller on or about April 4, 1929, on which sale a profit of $15,000 was made. The third count alleges a third sale on or about August 1, 1929, of property known as the "Charles Ray" residence, upon which sale defendants earned as commission and profit $3,500. The jury returned a verdict for $24,082.50 in favor of plaintiff. Defendants' motion for a new trial was denied as to the first two counts, but granted as to the third, the judgment thereupon rendered being reduced by $1,750, the amount of the verdict on such count. The appeal is from the judgment as so modified.

The evidence shows that the sale involved in the first count was made by defendant Harley Moore to one L. S. Barnes, and in the second count by said defendant through said Barnes to the Elbe Oil Company, of which Mr. Barnes was secretary-treasurer and general manager. Plaintiff testified that he met Harley Moore in 1926 when said defendant and his mother inspected the Casa del Mar Club, which was then about completed and where plaintiff was working at the time; that shortly after such meeting Harley Moore and his mother invited plaintiff to visit them

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⟹For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 31 P.2d 377.

at their home, which he did; that thereafter plaintiff saw said defendant four or five times, until in 1928, when Harley Moore and his father, the defendant J. Earlton Moore, visited the "Times home" in Mira Mar Estates, where plaintiff was employed by the Mira Mar Sales Corporation, at which time he was introduced by Harley Moore to J. Earlton Moore and that he invited them to lunch. After that, according to plaintiff's testimony, he paid two or three visits to the offices of defendants in Beverly Hills, and that in the "forepart of September" on one of such visits Harley Moore asked "if I didn't have quite a lot of wealthy clients that would be interested in Beverly Hills property * * * and he said if I had anyone he would * * * give me 50 per cent of * * * his gross commission on any sales that might be consummated through their firm. * * * I didn't mention any of the names until we had agreed upon a plan of commission. The plan was that if I would make the introduction to Harley Moore, that they would agree to give me one-half of the gross commissions on all sales made. I agreed to the proposition after I had asked him if we could have a little memorandum * * * to that effect so that I would be protected by an agreement. He says, 'Well, we don't usually do that. * * * We would rather put your name right in the escrow along with ours in case anything is done, and you will be paid direct from escrow and the bank will handle the money and * * * you will be positively protected that way.'" He testified further that: "J. Earlton Moore, who was at his desk, turning, said, 'Yes, that is the best way to do it; that is the way we would prefer to do it.'"

Plaintiff then testified that he told the above-named defendants the next day of Alfred F. Smith, who was living at the Beverly Hills Hotel, and made an appointment to go with Harley Moore to the hotel to meet Mr. Smith that afternoon. There is quite a sharp conflict in the evidence, not only as to the agreement to share commissions, testified to by plaintiff, but also as to the purpose of the visit to Mr. and Mrs. Smith. According to plaintiff's testimony, the Smiths "were going to buy a place" and were shown a house by Harley Moore at the corner of Bedford drive and Sunset boulevard that defendants had for sale. Mr. Smith testified that he had just come to Beverly Hills and was temporarily residing at the Beverly Hills Hotel, and that plaintiff called on him with a Mr. Cottrell (another realtor); that he had never seen either of them before; that there was no discussion of the sale of a house to him, but that he wanted to rent a house; that plaintiff and Cottrell showed the Smiths several places for rent, as did other realtors; that plaintiff brought Harley Moore out and introduced him, and that they looked at the house at Bedford and Sunset as a rental proposition; that nothing was said about purchasing it—"We were not in the market to purchase." Mr. Smith's testimony is corroborated by that of Harley Moore. He further testified that he rented the Lita Gray Chaplin place from another realtor for one year and lived in it "for nearly a year and a half"; that he played golf with Harley Moore beginning in the spring of 1929, and that through the efforts of Mr. Moore he purchased the Charles Ray place, but that Mrs. Smith was the one who first spoke to Mr. Moore about buying the property, and "the first I knew of it she had looked at it before I had ever been there."

About a week after he introduced Harley Moore to Mr. Smith, plaintiff met the former in his office and "told him that I knew a family by the name of Barnes in Beverly Hills and asked him if he knew them. He said no, he did not; didn't know where they lived. I told him that I had known Gloria Barnes, the daughter, quite well, and had met Mr. and Mrs. Barnes on one occasion. Q. Was anything said with reference to whether they were looking for property? A. Yes there was. I told him that Gloria had told me during the summer that they bought an estate in Beverly Hills, that Mr. Barnes was a real estate buyer and was looking for investments and I should meet him. She said that anything that she and her mother would select would be satisfactory to Mr. Barnes. Gloria Barnes was quite a horsewoman and was looking for a place where they could have stables for their horses. * * * On that occasion I discussed Miss Roma Seger * * * an unmarried woman," who with her mother lived in Beverly Hills, and "I discussed Miss Rita Seevers" and "Miss LePelletier," who were afterwards introduced by plaintiff to Harley Moore. Plaintiff further testified that on that occasion he told Harley Moore, "I thought the best method of approach, meeting the family, would be through the door—they would go horseback riding. He agreed that would be the best plan;" that "the last part of September or probably the first part of October * * * 1928 * * * we [Harley Moore and plaintiff] had been out to the beach and upon arriving at his office in Beverly Hills he suggested that I get Miss Barnes on the telephone and arrange a meeting that evening at a picture show, or something, in order to get acquainted. I called her on the telephone. She was out of town at the time." The evidence shows that Harley Moore did call Miss Barnes on the telephone and met her about ten days after the conversation above mentioned with plaintiff; that he was introduced by the daughter to Mr. and Mrs. Barnes in October or November of 1928, leaving the house with the daughter immediately afterwards for a horseback ride; that after the death of Fred Thomson on "Christmas day, 1929," defendants obtained a listing of the estate; that Gloria Barnes, reading that the Thomson horses were to be sold, visited the place to see them and saw the stables; that her mother had been planning a home to be built on property which Mr. Barnes had purchased for that purpose some time before, and as Gloria thought the plan of the Thomson stables good, she went with her mother to visit them in February of 1929; that Harley Moore visited the Ambassador horse show with Miss Barnes during the week of February 16, and that she then told him that "they were going to build a new home across from Doheney's in Beverly Hills, and she was going to have stables there and keep her horses there; and she said she had been up [to the Frances Marion Thomson property] and inspected the stables, or bought a horse from Mrs. Frances Marion Thomson, and that they had fine stables up there; and I told her at that time that I had the place for sale." Harley Moore further testified that about a week after the horse show he asked Miss Barnes if she thought her father "would consider buying the Thomson property instead of building a home, and she said she was quite sure he would not; that they had their plans all drawn and her mother had been working on them for a couple of years, and she didn't think she would be interested." Moore evidently spoke to Mrs. Barnes the next time he saw her, and "Mrs. Barnes told me she had already seen the property but had never been inside of the house. * * * I told her we had it for sale and would she like to look through the house. She said yes, and I took Mrs. Barnes and Miss Gloria Barnes up and showed them through the house; * * * that was in March, 1929." The evidence shows that thereafter "either Mr. or Mrs. Barnes" phoned Harley Moore one Sunday morning and asked him to take them to see the Thomson house, which he did; that a few days later Mr. Barnes asked him to come and see him, and that when he did so Mr. Barnes made an offer for the Thomson property. This was refused by Mrs. Thomson, and Mr. Barnes made "a further offer of more money," which was taken to Mrs. Thomson, who accepted "after three or four days, * * * about the first of April, 1929."

With regard to the second sale, Harley Moore testified that two or three days after the deal for the Thomson property went into escrow "we were speaking about real estate in general, and I told him [Mr. Barnes] that I had an option on what I considered the finest corner in * * * the Beverly Hills section, and that I would very much like to show it to him, that he might be interested in its purchase," and that about two weeks later Mr. Barnes purchased said property.

It is apparent from the evidence that plaintiff was introduced to Mr. and Mrs. Barnes, but that such introduction did not register with them, as neither had any recollection of meeting plaintiff until after the Thomson property was purchased, when he came to inquire if they had bought it. Mr. Barnes testified, and he is corroborated by his wife and daughter, that neither of the latter said anything to him about purchasing the property, but that they told him about the riding rings and stable and "wanted I should see them so they could put something similar" on the property he had bought to build on; that he went with Mrs. Barnes to look the place over; that "about a week or ten days afterwards I got to thinking about it and I suggested to Mrs. Barnes that we might not build; that there was shrubbery on this other place and we might buy the place and sell the other"; that "there were two or three conversations about it, and I finally sent for Mr. Harley Moore and made an offer on the place, which was rejected. Some time later he told me that he thought that we could buy the place at a price that I was agreeable to pay."

Harley Moore testified that plaintiff told him about Mr. Smith desiring to rent a "large house with four or five master bedrooms" and asked if he had any that might please him, "and I told him that I had"; that plaintiff then said he would like to introduce Mr. Smith to him, and asked "if we were successful in renting Mr. Smith a house, would I split the commission with him, I told him I would"; that at no time did he ever tell plaintiff he would give him one-half of the gross commission, compensation, or profits that he might make from a sale of properties then held or which might thereafter be held by his firm to any one produced or introduced by plaintiff.

As to the episode related by plaintiff with respect to the Barnes family, said defendant testified: "That was on the day that Mr. King * * * was trying to sell me a lot in the Bel Air Club * * * and I went down to look at it with him. We came back to Beverly Hills and I took Mr. King to dinner * * * and went back to our office and sat down * * * about 8:30 in the evening. I asked Mr. King if he wanted to go out and play a little bridge somewhere, and he said, 'Well, let us get a couple of girls and go to a picture show.' I said, 'Well, we will have to get someone in Beverly Hills. It is about time for the second show.' He asked me if I knew any girls in Beverly Hills, and I told him I didn't know any that I could call up just at that hour; that most of my girl friends lived in Los Angeles or Hollywood; and he said he knew a young lady in Beverly Hills who had not lived there very long and was a neighbor of mine, and * * * he said her name was Miss

Gloria Barnes, and she was a fine horsewoman, and that I rode horseback some, and that probably it would be a good thing if we were acquainted with each other; * * * I said 'all right, call her up.' And he called the Barnes home and Miss Barnes was not there; * * * Mr. King said to me that he would like to have me know Miss Barnes * * * and that he would give me his card with her name, phone number and address on it, and some time at my leisure I might call her up and say to her that I was a friend of his and that way I might meet her."

We have quoted at length from the testimony in order to show that there is really no conflict except on two vital questions, viz., Did the parties enter into the alleged agreement? and, Was L. S. Barnes introduced by plaintiff to defendants or any of them? It is clear the jury might fairly make either a negative or an affirmative answer to the first question from the evidence presented; and while there was no introduction made as that word is generally used, if they believed the testimony of plaintiff as to the alleged agreement and introduction, they might reasonably conclude that, while Barnes was not a client, in any sense, of plaintiff, he was a prospect known to him and not to defendants, and that the parties adopted the method of introduction through the medium of the daughter, who was known to plaintiff. The contrary conclusion, that the name of the daughter was mentioned in a purely social connection and that no business contact was thought of for months afterwards, when the death of Fred Thomson put his estate on the market and into the hands of defendants, which estate included stables and riding rings, shrubbery, etc., that appealed to the Barnes family, and that the sale grew out of fortuitous circumstances rather than any prearranged planning on the part of plaintiff and defendant Harley Moore, may also be drawn.

With the evidence in such condition the court overruled defendants' objections and permitted the Misses Willian Le Pelletier, Rita Seevers, and Roma Seger to testify that plaintiff introduced them to defendant Harley Moore "on a business transaction," viz., the sale of property belonging to their respective mothers or themselves. The introduction to Miss Le Pelletier was in the late summer of 1928, to Miss Seevers in December of 1928 or the early part of 1929, and to Miss Seger in September or October of 1928. No sales were made by defendants of the properties so listed, nor does any arrangement for division of commission with plaintiff seem to have been made. In the case of Miss Seever, however, an option in favor of plaintiff and Harley Moore was drawn up by the latter and presented by plaintiff for Miss Seever's signature, but was never signed by her. The proposed option was permitted to be introduced in evidence, however, over the objection of defendants, counsel for plaintiff in making his offer saying that it was "for the purpose of corroborating the testimony of plaintiff as to his relations with the defendants in this action."

Respondent urges that the case of Moody v. Peirano, 4 Cal. App. 411, 88 P. 380, completely disposes of appellants' claim of error in the introduction of such evidence. In that case plaintiff had purchased seed wheat of defendant alleged to have been represented to be "White Australian," but which produced a crop of very inferior wheat. At the trial the testimony of two witnesses was introduced over plaintiff's objection to the effect that they each bought seed wheat from defendant the same season and from the same lot as that sold plaintiff, and with the same representations made. It will be observed that the acts so permitted to be testified to were, not only similar acts, but they were also the acts of the defendant. We fail to see how the fact that plaintiff in the instant case introduced these three young ladies to Harley Moore, and that the Moore firm listed their properties for sale, could by any stretch of the imagination be held to be competent evidence from which the jury might conclude that plaintiff's story that defendants agreed to cut commissions with him on any sale made by their firm to purchasers introduced to them was true. Such a rule would make it possible for a plaintiff to corroborate his disputed testimony by evidence, not disputed by a defendant, which he himself caused to exist—a dangerous and seemingly unwarranted extension of the rule that upon the trial of a fact other facts from which the facts in issue are logically inferable are competent evidence, as provided in section 1870 (15), Code of Civil Procedure. We are of the opinion that such evidence was erroneously admitted by the court and must have had a prejudicial effect on the jury, considering the condition of the evidence as a whole. A case like the present should not be confused in the minds of the jurors with collateral facts, undisputed, which are given the stamp of competency by their admission into evidence and which can only be used by the jury as tending to support the case of the party so presenting them, when as a matter of fact they have no bearing upon the question at issue.

The conclusion reached makes it unnecessary to discuss the remaining contentions of appellants.

Judgment reversed.

We concur: WORKS, P. J.; STEPHENS, J.

133 Cal.App. 782

**McGILLICUDDY et al. v. CIVIL SERVICE COMMISSION et al.**

**Civ. 8837.**

District Court of Appeal, First District, Division 2, California.

Aug. 22, 1933.

Hearing Denied by Supreme Court Oct. 20, 1933.

**1. Municipal corporations** ⚷218(2).

Positions of trackmen and car repairer for city street railway at which each employee had worked continuously for approximately one year or more before his removal *held* "permanent positions," entitling employees to civil service rights (St. 1931, p. 3061, § 142).

**2. Municipal corporations** ⚷217(2).

Where civil service appointees worked in permanent positions in excess of maximum probationary period, appointments were complete, notwithstanding attempt to keep appointees in temporary employment by successive reappointments to so-called "temporary" positions (St. 1931, p. 3061, § 142).

**3. Municipal corporations** ⚷217(2).

Civil service commission had no power to adopt rule whereby positions which were neither temporary in fact nor by law of their creation could be designated temporary, thereby preventing eligibles appointed thereto from acquiring permanent tenure after serving through probationary period (St. 1931, p. 3061, § 142).

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Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action for declaratory relief brought by Dennis McGillicuddy and others against the Civil Service Commission and others. From an adverse judgment, defendants appeal.

Affirmed.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco (E. H. Zion, of Modesto, of counsel), for appellants.

Joseph T. Curley and Marvin C. Hix, both of San Francisco, for respondents.

SPENCE, Justice.

Six of the plaintiffs were trackmen and the seventh was a car repairer in the employ of the city and county of San Francisco. On April 8, 1932, plaintiffs were removed from their respective positions by defendants without cause and without an opportunity to be heard. Other persons were immediately employed to fill said positions. Claiming the benefits of the civil service regulations, plaintiffs brought this action for declaratory relief. From a judgment in favor of plaintiffs, defendants appeal.

Section 142 of the new charter of the city and county of San Francisco (Stats. 1931, pp. 2973, 3061), which went into effect January 8, 1932, provides: "The civil service rights, acquired by persons under the provisions of the charter superseded by this charter, shall continue under this charter." Appellants concede that said section protects the rights, if any, which respondents may have acquired under the old charter, but appellants contend that respondents were "emergency employees," that "they had no standing as civil service employees," and "therefore had no civil service rights to be protected under the provisions of section 142" of the new charter.

We are therefore called upon to examine the facts and the provisions of the old charter in order to determine whether respondents had acquired any "civil service rights" under the old charter which were protected by the new. It is unnecessary, however, to set forth in full all of the sections of the old charter dealing with this subject, as said sections have been considered and are to be found in the opinions in several of the cases cited by the respective parties. Powers v. Board of Public Works, 216 Cal. 546, 15 P. (2d) 156, 158; Rodgers v. Board of Public Works, 208 Cal. 291, 281 P. 64; Gilbert v. Civil Service Commission, 61 Cal. App. 459, 215 P. 97; Rodrigue v. Rogers, 4 Cal. App. 257, 87 P. 563.

Section 10 of article XIII of the old charter provided: "The appointing officer shall notify the Commissioners of each position to be filled separately, and shall fill such place by the appointment of one of the persons certified to him by the Commissioners therefor. Such appointment shall be on probation for a period to be fixed by the rules of the Commissioners; but such rules shall not fix such period at exceeding six months. The Commissioners may strike off names of candidates from the register after they have remained thereon more than two years. At or before the expiration of the period of probation, the head of the department or office in which a candidate is employed may, by and with the consent of the Commissioners, discharge him upon assigning in writing his reason therefor to the Commissioners. If he is not then discharged his appointment shall be deemed complete. To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the Commissioners, make temporary appointments, to remain in force not exceeding sixty days, and only until regular appointments, under the provisions of this Article, can be made." It will thus be seen that the old charter contemplated but two types of appointments, to wit: First, "regular appointments" made from the eligible list, which appointments were to be made on probation for not to exceed six months; and, second, "temporary appointments" to remain in force only until "regular appointments" could be made. It is quite obvious as conceded by counsel that it was intended that such "temporary appointments" should be made only in the event that there was no list of eligibles from which "regular appointments" could be made. In order to avoid confusion with the word "temporary" as hereinafter used, we shall refer to "temporary appointments" mentioned in the old charter as "emergency appointments," as such appointments were to be made only "to prevent the stoppage of public business or to meet extraordinary exigencies," and were "to remain in force not exceeding sixty days and only until regular appointments" could be made.

Section 2 of said article XIII of the old charter read in part as follows: "No appointment shall be made to any such place, except in accordance with the provisions of this article and the rules adopted thereunder by the civil service commission." Section 3 thereof empowered the commission to "make rules to carry out the purposes of this article. * * *" Purporting to act under the authority of said last-mentioned section, the commission adopted rules, among which was rule 33, reading as follows: "All positions which are expected by the appointing power to exist for a period of six months or over shall be considered, for the purposes of the rules of this Commission, as permanent positions. All other positions shall be considered as temporary positions, and appointments to temporary positions shall automatically expire at the end of four months. The probable period of employment must be specified by the appointing power in its requisition. This rule shall govern only appointments made after July 15, 1912." By this rule the commission attempted to classify positions as "permanent positions" and "temporary positions," which classification, regardless of the nature of the position, was to be arbitrarily based on the expectation of the appointing power as stated in its requisition made to the commission.

Turning to the facts in the present case, we find that respondents' names appeared upon the eligible list, and that each was appointed therefrom after certification by the commission, and that each had been employed continuously in his position for a long period of time before his removal. Manley was employed from June 1, 1928, to April 8, 1932; McGillicuddy, McCarthy, and Dunleavy were employed from November 28, 1930, to April 8, 1932; Savage was employed from December 2, 1930, to April 8, 1932; and O'Connell and Scully were employed from February 18, 1931, to April 8, 1932. The positions which they held were not abolished at the time of their removal, and, as others were employed in their places, it is clear that the work continued and funds were available therefor.

The appointments of respondents were "regular appointments" in the sense that they were made after the commission had certified the names from the eligible list. In other words, they were not "emergency appointments" made only until "regular appointments" could be made. It is appellants' contention, however, that, despite the fact that each of the respondents served in his position in excess of the maximum probationary period of six months as provided in the charter, the appointment was not to be "deemed complete" under said section 10 of article XIII of the old charter, as each of the respondents was appointed to what appellants term a "temporary position" as defined in the abovementioned rule 33. This contention is based upon the procedure adopted in making the appointments. In each case the probable period of employment was estimated by the appointing power as less than six months, and the employee was certified by the commission for "temporary employment," and each was appointed by the appointing power for "temporary employment." During the time respondents were employed, some, but not all, of them were put through the formality of certain successive reappointments to their so-called "temporary" positions. The requisition in each case of reappointment was in the following form: "This requisition is made to reestablish by new temporary appointment, the temporary position that will automatically expire on (date), under Civil Service Rule 33." It appears, however, that the last such appointment of McGillicuddy, McCarthy, Dunleavy, and Savage was made on April 16, 1931, that the last such appointment of Manley was made on November 17, 1930, and that the only appointment of O'Connell and Scully was made on February 18, 1931.

[1, 2] In our opinion, the trial court properly treated the positions to which respondents were appointed as "permanent positions." As was said in Powers v. Board of Public Works, supra: "* * * If the position of painter, or granite cutter, actually exists in practice with a reasonable degree of continuity and permanency, the courts are justified in treating the position as a permanent one within the meaning of the civil service provisions of the charter. * * *" The facts above stated show that each of the respondents had worked in his position continuously for approximately one year or more before his removal. Respondent Manley had worked continuously in his position for approximately four years, with the exception of a short period on leave of absence in 1929. These positions could not be said to be temporary or seasonal. As respondents had worked in such positions in excess of the max-

imum probationary period fixed by the charter, their appointments were to be "deemed complete" within the meaning of the old charter.

Appellants cite and rely upon Gilbert v. Civil Service Commission, supra, and Rodrigue v. Rogers, supra, but these cases are not in point. There the eligibles were classified as "ordinary clerks" from which "the extra clerks" mentioned in the charter were appointed for temporary or seasonal work in the various departments. A vital distinction is pointed out in Rodrigue v. Rogers, at page 261 of the opinion in 4 Cal. App., 87 P. 563, 564, where it is said: "A further examination of the charter discloses that various positions are provided for, *which by the law of their creation are not continuous or permanent, but are intended by the law to be for limited periods.*" (Italics ours.) The court then proceeded to show that the positions designated as "extra clerks" were not permanent, but were of limited duration in contemplation of the charter creating them. In the present case the positions involved cannot be said to be temporary or seasonal "by the law of their creation." They were of the type of positions which ordinarily exist "with a reasonable degree of continuity and permanency," and the facts show that the particular positions involved did so exist.

[3] Appellants' position with respect to the rule promulgated by the commission is "that an appointment to and acceptance of a position designated as 'temporary,' gives to the appointee, under the rules of the civil service commission, a limited and qualified enjoyment of the same." We are of the opinion, however, that the commission had no power to adopt a rule whereby positions which were neither temporary in fact nor temporary by the law of their creation could be designated temporary, thereby preventing the eligibles appointed thereto from acquiring permanent tenure after serving through the probationary period. Such a rule would not serve to "carry out the purposes" of the civil service provisions of the old charter as contemplated by section 3 of article XIII above set forth, but would tend to defeat said purposes. Under such a rule as interpreted by the commission, the appointing power could absolutely prevent eligibles from acquiring a permanent status merely by following the procedure adopted in the present case. Regardless of the true nature of the position or the length of time the appointee had served, such appointee could be removed at will, according to appellants' theory, without cause and without a hearing merely because he had been appointed to a position designated under the rule as "temporary." There is no express authority found in the old charter for such rule, and, on the contrary, we believe that it is violative of the general provisions of the old charter relating to civil service just as the so-called "one-year rule" was held to be violative of the specific requirements thereof. Powers v. Board of Public Works, supra; Rodgers v. Board of Public Works, supra.

Each of respondents having been regularly appointed from the eligible list to a position which was neither temporary in fact nor temporary by the law of its creation, and having served therein for a period in excess of the maximum probationary period provided in the old charter, had in our opinion acquired civil service rights which were protected by section 142 of the new charter. Respondents were not merely "emergency employees" as contended by appellants, and the trial court correctly declared their rights accordingly.

The judgment is affirmed.

We concur: NOURSE, P. J.; DOOLING, Justice pro tem.

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134 Cal.App. 106

## In re CARNIGLIA'S GUARDIANSHIP.

Civ. 9191.

District Court of Appeal, First District, Division 2, California.

Sept. 6, 1933.

Rehearing Denied Oct. 6, 1933.

**1. Appeal and error ⟹660(2).**

Motion for diminution of record to include alleged omitted copies of exhibit and petition was denied, where counsel expressed desire to introduce certificates, and, after obtaining court's assent, proceeded with other testimony without having exhibit marked or filed, and alleged exhibit was not shown to be material to determination of merits.

**2. Appeal and error ⟹659(4).**

Appellate court may not direct trial court to certify alleged exhibit not read in evidence or identified in any manner.

**3. Appeal and error ⟹659(4).**

Leaving of documents upon clerk's desk after hearing was concluded, and with statement that they were withdrawn, *held* not "filing" entitling appellant to have documents incorporated in clerk's record.

[Ed. Note.—For other definitions of "File," see Words & Phrases.]

In the matter of the guardianship of the person and estate of Caesar Carniglia, an incompetent person. On motion by appellant J. M. Toner, as director of the Department of

Institutions, for an order directing the trial court and the clerk thereof to prepare and certify a supplemental reporter's and clerk's transcript containing copies of an exhibit and a petition alleged to have been omitted from the original transcripts on file.

Motion denied.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for appellant.

Randall O'Neill, Morettini & O'Neill, and G. A. Martinelli, all of San Jose, for respondent.

SPENCE, Justice.

This is a motion by appellant, J. M. Toner, as director of the department of institutions, upon suggestion of diminution of the record, for an order of this court directing the trial court and the clerk thereof to prepare and certify a supplemental reporter's transcript and a supplemental clerk's transcript containing copies of an exhibit and a petition alleged to have been omitted from the original transcripts on file.

The trial court heard the petition for settlement of the guardian's first account and appellant's objections to the various items thereof. Said account showed that there was no money or property remaining after the payment of the obligations of the incompetent. During the course of the hearing counsel for appellant stated: "I would like to introduce some certificates from the County Clerk's Office of San Mateo County to the effect that there is nothing on file showing restoration to capacity after the original commitment in 1910, for that commitment." The court said, "Very well," and, after hearing the objection to counsel for the guardian, further said, "Objection overruled." The hearing then proceeded, but no such certificates or certificate were read in evidence, nor does it appear that any such certificates or certificate were presented for marking as exhibits. Later on counsel for appellant said, "I have prepared a petition for an order directing payment to the Department of Institutions for this man's keep under Section 2181 of the Political Code, and also a copy of an order—I presume it will be denied." The court then said, "Yes, there isn't anything left to pay." At the conclusion of the hearing, the court orally made its order settling the account, and thereafter a written order was filed overruling appellant's objections to the account and settling the same.

In support of his motion appellant calls attention to the above-mentioned portions of the record, and contends that "an exhibit" has been omitted from the reporter's transcript, and that "a petition" has been omitted from the clerk's transcript. In opposition to the motion counsel for the guardian has submitted numerous affidavits purporting to show that neither the alleged exhibit nor the alleged petition ever became part of the record in the trial court. These affidavits further relate to an occurrence on the day of the hearing, but after the hearing had been concluded. The trial court had ordered the account settled, and counsel for the guardian had left the courtroom. The reporter's transcript discloses that at said time counsel for appellant again addressed the court and said, "May I put these three documents in evidence (showing three documents)?" An attorney who had no connection with the proceeding pointed out to the court that counsel for the guardian was no longer present. Counsel for appellant then said: "If there is any objection I will take them out. They are withdrawn. (Referring to the three documents.)" Counsel for appellant has objected to the consideration by this court of the affidavits mentioned above, but it is only through these affidavits that it appears that any documents prepared by appellant ever came into possession of the clerk of the trial court. It appears from said affidavits that counsel for appellant, after stating the three documents were withdrawn, left them on the clerk's desk, but that said three documents were never filed or marked in any manner. It may be further noted that it is impossible to ascertain from the record or from any showing made on this motion whether the identical certificates and petition referred to on the hearing were among the documents left on the clerk's desk after the hearing had been concluded.

[1, 2] Without regard to the affidavits presented in opposition to the motion, we are of the opinion that appellant's motion must be denied. The record shows that counsel for appellant merely stated that he "would like to introduce some certificates," but after obtaining an expression of the trial court's assent thereto he proceeded with testimony along other lines without completing the introduction in evidence of the certificates or certificate to which he had referred. This court may not direct the trial court to certify an alleged exhibit which was not read in evidence nor identified in any manner. See Wulferdinger v. Pickwick Stages System, 105 Cal. App. 509, 288 P. 93. Furthermore, appellant has failed to make it appear that the alleged exhibit would be material in the determination of the merits of the appeal.

[3] The petition to which appellant refers was not filed prior to or during the hearing. In the trial court counsel for appellant merely stated that he had "prepared a petition," and that he presumed that it would be denied. The trial court indicated that such would be its ruling. A filing of a petition after the conclusion of the hearing would not be timely, but it does not appear that any petition was filed at any time. If said petition was among the documents which appellant offered "in evidence" after the hearing

had been concluded, the mere leaving of said documents upon the clerk's desk with the statement that they were "withdrawn" would not constitute a filing so as to entitle the appellant to have them incorporated in the clerk's transcript.

The motion is denied.

I concur: DOOLING, Justice pro tem.

NOURSE, P. J. (concurring).

I concur in the order upon the last ground stated—that it does not appear that the proposed exhibits are material on this appeal. I do not approve the provincial tactics which took advantage of counsel's oversight in not insisting upon having the exhibits marked in the presence of the court while at the same time and under like circumstances an exhibit offered by local counsel was included in the record and certified as having been duly filed.

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134 Cal.App. 65

## GERNHARDT v. RANCADORE et al.

Civ. 8853.

District Court of Appeal, Second District, Division 2, California.

Aug. 26, 1933.

Rehearing Denied Sept. 25, 1933.

1. **Automobiles** ⚷245(72).

Contributory negligence of pedestrian struck by defendant's automobile after alighting from public vehicle and when crossing street *held* for jury.

2. **Automobiles** ⚷216.

Contributory negligence of pedestrian struck by automobile must be determined without regard to negligence of driver (Civ. Code, § 1714).

3. **Negligence** ⚷136(9).

If reasonable men might differ as to whether plaintiff was contributorily negligent, judge, though believing plaintiff contributorily negligent, must submit question to jury (Civ. Code, § 1714).

4. **Negligence** ⚷136(5).

Contributory negligence can be established as matter of law only where no fact is left in doubt (Civ. Code, § 1714).

5. **Appeal and error** ⚷1050(1).

In action by pedestrian struck by automobile, permitting witnesses to testify respecting imaginary lines of crosswalk upon street at end of block *held* not prejudicial, where both parties testified as to prolongation of curblines (St. 1923, p. 517, § 131½(e), as added by St. 1931, p. 2127, § 47).

6. **Appeal and error** ⚷1050(1).

Permitting testimony of plaintiff's wife as to how far she preceded him in crossing, after she testified her back was turned and she did not see him struck by automobile, *held* not prejudicial, where same questions were fully answered by eyewitnesses.

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Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action by John S. Gernhardt against I. Rancadore and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

George L. Greer, of Los Angeles, for appellants.

Leonard E. Thomas and Harold A. Jones, both of Los Angeles, for respondent.

CRAIG, Justice.

In an action for damages alleged to have been incurred through the negligent operation of an automobile, a trial before a jury resulted in favor of the plaintiff. The defendants appealed.

[1] It is contended by the appellants that the record presents as a matter of law contributory negligence on the part of the respondent which would have constituted a bar to recovery, and requires a reversal of the judgment. The appellants premise their argument by conceding its limitation by the rule that "when the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury," it ceases to be a question of fact for the determination of the jury. Upon the trial the plaintiff was shown to have alighted from a public vehicle on an easterly and westerly street, which thereafter proceeded in a westerly direction. He thereupon started across said thoroughfare toward the south, and had arrived at or below the center line of the street when he was thrown by the left rear door of the defendants' car, and was injured. It was dark, the street lights were burning, and the plaintiff had seen a number of automobiles approaching from the westerly direction as he attempted to cross. He raised his left arm, signaling with an umbrella, that he intended to cross. There were no street signals, nor were there lines on the pavement to mark a pedestrian zone. Witnesses differed as to the distance within which the defendants stopped after the im-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

pact being eight or ten feet or more than forty feet, and the speed of their car was estimated at eighteen miles per hour, and at twenty-five miles, and again as "very fast." It was testified that respondent stopped when he arrived at the center of the street, and that he was frightened, as he had previously seen the cars about three blocks distant and believed he had ample time to reach the south side of the street. He swore: "I didn't know whether to stop or go forward or backward; I was just stunned." "I held it up, the umbrella, to beg him to get him to stop the car, and of course that is all I know; just then I was hit." There was other evidence that the plaintiff was standing still, to await the passing of the cars. A passenger of the defendants testified: "I only saw this man standing there and he had some luggage in his hands and all of a sudden there was a crash and he came in through the window." The defendant Rancadore conceded that "he was standing still." It would seem that the respondent can be said to have done no less than was necessary to bring the case within the rule announced in a somewhat recent case wherein it was observed that the injured person "did at least look up and in the direction from which danger was to be expected. This action on his part would appear to be sufficient to relieve him of the disability of contributory negligence as a matter of law, and appellants were entitled to have the question submitted to the jury as a matter of fact." Rapp v. Southern Service Co., 116 Cal. App. 699, 4 P.(2d) 195, 196. It would be difficult to determine as a matter of law that the appellants' automobile was at a distance, or traveling at a rate of speed, which justified the respondent in crossing the street at said time, or that he did all that a reasonable and prudent man would be expected to do in standing at the center of the street at a time when the defendants were proceeding easterly.

[2-4] The question of contributory negligence must be determined without regard to negligence on the part of the driver. Hutson v. Southern Cal. Ry. Co., 150 Cal. 701, 89 P. 1093. He must be held responsible not only for the result of his willful acts, but also for an injury occasioned to the plaintiff by a want of ordinary care or skill in the management of his property, except so far as the plaintiff willfully or by want of ordinary care brought the injury upon himself. Civ. Code, § 1714. "If reasonable men might differ as to whether or not the plaintiff did what an ordinarily prudent person would have done in the same or similar circumstances, then the judge is not justified in drawing the conclusion that, because in his own mind the plaintiff was guilty of contributory negligence, all other reasonable persons must think likewise. A determination by the trial judge to the effect that a plaintiff has been guilty of contributory negligence must rest upon such a state of facts that not merely a bare majority of reasonable men will agree with his conclusion." Reinders v. Olsen, 60 Cal. App. 764, 214 P. 268, 269. It is only where no fact is left in doubt that contributory negligence is established. Zibbell v. Southern Pac. Co., 160 Cal. 241, 116 P. 513, 515. Conflicts in the evidence as to facts recited created such a doubt in numerous instances, and it cannot be said as a matter of law that it was error to present them to the jury nor for the jury to resolve them in favor of the respondent.

[5] It is next contended that while the plaintiff is assumed to have been in a crosswalk when injured, this did not relieve him from exercising due care and that the trial court erred in permitting witnesses to indicate and testify regarding imaginary lines of a crosswalk upon said street. However, section 131½ of the California Vehicle Act provided that the plaintiff should be given the right of way within any unmarked crosswalk at the end of a block; and that for the purposes of said section "a crosswalk shall mean that portion of a roadway ordinarily included within the prolongation or connection of curb lines and property lines at intersections, or any other portion of a roadway clearly indicated for pedestrian crossing by lines or other markings on the surface." California Vehicle Act, § 131½ (e), as added by St. 1931, p. 2127, § 47. Both parties testified as to the prolongation of curb lines, and the error, if any can be said to have existed, was neither misleading nor prejudicial.

[6] Finally, error is assigned to the overruling of objections to questions propounded to the plaintiff's wife as to how far she preceded him in crossing, after she had testified that her back was turned and that she did not see the accident. This she estimated at about three feet, or possibly less, but that she could not say positively. The same questions were fully answered by eyewitnesses from whose testimony the jury might compare her evidence and allot to it such, if any, weight as the same might warrant. The appellants do not indicate wherein it could have unfavorably influenced the jury, nor is its prejudicial effect apparent.

The judgment is affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

133 Cal.App. 653

## GRAY v. MAGEE et al.

Civ. 1065.

District Court of Appeal, Fourth District, California.

Aug. 10, 1933.

**1. Highways 🔑17.**

Evidence supported finding that public road existed over lands of estate and touched way of necessity at designated place.

**2. Trial 🔑375.**

What trial judge observed on views of territory in action involving way of necessity and existence of public road was evidence in case.

**3. Appeal and error 🔑994(3), 1011(1).**

Appellate court cannot weigh conflicting evidence or pass on its credibility.

**4. Highways 🔑17.**

Government maps were admissible in action involving way of necessity and existence of public road, notwithstanding they did not show use of road after 1916 (Code Civ. Proc. § 1936).

**5. Highways 🔑17.**

Government records showing homestead entries and final proofs *held* admissible, in action involving existence of public road, to show occupation of lands and necessity of using some road.

**6. Dedication 🔑13.**

Executor may not make an express dedication, but an easement may arise in respect of estate lands through implied dedication or prescription.

**7. Highways 🔑7(1).**

Failure for 50 years to close estate and re-routing for estate's convenience of road which had existed over lands long before deceased purchased them and in excess of statutory period could not break continuity nor prevent accrual of public right to relocated portions.

**8. Highways 🔑17.**

Where road across estate lands had been used long in excess of statutory period, burden was on estate to show that public use of changed routing was not under claim of right adverse to owners.

**9. Highways 🔑16.**

General description of alleged road was sufficient, in action involving existence of public road across lands of estate.

**10. Actions 🔑50(7).**

Complaint which joined owner of land over which way of necessity was sought and owners of land over which public road allegedly existed *held* not demurrable on ground of misjoinder of parties or actions.

**11. Judgment 🔑586(2).**

Judgment that alleged road was not public *held* no bar to action to determine whether different road on same land was public, particularly where second action also involved way of necessity over other land to join alleged public road less direct than one previously sought to be established.

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Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Coleman M. Gray against Hugh Magee and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Estudillo & Schwinn, of Riverside, and A. M. Thompson, of San Diego, for appellants.

George H. Stone, of San Diego, for respondent.

BARNARD, Presiding Justice.

Victoria P. de Magee, who died in 1886, left as a part of her estate a mountain ranch consisting of several hundred acres, only a part of which is tillable land. Her estate has never been closed, and Hugh Magee, as one of the executors, has been in personal charge of these lands since 1913. He is also the owner of a tract of several hundred acres of land immediately adjoining the estate lands on the west. There is an old adobe house on the estate lands, some 300 or 400 feet easterly from the private land of Hugh Magee, which was erected there some years before these lands were acquired by Victoria P. de Magee. Between 1911 and 1913 Hugh Magee built a barn on his own land near the west line of the estate land and a few hundred feet northeasterly of the adobe house, and in 1927 or 1928 he built a house near this barn.

In 1924 the plaintiff established a home on a portion of the Hugh Magee land referred to, under some arrangement with him, doing some clearing and irrigating, as well as erecting several buildings. At that time he entered by following a road over the estate lands past the adobe house to the Hugh Magee barn and thence over the Hugh Magee land in a southerly direction to the site of his home. In 1927, at the suggestion of Hugh Magee, the plaintiff improved a road westerly from his home site across the estate lands to a point on the road by which he had formerly entered which is somewhat southwesterly from the old adobe house. This short piece of road improved by the plaintiff will be hereinafter referred to as the "Gray" road. In July, 1928, Hugh Magee conveyed by deed to the plaintiff

25 acres of his private land, upon a part of which the plaintiff had established his home, and during the same year one of the executors and some of the heirs of the Magee estate took measures to prevent the plaintiff from using the Gray road. The plaintiff then brought an action, one purpose of which was to establish the location of the Gray road as a public road. On appeal this court affirmed a decree to the effect that the Gray road was not a public road and prohibiting the plaintiff from using the same. Gray v. Magee, 108 Cal. App. 570, 292 P. 157. The present action was started in November, 1930, after the decree in the case referred to became final.

[1, 2] In this action the plaintiff is seeking to establish a way of necessity over the lands of his grantor, Hugh Magee, to connect with what is claimed to be a public road at a point near the barn above referred to. As a part of his case the plaintiff also seeks to establish that a public road exists at the point near this barn, being the westerly end of the way of necessity, and for that purpose the executors of the estate and other individuals were joined as defendants, since the road relied upon as a public road runs across their respective lands. At the trial little, if any, defense was made as to the way of necessity across the lands of Hugh Magee in itself, and the entire controversy centers upon whether this way of necessity reaches a public road; in other words, whether there is a public road across the Magee estate lands which meets the way of necessity at Hugh Magee's barn. The trial court found in all respects for the plaintiff, and the defendants have appealed.

The main contention of the appellants is that the evidence does not support the findings to the effect that a public road exists across the estate lands and touches the way of necessity at the barn. More than a hundred witnesses were examined, and the transcript contains more than 2,000 pages, including two large volumes of exhibits. The printed briefs contain more than 1,000 pages, the greater portion thereof being devoted to quoting, summarizing, and marshaling portions of the evidence in accordance with the points of view of respective counsel. It would serve no useful purpose, and would require an unwarranted amount of time and space, to analyze this evidence in detail, and we shall make only the most general references thereto. No more appears than a conflict in the evidence, the great preponderance whereof, in our opinion, sustains the findings and judgment. In general, the appellants' contentions as to the evidence may be thus summarized: That the roads shown to have long existed over the estate lands were private roads for the use and benefit of the estate; that any use of such roads by outsiders was casual and permissive only; that certain changes in the location of portions of the road were made by the executors solely for the benefit of the estate; and that no public road has ever extended to any part of the private land of Hugh Magee.

There is overwhelming evidence that a road has existed across the estate lands since many years before the same were acquired by Victoria P. de Magee, and that until about 1875 this was the only road between Pala, to the south of these lands, and Temecula and Pechanga to the north. While after that date another more direct road between Pala and Temecula was established some miles to the west, this road across these lands has remained the only road to Pechanga. There is evidence that this road was used by the Indians as early as 1846 for the purpose of hauling lime from Pechanga to Pala, and direct testimony of its use for hauling and general traffic during nearly every year from 1862 to 1875, and during practically every year from 1875 to 1930, when this action was brought. Nearly a hundred witnesses testified to such use, some limiting their testimony to one or two years while others covered many years, and these same witnesses testified to having seen literally hundreds of other people use the road over a period of many years. The appellants take exception to the testimony of some of these witnesses, claiming that the same does not establish adverse use of the road. While it is true that certain items of evidence may not be sufficient, standing alone, all of the evidence must be taken together, and each part has its place in the composite whole. A number of maps were introduced in evidence, including one prepared by the surveyor general of California in 1875; one by the surveyor general of California in 1880; one by the surveyor general in 1886; a land office plat published in 1892; a United States topographical map of the quadrangle in which this land is situated, prepared from surveys made in 1891 and 1898; a land office map prepared in 1913 from a resurvey; and a map of San Diego county published in 1931. All of these maps indicate a road running from Pala across these estate lands and in the direction of Pechanga and Temecula. The respondent introduced in evidence copies of government records showing original homestead entries and final proofs in a dozen cases relating to lands in the immediate vicinity of the lands here in question. In some cases there is evidence that these homesteads were occupied by several successive homesteaders or vendees. A natural inference is to be drawn that these parties, while living upon and proving up on their homesteads, used some road to get to the outside world. Other evidence in the record plainly indicates that the only road they could have used is the one in question across these estate lands, and there is some direct testimony to that effect. In addition, the trial judge visited the lands in question and went over the points in controversy on two occasions during the trial. What he there observed is to be considered as evidence in the case. People v. Milner, 122 Cal. 171, 54 P. 833; Hatton v. Gregg, 4 Cal. App. 537, 88 P. 592; Wright v. Locomobile Co., 33 Cal. App. 694, 167 P. 407; Vaughan v. County of Tulare, 56 Cal. App. 261, 205 P. 21; MacPherson v. West Coast Transit Co., 94 Cal. App. 463, 271 P. 509. It was thoroughly established by the evidence that a road continuously existed across these estate lands from a date long prior to the time they were acquired by Mrs. de Magee to the time of the trial, and that throughout a period of some seventy years the same was used by the general public having occasion to use such a road without objection from any one.

Coming to the more specific question as to the location of this road as it crossed the estate lands during various periods of time, it fully appears that before these lands were acquired by Victoria P. de Magee, and during most of the time she occupied the same, this road crossed what is known as "Milkhouse" canyon, and passed over what was called the "Colorado Mesa," about 3,600 feet westerly from the Hugh Magee land, and some 3,000 feet west of the old adobe house. It appears that this crossing through the canyon was washed out and rendered impassable in 1884, and that in that year or the next, and either one or two years before Victoria P. de Magee died, the location of this part of the road across the estate lands was changed by making a new crossing over the canyon at a point considerably nearer what is now Hugh Magee's land, and connecting the same with the other road at a point some 400 feet northwesterly from the old adobe house. It further appears that the last-mentioned crossing over the canyon was washed out by floods in 1916, and that Hugh Magee, who was living on his land and caring for the estate lands, then put in a new crossing at a point still nearer his land, running this part of the road a few hundred feet easterly to his barn, then a few hundred feet southwesterly to the old adobe house, and connecting with the old road a few hundred feet farther on. There is an abundance of evidence that from 1916 until the time of the trial this road ran past the old adobe house on up through Hugh Magee's barnyard and then northwesterly across the canyon and on toward Pechanga. It is undisputed that Hugh Magee's barn was upon his own land, although it was near the line between his and the estate land. In 1927 or 1928, the Southern Sierra Power Company used the road here in question in connection with some work it was doing farther up in the mountains, and, in order to avoid some sharper turns, constructed a new cut-off from a point a little northwest of the old adobe house to a point a few feet westerly from Hugh Magee's barn. The appellants strenuously maintain that this cut-off was in fact the road used by the public, and that the slightly longer road, by the old house and the barn, was used only by the family. However, there is abundant evidence that this cut-off was not opened until 1927 or 1928, and that prior thereto all traffic went over the road by the adobe house and the barn, and there is some testimony that, after that short piece of road was constructed, a part of the public continued to go over the portion of the road leading by the adobe house and directly to the barn. A number of witnesses testified that between 1916 and 1928 the road from Pala went past the adobe house and on to the barn and then out toward Temecula. Several of these witnesses testified that this was the only road. Not only is there ample evidence that from 1916 to 1928 this road ran past the adobe house and Hugh Magee's barn, but this fact appears from much of the appellants' own evidence and particularly from the testimony of Hugh Magee. He testified that in coming from Pala he had turned to the right toward the old adobe house for more than forty years; that his barn was built in 1911 and rebuilt in 1913; that the road between the house and the barn has not been changed since 1913; and that a certain party used to come from lands considerably to the north of the estate lands to his house over the same road that runs from his house to Temecula. He admitted that the road from Pala came up to his barn and had since 1916, and that, when they went out to Temecula, they went on from the barn. He testified that from 1913 to the time he built his new house the only way to get to the homestead and the barnyard was from the old adobe house up to the barn, that he hauled cream from there to Pala, and that he also went out from there north toward Pechanga. While this witness maintained that that portion of this road crossing the estate lands was and always had been a private road used only in connection with working the ranch, the court was justified in drawing an entirely different inference from the facts testified to by him, especially when the same is taken in connection with other portions of the evidence. Without reviewing the evidence in any greater detail, it is sufficient to say that it fully supports the findings.

[3] While the appellants rely upon certain conflicting evidence and upon the claim that much of the evidence is unworthy of belief, such matters are for a forum other than this. While there is some evidence that at certain times during these many years gates were found across this road, sometimes not even being closed, there is no evidence that any locked gate was ever found until some time in 1930, after the prior case referred to

was affirmed on appeal, and then only near the northerly limits of the estate lands and above the point where the way of necessity connects with the road. There is evidence that the road across the estate lands was a part of a general road some 12 miles in length, and that no objection was made to its use by the public for nearly eighty years. The slight evidence of the presence of unlocked and sometimes open gates at a few scattered times throughout these years on a mountain ranch in a cattle country could not be held sufficient to defeat the rights of the public in and through a road shown to have been used by the public long years before the estate or the deceased acquired the land, and continuously thereafter.

[4, 5] Some thirty assignments of error in ruling upon the admission of evidence are presented by the appellants. Most of these relate to immaterial matters of trifling moment, and call for no special attention, especially in view of the liberal cross-examination permitted by the court. The remaining assignments fall into two groups which will be briefly considered. It is contended that the court committed prejudicial error in admitting a number of maps, nearly all of them government maps, all of which were objected to as immaterial and hearsay. It is not only argued that these were inadmissible, but that they could not and did not show any use of the road in question after the year 1916. We think these maps were admissible under section 1936 of the Code of Civil Procedure, and certainly no one piece of evidence is inadmissible merely because it does not prove the entire case of the party offering the same. Complaint is also made of the receipt in evidence of certified copies of government records showing various homestead entries and final proofs in connection therewith. These documents were offered and admitted, not as proof of the facts contained therein, but for the purpose of showing that other lands around and above the land here in question had been occupied and settled, and as justifying the inference that such settlers must have used some road in getting to the outside world. The testimony of other witnesses sufficiently indicated that the road here in question was the only one that could have been thus used. We think that this evidence was admissible for the limited purpose for which it was received. Moody v. Peirano, 4 Cal. App. 411, 88 P. 380; Lobree v. L. E. White Lumber Co., 53 Cal. App. 85, 199 P. 821; Bone v. Hayes, 154 Cal. 759, 99 P. 172. We find no error with respect to the admission of evidence of sufficient importance to justify a reversal.

[6-8] It is further contended that the executors of the Magee estate could not make a dedication of the estate lands to the use of the public, and that any use of the road shown was both casual and by permission, and not sufficient to give to the public an easement over the estate lands. Without doubt, an executor may not make an express dedication as to estate lands, but an easement may arise as to estate lands through implied dedication or prescription. Patchett v. Pacific Railway Co., 100 Cal. 505, 35 P. 73. Where a road has been in existence over certain lands since long before the same were acquired by a decedent and has continued thereon for a long period of years, greatly in excess of the statutory period, and where the course of such a road over the lands of an estate is re-routed because of washouts and for the greater convenience of the occupants of the land, the mere fact of such a re-routing cannot break the continuity of such a long-established route and cannot be held to prevent the possibility of any right accruing to the public over the relocated portions of the road merely because of the failure to close the estate during a period of nearly fifty years. We may add that, under the circumstances here shown, the burden was upon the appellants to show that the use by the public of the changed routing of the road over a period of many years was not one under a claim of right and adverse to the owners of the land. Yuba Cons. Goldfields v. Hilton, 16 Cal. App. 228, 116 P. 712, 715; Costello v. Sharp, 65 Cal. App. 152, 223 P. 567; Pacific Gas & Electric Co. v. Crockett, 70 Cal. App. 283, 233 P. 370; Fleming v. Howard, 150 Cal. 28, 87 P. 908. The matters of casual use and claimed permission were questions of fact which have been resolved against the appellants upon sufficient evidence.

[9, 10] It is urged that the court erred in overruling general and special demurrers to the complaint. It is first contended that the complaint does not sufficiently describe the road claimed to exist across the estate lands. The complaint alleges that there is a public road extending from the home of Hugh Magee in a northwesterly direction toward Temecula and in a southerly direction towards Pala, describing the property allegedly owned by the defendants over which the road passes by section, township, and range. It is also alleged that this forms one continuous road from Pala to Temecula via Smith Mountain, and that it is impossible for the plaintiff to accurately describe its course upon the ground without a survey. During the trial of the case, proof was made that in another action the plaintiff had been restrained from going upon the property owned by the Magees. We think the complaint sufficiently apprised the defendants of the location of the public road which was claimed to exist. A second contention is that the complaint is fatally defective because of a mis-

joinder of parties and actions. In this connection it is claimed that an action against Hugh Magee for a way of necessity over his land is improperly joined with an action against the other defendants to establish the existence of a public road over their lands. In order to establish a way of necessity over the lands of Hugh Magee, it was necessary for the plaintiff to establish that such a way would give him access to a public road. He could do this only by alleging and proving that a public road existed over the estate lands which came to the line of Hugh Magee's land. Only one cause of action is alleged, and all defendants were proper parties. In our opinion, the demurrers were properly overruled.

[11] It is contended that the respondent's action is barred by the decision in the former case referred to, Gray v. Magee, supra. In that action, this respondent sought to establish the existence of a public road running in a westerly direction from his land across a part of the estate lands to a point on the Pala-Temecula road, some distance southerly from the old adobe house. We are unable to see how a decision holding that such a road was not in fact a public road can be a bar to the present action to establish a way of necessity running northerly from the respondent's land, through the lands of his grantor, to a point on the Pala-Temecula road a short distance northerly from the adobe house. It is further argued that, in any event, the issues of the present action could have been litigated in the former action, and that the respondent should not be permitted to harass the appellants with a multiplicity of suits or to saddle the expense thereof "upon the breaking back of the isolated Magee mountain ranch." The sympathy we might otherwise feel is somewhat tempered by the evident fact that the expense of this litigation, apparently out of all proportion to the material values involved, could easily have been avoided by a course of conduct governed less by bitterness and more by equitable considerations. While this respondent did not prevail in the former action, the record in that case discloses that his claim that the more direct road was a public one possessed considerable merit. If it may be assumed that he could with propriety have sought at the same time to establish both that he had an outlet and that he was entitled to a way of necessity because he had none, it certainly cannot be held that he foreclosed himself from all relief by first attempting to secure the more direct and better route to the outside world.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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133 Cal.App. 532

## COOPER et al. v. GIBSON, County Treasurer (RIVER FARMS CO. OF CALIFORNIA et al., Interveners).

Civ. 4952.

District Court of Appeal, Third District, California.

July 31, 1933.

**1. Mandamus 🔑176.**

It is right and duty of Court of Appeals to order distribution of portion of reclamation district's bond fund in county treasurer's possession in mandamus proceeding.

**2. Drains 🔑88.**

Payment of portion of reclamation district assessments, unpaid when last of district's bonds and interest coupons, for payment of which assessments were made, fall due, may be enforced to pay unpaid portion of principal of or interest on bonds, and supplemental assessment in amount still unpaid after full payment of assessments must be made (Pol. Code, § 3459, and § 3480, as amended by St. 1931, p. 762, § 6).

**3. Drains 🔑88.**

Reclamation district bond interest coupons, falling due on certain date, and county treasurer's call for payment of installments on assessments made to pay them, are independent of previous and subsequent calls and one call cannot be tacked to prior call (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

**4. Drains 🔑88.**

County treasurer must estimate amount necessary to meet interest, due at certain date, on reclamation district's bonds, call portion of assessment necessary to make payment thereof, and, if amount realized exceeds necessary sum, include money in bond fund in estimate (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

**5. Drains 🔑88.**

Money received by county treasurer on account of call for payment of assessment installments to pay reclamation district bond interest coupons, due on certain date, must be applied to payment of such coupons only (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

**6. Drains 🔑88.**

Moneys received from leasing or operation of lands, titles to which have vested in reclamation district by sale for delinquent assessment installments, called for to pay district bond interest coupons, should be first applied to payment of such coupons (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

**7. Drains** ⚷88.

Calls for payment of assessment installments to pay reclamation district bond interest coupons *held* proper, notwithstanding delinquency in payment of prior installments, where records showed no divestiture of assessed corporation's title to land because of delinquency sales (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

**8. Drains** ⚷89.

"Certificate of sale" of land for nonpayment of reclamation district assessment installment is not conveyance of title, but only evidence of purchaser's right to receive property free from former owner's claim, if latter fails to pay installment and penalty within year after sale (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

[Ed. Note.—For other definitions of "Certificate of Sale," see Words & Phrases.]

**9. Drains** ⚷89.

Title to land, sold for nonpayment of reclamation district assessment installments, remains in owner until county treasurer executes deed to individual purchaser or district (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

**10. Drains** ⚷89.

County treasurer's deed of land to purchaser at sale for delinquent reclamation district assessment installment or to district does not relieve land from assessment lien, which continues until full payment of assessment (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

**11. Drains** ⚷89.

While deed, executed by county treasurer because of landowner's failure to redeem from sale for delinquent reclamation district assessment installment, destroys right of purchaser at prior sale to receive deed and takes precedence over prior deed, assessment lien is neither diminished nor discharged thereby (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

**12. Drains** ⚷84.

Lien for unpaid portion of reclamation district assessment installment, so far as owners of land assessed, purchasers at delinquency sales, and purchasers from district of lands sold and conveyed to latter are concerned, continues even after conveyance of land to district and latter's subsequent sale thereof (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

**13. Drains** ⚷89.

Reclamation district and county treasurer had legal right to sell land for nonpayment of assessment installment, notwithstanding prior sales thereof to treasurer for district's benefit on delinquencies in payment of previous installments and owner's redemption of land from first sale (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

**14. Taxation** ⚷786.

Tax deed latest in time is prior in right.

**15. Drains** ⚷89.

Owner of land, sold for nonpayment of assessment installment, called to pay reclamation district bond interest coupons, must ratify sale before claiming any portion of surplus proceeds (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

**16. Drains** ⚷89.

Statutory requirement that county treasurer pay moneys collected on assessments for payment of reclamation district bonds, including moneys derived from sales of land for delinquent installments, into main county treasury, does not enlarge district's right to receive moneys, nor purposes for which treasurer may sell lands, but refers exclusively to moneys, right to which is unquestioned (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

**17. Drains** ⚷89.

Landowner not ratifying reclamation district's sale of land, purchased for it by county treasurer at sale for nonpayment of assessment installment, cannot claim any portion of proceeds above amount due district (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

**18. Drains** ⚷89.

Reclamation district, in which title to land has vested unconditionally by a conveyance thereto as purchaser at sale for nonpayment of assessment installment, may sell it for highest sum obtainable and appropriate entire proceeds to its own uses (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

**19. Drains** ⚷89.

Only purpose of power, vested in county treasurer, to sell land for reclamation district's benefit after purchasing it at sale for nonpayment of assessment installment, is to realize sum sufficient to pay amount due district (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

**20. Drains** ⚷89.

Rights of landowner, not redeeming property, title to which has passed to reclamation district as purchaser at sale for nonpayment of assessment installment, are forever foreclosed (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

**21. Drains** ⚷89.

Sale of tract for nonpayment of reclamation district assessment installment must be made only for amount chargeable against such tract (Pol. Code, § 3480, as amended by St. 1931, p. 762, § 6).

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

**22. Mandamus** 🔑15.

Mandamus will not generally issue, where rights of third persons not parties would be injuriously affected, and may be refused in exercise of sound judicial discretion, where questions of grave importance concerning rights of persons, given no opportunity to be heard, are involved.

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Proceeding by Frederick F. Cooper and others, as members of the Bondholders' Protective Committee of Reclamation District No. 108, for a writ of mandate to California Gibson, as Treasurer of Colusa County, in which the River Farms Company of California, a corporation, and the receiver thereof, intervened.

Writ granted.

Athearn, Chandler & Farmer and Frank R. Devlin, all of San Francisco, for petitioners.

Ralph W. Rutledge, of Colusa, for respondent.

Devlin, Devlin & Diepenbrock, of San Francisco, for interveners.

Mr. Justice PLUMMER delivered the opinion of the court.

Reclamation district No. 108, hereinafter referred to as reclamation district, is now, and was at all the times hereinafter mentioned, a reclamation district organized and existing under and pursuant to the laws of the state of California, situate in the counties of Colusa and Yolo, the greater portion of which is situate in the county of Colusa. The respondent, California Gibson, is, and at all the times hereinafter mentioned, was, the duly elected, qualified, and acting treasurer of the county of Colusa, and, as such, custodian of the bond fund of reclamation district No. 108; that subsequent to the organization of said reclamation district, to wit, on or about 1925, said reclamation district duly authorized, issued, and sold bonds in the aggregate par value of $3,142,000, all dated the 1st day of January, 1925, bearing interest at the rate of 6 per cent. per annum, payable semiannually on the 1st day of January and the 1st day of July of each year during the term of said bonds; that said bonds and the whole thereof were sold and issued by said reclamation district; that the principal of said bonds mature serially from January 1, 1935, to and including the 1st day of January, 1943, said bonds having attached thereto interest coupons payable on the 1st day of January and the 1st day of July during said term; that of the bonds so issued there have been surrendered and canceled bonds of the par value of $9,025.

The petitioners in this action constitute what is called a bondholders' protective committee, organized and existing for the purpose of protecting the interest of owners of bonds issued by said district; said committee having under its control bonds of said district in the par value of $695,000, together with all interest coupons on said bonds maturing July 1, 1932, and of all subsequent interest-maturing dates subsequent thereto. The agreement under which said committee is organized authorizes and empowers the committee to take any and all actions and institute all proceedings that may be considered proper, etc., in order to procure the payment of the principal and interest on said bonds. The petition in this action schedules the number of all of the bonds so held and controlled by the committee specifying that each bond is of the par value of $1,000, and that the interest coupons attached thereto are all in the sum of $30 each, specifying that the county treasurer of Colusa county will pay to the holder thereof, out of the funds of said reclamation district, the sum of $30 at and on the respective dates mentioned in said interest coupons.

The petition further sets forth that on the 2d day of May, 1933, there were outstanding unpaid coupons due on July 1, 1932, to the number of 2,092, each in the sum of $30, and on January 1, 1933, there were likewise outstanding and unpaid additional interest coupons to the number of 2,128, each in the sum of $30.

The petition then sets forth the number of coupons held by the committee, and the face value thereof, which became due and payable on July 1, 1932, and also of the coupons held by said committee, which became due and payable on January 1, 1933, and which coupons are still outstanding and unpaid.

The record shows that the respondent, as treasurer of Colusa county and custodian of the bond fund of said reclamation district, has in her possession the sum of $33,616.18, of which sum $14,588.07 was realized as the result of a call duly and regularly made by said treasurer of an installment due upon the reclamation assessment theretofore levied upon the lands of said district, which installment was called for the purpose of paying the coupons of said district maturing on July 1, 1932; that of said $33,616.18, the sum of $18,478.11 was realized as the result of an installment called by the respondent with which to make payment of the coupons maturing January 1, 1933.

It further appears that, of said last-mentioned sum of $18,478.11, $8,000 thereof was derived from the delinquent sale of certain lands belonging to the intervener River Farms Company of California for failure to pay an installment called for the purpose of paying interest coupons maturing on January 1, 1933.

The proceeding leading up to the receipt of said $8,000 appears to have been as follows: On or about the 1st day of October, 1932, the respondent, pursuant to the provisions of section 3480 of the Political Code, as amended by St. 1931, p. 762, § 6, made a call for the payment of an installment on the assessment theretofore levied upon the lands belonging to the River Farms Company of California, as intervener (which for convenience will be called River Farms Company, which designation will also include John D. McGilvray, the receiver of said company), in the sum of $1,833.81; that said intervener did not, nor did any owner of the property, or any one interested in the property belonging to the intervener, pay, or offer to pay, said installment, and that upon the expiration of the time mentioned in said section of the Political Code, said call became delinquent, and the respondent, on the 22d day of December, 1932, at the hour of 2 p. m., after having given notice thereof as required by law, offered the property belonging to the intervener, known as parcel No. 54–B for sale, and at such sale one Zumwalt became the purchaser thereof for the sum of $8,000; that thereupon the respondent in this action received said sum from said Zumwalt and issued to him a certificate of sale for said parcel of land known at 54–B.

The record further shows that prior to the sale just mentioned, to wit, on October 1, 1931, an installment in the sum of $1,593.75 was called, and the assessment of parcel No. 54–B, which subsequently became delinquent, and that on or about the 29th day of December, 1931, after regular proceedings had been taken and had therefor, said parcel was sold on account of the failure of the owner of said parcel of land, or any one interested therein, to pay said installment, at which sale the treasurer of said county bought in said parcel for the benefit of said reclamation district.

The record further shows that on April 1, 1932, a call for the payment of an installment of the assessment levied upon said parcel No. 54–B in the sum of $1,813.68, was made. This installment not having been paid, said parcel No. 54–B was, on or about the 29th day of June, 1932, again sold and bid in by the respondent for the benefit of said district.

It further appears from the record that the intervener, River Farms Company, has redeemed said parcel of land known as No. 54–B, from the sale thereof made on or about the 29th day of December, 1931, on account of delinquency in the payment of the call made on or about the 1st day of October, 1931. So far as the record before us appears, there is nothing to indicate that any redemption has been made from the sale of said parcel No. 54–B, made on or about the 29th day of June, 1932, on account of delinquency in payment of the installment called on the 1st day of April, 1932.

Upon this proceeding we have first to consider whether the moneys received upon the respective calls to which we have referred are earmarked and appropriated to a specific purpose, to wit, to the payment of the interest coupons falling due on July 1, 1932, and the interest coupons falling due on January 1, 1933, and should be applied only to the payment of coupons falling due following the interest date for which the respective calls were made; that is, that the money received on account of an installment called to pay interest coupons falling due on July 1, 1932, should be applied only to the payment of such coupons, and that the money received for and on account of the installment call to make payment upon the interest coupons falling due January 1, 1933, should be applied only to the payment of such coupons.

The contested questions relate to the validity of the third sale made of said parcel No. 54-B, at which sale one Zumwalt paid therefor the sum of $8,000, and received from the respondent a certificate of sale; the disposition of the $8,000 received on account of said sale; whether it should be added to the bond fund of reclamation district and made available for payment to holders of interest coupons; whether the interveners are entitled to the surplus remaining of said $8,000, after the payment of the amount of the third call herein referred to in the sum of $1,832.81, after adding thereto interest and penalties as provided by law.

These questions involve the further issue of whether the court should, upon a mandamus proceeding, pass upon the rights and titles of persons who are not parties to this proceeding; and likewise whether the court in a mandamus proceeding should order the distribution of a fund, the right to the retention of which, by the respondent, is a matter of dispute.

[1] The right and duty of the court in this proceeding to order distribution of that portion of the fund in the possession of the respondent as custodian of the bond fund of the reclamation district is fully answered by the opinion of this court in the case of Rohwer v. Gibson, 126 Cal. App. 707, 14 P.(2d) 1051, and need not be restated herein.

[2] Section 3480, supra, contains no provision for supplementing the call for an installment to pay interest coupons falling due upon the date specified in the call in the event that the amount of money realized on account of said call proves insufficient to meet the amount of interest coupons so falling due. The only provision in the section which can possibly be construed as relating thereto is the one providing as follows: "The lien of any unpaid assessment upon which bonds shall have been issued shall continue until all

said bonds, and any refunding bonds which may be issued, shall have been paid in full, and if for any reason any part of such principal or interest of said bonds, or of refunding bonds shall remain unpaid after enforcement of said assessment as in this article provided, the board of supervisors of the main county shall order an additional or supplemental assessment to be made as provided in section 3459, sufficient to pay such unpaid principal and interest; which additional or supplemental assessment shall be enforced and collected in the same manner as the original assessment." This portion of the section presupposes a lapse of time coincident with the falling due of the last of the serial bonds and the interest coupons thereon. The reasonable construction of this language would be that, if any portion of the assessment remains unpaid at said date, and any portion of the principal of the bonds, or of the interest that may have accrued during the series of years that the bonds have been outstanding, then and in that case the unpaid portion of the assessment might be enforced for the making of such payment, and, if the assessment has been fully paid by the respective landowners, recourse must be had to a supplemental assessment covering the amount of principal and interest on the bonds left unpaid by the previous proceeding taken and had to enforce payment. Applied to the situation here presented, there is no other provision for making payment for any balance that may remain unpaid of the interest coupons falling due on a certain date after the moneys received for making payment thereof, pursuant to the call, has been applied toward such payment.

[3] That the interest coupons falling due upon a certain date and the call made for their payment stand alone and are independent of both previous and subsequent calls, and that there can be no tacking of a subsequent call to a prior call, and that such was the intent of the Legislature appears from the following paragraph contained in section 3480, supra, to wit: "At least ninety days before any interest date of the bonds, including refunding bonds, the county treasurer of the main county shall estimate the amount of money necessary to pay interest and principal maturing on such interest date, after crediting thereon the funds in the treasury applicable to the payment thereof, and shall add thereto 15 per cent. of such aggregate sum to cover possible delinquencies, and said county treasurer shall thereupon cause to be published two times, to-wit, once a week for two weeks in some newspaper of general circulation published in each county in which any of the district may be situate, a notice substantially as follows:" (Here follows the form of the call.)

[4] The inference to be drawn from this paragraph of the section is that the county treasurer shall estimate the amount necessary to meet the interest falling due at a certain date, and shall call such portion of the assessment as may be necessary to make payment thereof. If the amount realized is over and above the sum necessary to meet an interest payment, then and in that event the money in the bond fund shall be included by the county treasurer in making his estimate of the amount necessary to make payment of the interest coupons for which the installment is called.

[5] There is no provision in the paragraph which we have quoted, nor in any other paragraph, save and except as hereinbefore stated, covering the subject of a deficiency to meet interest payments. That this is the correct interpretation of the intent of the Legislature appears from the fact that the subject and provisions of section 3480, supra, set up the necessary machinery and procedure for enforcing each installment call, and contain no provision for enforcing collective installment calls.

We conclude, therefore, that the money received on account of each call is so far earmarked that, if ordered distributed, it should be ordered distributed so as to apply the money received on account of the call intended to make payment of the interest coupons falling due on July 1, 1932, to the payment of such interest coupons only, and that the moneys received on account of an installment call intended to raise money for the payment of interest coupons falling due on January 1, 1933, should be applied to the payment of such interest coupons only.

No procedure being set forth in the statutes for calling assessments to pay any deficiency in the amount realized to meet the semiannual interest payments, it may be that a court of equity would have jurisdiction of an action instituted for the purpose of requiring the treasurer to make an additional or supplemental installment call for the purpose of covering such deficiency.

[6] As to the appropriation of the moneys received from the leasing or operation of lands, the titles to which have become vested in the district, it would appear that the money so received should be first applied to the payment of the interest due coincident with the period when the installment intended for the payment of such interest became delinquent. This would seem to be the intention of the Legislature by the language used in section 3480, supra, wherein the treasurer, in making his estimate of the amount necessary to pay interest and principal maturing on any date, is directed to credit such funds in the treasury to the payment of such interest and principal. In other words, the amount on hand so received is to be applied to the payment of the interest and principal falling due, to pay which the installment call

is made and becomes a part of the fund available for such purpose.

[7] Was the respondent, as treasurer of reclamation district, without legal authority to make sale of parcel No. 54–B, on the 22d day of December, 1932, by reason of the delinquency in making payment of the installment called on the 1st day of October, 1932? So far as the record is before us, it discloses title to said parcel of land as vested in the River Farms Company on the 1st day of October, 1931, at the date of the first call mentioned herein. It likewise discloses the title vested in the River Farms Company on the 1st day of April, 1932, the date of the second installment call considered herein, and also that the title to said parcel No. 54–B was vested in the River Farms Company on the 1st day of October, 1932, the date of the third installment presented for our consideration. Likewise it appears from the record that on the 22d day of December, 1932, title was still vested to parcel No. 54–B in the River Farms Company.

Redemption is alleged to have been made by the intervener as to the first installment mentioned herein called on the 1st day of October, 1931. The record is silent as to any redemption following the second installment call made the 1st day of April, 1932. It is likewise silent as to any deed having been made transferring title to said property from the River Farms Company to the reclamation district. The record showing no divestiture of title by reason of any delinquent sales, it follows that the several installment calls were properly made, irrespective of the fact that a prior delinquency had been suffered by the River Farms Company.

[8-11] The form of the notice required to be given by the treasurer is directed to "all assessed landowners of said district," and, at the date of the respective calls and the several notices given in pursuance thereof, the lands involved in this action were owned by the River Farms Company. A certificate of sale only had been issued by the treasurer on account of sales made following each delinquency, but a certificate of sale is not a conveyance of title and is only an evidence that the person named therein is entitled to receive the property free from any claims of the former owner in the event that the owner does not avail himself, or itself, of the privilege given by the statutes of paying the amount of the installment, together with certain specified penalties, within one year from the date of sale. The right given under the Code provisions, to the treasurer as trustee for the district, is simply a power of sale for a particular purpose, to wit, raising money to cover the amount of the installment, interest, and penalties mentioned. This procedure follows each delinquency suffered subsequent to an installment call, and the title remains in the owner until a deed of conveyance is made by the county treasurer, either to an individual purchaser or to the district, by reason of failure of individual purchasers to bid for the lands burdened with the delinquency. Even this deed does not relieve the lands from the lien of the assessment. Under the provisions of the Code, the lien of the assessment continues until it is fully paid. Thus, while a deed executed and delivered by reason of failure of the owner to redeem, following a subsequent sale, cuts off or destroys the right of a purchaser at a prior sale to receive a deed to the premises, and also takes precedence of a prior deed, the lien of the assessment is neither diminished nor discharged. This seems to us clear from the following language found in one of the paragraphs of section 3480, supra, to wit: "Which deed shall convey to the grantee therein named the said land free and clear of all encumbrances, except state, county and municipal taxes, and any taxes or assessments of irrigation, conservation or water storage districts, and except any portion of any reclamation assessment remaining unpaid at the date of said sale."

[12] The only exemption as to the calling of installments is made when the property has been conveyed to the county treasurer as trustee of the district. Even after the land has been conveyed to the county treasurer as trustee of the district, and by the district subsequently sold, the lien of the assessment immediately comes into full force and effect with the same operative power against the lands, although no sale had been made. The deed can only be made subject to the payment "of the amount for which the parcel of land was bid in by the treasurer at the delinquent sale, with interest thereon at the rate of 7 per cent per annum, compounded yearly from the date of said delinquent sale, and also the amount of all subsequent installments then delinquent with accrued interest and penalties thereon." It is then provided "that the deed to such purchaser upon such sale conveys said property free of incumbrance, except state, county and municipal taxes, and the unpaid balance of said assessment."

Under the various provisions of the Code which we have cited, the lien of the assessment, so far as the owners of the land assessed are concerned, so far as purchasers at delinquent sales may be affected, and also including purchasers from the district of the lands which have been sold and conveyed to the district, the lien of the assessment for the unpaid portion thereof still exists. Any other construction of the Code provisions would permit an owner, by suffering an installment call to go delinquent, to escape payment of a portion of the assessment levied upon his lands. The levy is made upon the lands of the respective owners according to the benefits conferred, and each landowner owes it to every other landowner in the district to make payment of his proportionate share, and the construction of the Code provisions which we have given carries out, we think, the intention of the Legislature that no tract of land shall be relieved of the burden so imposed upon it save and except by making full payment.

[13] We conclude from this résumé of the Code provisions that the district, and respondent as the county treasurer of the county of Colusa, had a legal right to make sale of parcel No. 54–B on the 22d day of December, 1932.

[14] That a tax deed, latest in time, is prior in right, is the law of this state, as set forth in the opinion in the case of Anderson v. Rider, 46 Cal. 134, 135. Other cases might be cited from other jurisdictions, supporting what we have just stated, but, as the California case has never been modified, it is unnecessary to make further citations.

Our conclusion that the respondent, as trustee for reclamation district, had the legal right to exercise the power of sale vested in him on December 22, 1932, is not intended to express any views of the court as to whether the River Farms Company might or might not, in an action brought for that purpose, have said sale set aside as voidable. In such a proceeding, however, equity being claimed by the River Farms Company, equitable action on its part would also be required of making payment of the amount of the delinquent installment for which the land was sold, and the costs and penalties legally attaching thereto, thus leaving in the funds of the district the amount of the installment, together with the penalties, whether such moneys were moneys paid by the purchaser Zumwalt or moneys paid by the River Farms Company in complying with equitable principles upon its part.

[15] This leaves undisposed of $6,167.19 of the $8,000 bid by Zumwalt for parcel No. 54–B. The petitioners claim that the writ of mandate prayed for herein, if issued, should direct that this sum be distributed in payment upon the interest coupons due as heretofore stated in this opinion. A portion of the River Farms Company contention is to the effect that the sale is absolutely void, and another portion of its contention is that the company is entitled to the surplus.

Section 3466 of the Political Code, as it read in 1920, having to do with sales on account of delinquent installments called on assessments where no bonds have been issued, or were outstanding, required surplus moneys to be paid to the owner. As amended in 1931 (St. 1931, p. 759, § 5), that provision now reads: "Out of the proceeds of said sale the County Treasurer shall place the amount due on said property, as shown in said notice in the proper funds of said District and shall pay to the owner of said property any surplus remaining." No such provision is found in section 3480, supra. There is, however, a principle of law involved which we think controlling here: That the landowner must first ratify the sale before it can claim any portion of the surplus. If the sale of parcel No. 54–B to Zumwalt should be set aside upon proceedings taken by the River Farms Company for that purpose, it is evident that the surplus would not belong to the River Farms Company. Whether it would belong to Zumwalt or to the district is a question, which we cannot definitely decide here, for the reason that Zumwalt is not a party to this action and will not be included in the order, for reasons hereinafter stated.

The principles which we are stating are succinctly set forth in 61 C. J., p. 1213, § 1641, showing when the owner is entitled to the surplus, and where his accepting any portion of the surplus presupposes and is based upon a ratification of the sale. A number of cases are cited in the footnotes to section 1641, supra, including Cooley on Taxation, vol. 3 (4th Ed.) p. 2443, § 1436. Also the case of Shattuck v. Smith, 6 N. D. 56, 69 N. W. 5, is called to our attention by counsel both for the petitioners and for the River Farms Company.

[16] The following language, to wit: "All moneys collected by any county treasurer upon any assessment upon which bonds shall have been issued, including all moneys derived from sale of land for delinquent installments, or from redemption thereof, or from sale of lands bought by the treasurer at any such sale, shall be by such treasurer forthwith paid into the main county treasury," etc.—contained in section 3480, supra, is not an enlargement of the right of the reclamation district to receive any moneys to which it would otherwise not be entitled, nor does it confer upon the reclamation district any additional title to moneys so paid into the bond fund, nor is it an enlargement of the purposes for which the county treasurer may exercise the powers of sale elsewhere conferred upon him by the section from which we have quoted. A direction to pay over money and a further provision for its use cannot be construed as a transmutation of title. The only rational interpretation to be given to the language which we have just quoted is that it refers exclusively to moneys where the right thereto and the ownership thereof are unquestioned.

[17, 18] Without elaborating further upon this point, there appears to us no ratification of the sale made of parcel No. 54–B on the 22d day of December, 1932, and the River Farms Company is not in a position to claim any portion of the surplus. There seems to us a clear line of demarkation between the right of the district upon lands

sold on account of a delinquent assessment and lands sold by the district after it has acquired a title thereto. When the lands have been sold and conveyed to the district, and title thus vested unconditionally in the district, it seems to us clear that the district has a right to sell the land for the highest possible sum that it can obtain for the same, and appropriate to its own uses and purposes every dollar received from such sale.

[19] This view is upheld in the case of Furrey v. Lautz, 162 Cal. 397, 122 P. 1073, an instance where the title was vested. That was an instance where the taxing power had obtained an indefeasible title and made sale of its own property. As we have stated, the power of sale vested in the county treasurer by section 3480, supra, for the benefit of the district, has for its purpose one object, just as the power of sale in a trust deed or mortgage, to wit, the realizing of a sum sufficient to pay the amount of money then due, including penalties and costs; that is, the money to which the district is entitled. Any other conclusion would lead to the imposition upon the landowner of a more onerous burden than contemplated when the assessment was levied upon his land, to wit, that he should pay for the benefits conferred upon his property.

[20] The redemption clause in section 3480 is general in its terms, reading as follows: "Any person interested in the said property may redeem the same at any time within one year after the date of sale, by paying to the county treasurer for such purchaser a sum equal to the purchase price stated in the certificate, with interest thereon at the rate of seven per cent per annum from the date of sale to such redemption." This leads us back to the price for which the county treasurer, representing the district, is entitled to obtain by the exercise of the power of sale. This does not trench upon the rights of any of the bondholders. All the bondholders are entitled to is to have the assessment upon each particular tract of land fully paid; that is the lien provided for by the Codes and the security to which each bondholder is entitled to look. In the event that the redemption is not made and the county treasurer becomes the holder of the legal title for the benefit of the district, then and in that event the district, for the benefit of the bondholders, is entitled to sell the land for any sum that it may obtain, as such sale does not place any additional burden upon the landholder. Not having exercised the right of redemption and allowing the title to pass into the district, his rights, of course, are forever foreclosed.

In determining the right of the district to moneys realized upon sales, the distinction must be clearly kept in mind between sales made following delinquent installments and sales made after title has become vested in the district or in the county treasurer as trustee for the district. In the one instance the district is entitled to have sale made for a specific purpose; in the other, to have sale made to obtain all the money possible.

[21] The Legislature has fixed the penalties and costs that must be paid by a redemptioner after allowing an installment to go delinquent, and we are not aware of any rule of law or principle of equity that would permit penalties and costs fixed by the Legislature to be increased by any action of the county treasurer. Nor do we know of any rule of law or principle of equity which would permit bondholders to increase the value of their security at the expense of the landowner seeking to redeem his property from a delinquent sale. The principle of law applicable to the sale of lands for delinquent taxes in the state of California, we think, in the absence of any specific statute, should be applied to the sale of lands in reclamation districts. In sales of land made by other tax-collecting officials in the state of California, it is a prerequisite that the sale of the smallest parcel of land must be made that will discharge the delinquent tax penalties and costs. Applied to a sale of a reclamation district where the whole tract is burdened with an assessment, it would require the sale to be made only for the amount chargeable against the tract. Otherwise, any landowner in a reclamation district whose financial condition prevented his meeting the installment calls until after a sale had been made might be required to pay two or three times the amount of the installment call or lose his land entirely. The cases having to do with the fixing of penalties by Legislatures do not lay a basis for the enhancement of a penalty by a county treasurer making sale, or by persons bidding for the land upon an installment sale. If the land had been sold and conveyed to the county treasurer, as trustee for the district, then, as we have stated, the sale may be made for the highest obtainable price.

As the case is presented to us, we do not deem it necessary to go further into the constitutional questions presented, nor to cite the various decisions affecting the constitutionality of the different provisions of section 3480, supra.

[22] Finally, should the writ of mandate issue herein to the full extent prayed for by the petitioners? This question is answered in the negative by the rule stated in 38 C. J. p. 558, § 30, where the text reads: "Mandamus will not as a general rule issue, where the rights of third persons not parties would be injuriously affected. Where questions of grave importance concerning rights of persons who have had no opportunity to be heard are involved in mandamus pro-

ceedings, the court, in the exercise of its sound judicial discretion, may refuse the writ, although it is an appropriate remedy." This precise question was passed upon by this court in the case of Spurrier v. Neumiller, 37 Cal. App. 683, 174 P. 338, 340, where it is said: "Mandamus will not lie where its effect would be inequitable or unjust as to third persons or will introduce confusion or will not promote substantial justice." To the same effect is the case of Board of Education v. San Diego, 128 Cal. 369, 60 P. 976. See, also, 16 California Jurisprudence, p. 780, § 14.

It follows, therefore, from what we have said, that, in the calculation of the fund to be distributed in payment of the interest coupons alleged to be due, there should be deducted therefrom the sum of $6,167.19.

Following this deduction, it is ordered that the writ prayed for be issued, directing the respondent as custodian of the funds of reclamation district to make distribution of the remaining funds in her hands, in accordance with the opinion of this court.

By reason of the conclusions at which we have arrived, the amount of money available for payment set forth in the petition on file herein must be revised.

It is therefore ordered that counsel for petitioners prepare the form of an order to be made by this court, specifically directing the amount of payments to be made and the percentage to be paid upon each interest coupon.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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133 Cal.App. 758

## COHEN v. HELLMAN COMMERCIAL TRUST & SAVINGS BANK et al.

## POLLARD v. SAME.

Civ. 8936.

District Court of Appeal, First District, Division 1, California.

Aug. 19, 1933.

**1. Vendor and purchaser ⇨232(1).**

Possession of real estate constitutes relevant fact on question whether purchaser of interest therein had notice of claim by one in possession.

**2. Parties ⇨29.**

Generally, plaintiff has right to select defendants in action.

**3. Parties ⇨38, 50.**

Plaintiff's right to select defendants is subject to right of third party to intervene and power of court to bring in necessary or proper parties.

**4. Parties ⇨50.**

Where evidence shows that third person has interest as beneficiary in subject-matter of suit, court may order him to be made a party.

**5. Parties ⇨40(2).**

In suit to terminate trust, obtain reconveyance of property, and for accounting, permitting third party, who was entitled to monthly payments during his natural life as part consideration for conveyance to grantors in trust, to continue as defendant and file cross-complaint, *held* not error (Code Civ. Proc. § 387).

**6. Venue ⇨5(2, 3, 4).**

Where suit to recover possession of, quiet title to, or enforce lien against, real estate is brought in county other than that in which real estate is situated, court is without jurisdiction, and action must be dismissed (Const. art. 6, § 5).

**7. Venue ⇨5(1).**

Constitutional provision requiring actions affecting real estate to be brought in county in which realty or any part thereof is situated must be strictly construed (Const. art. 6, § 5).

**8. Venue ⇨5(1).**

Application of constitutional provision requiring actions affecting real estate to be brought in county in which realty is situated is confined to instances in which complaint without reference to defendant's pleadings states case coming within actions enumerated (Const. art. 6, § 5).

**9. Trusts ⇨61(1).**

Where purpose of express trust ceases, estate of trustee also ceases, and persons beneficially interested may maintain suit to extinguish trust (Civ. Code, § 871).

**10. Venue ⇨5(3, 4).**

Suit to terminate trust in realty and for reconveyance *held* not action to recover possession of, or to quiet title to, realty, so as to require suit to be brought in county in which land was situated (Civ. Code, § 871; Const. art. 6, § 5).

> Suit to terminate trust in realty and to obtain reconveyance thereof was not action to recover possession of, or to quiet title to, realty within Const. art. 6, § 5, requiring such actions to be brought in county in which real estate, or any part thereof, is situated, because a suit to compel a reconveyance is an action in personam and constitutional provision

has no application to action for settlement of trust, nor where action is one to compel a trustee to perform his duties and close the trust.

**11. Venue 🔑77.**

Where county in which action concerning realty is commenced is not proper place for trial, only remedy is demand for change of venue; otherwise objection is waived (Code Civ. Proc. § 392, subd. 1).

**12. Venue 🔑77.**

Where no objection was made to venue of suit concerning realty, right to change of venue to county wherein subject of action was situated *held* waived (Code Civ. Proc. § 392, subd. 1).

**13. Reformation of Instruments 🔑30.**

Generally, proceeding to reform written instrument is in personam and not in rem.

**14. Venue 🔑5(3).**

Action to reform trust declaration by grantee of realty *held* action to determine some right or interest therein, which should be brought in county in which subject of action or part thereof is situated (Code Civ. Proc. § 392, subd. 1).

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Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Suit by Emanuel Cohen against the Hellman Commercial Trust & Savings Bank and others, wherein the defendant Joseph Pollard filed a cross-complaint against the plaintiff and the other defendants. From the judgment rendered, the plaintiff appeals.

Judgment affirmed in part and reversed in part, with directions, and case remanded.

Patterson, Bailey & Montgomery, E. S. Patterson, Frederick I. Richman, and William S. Scully, all of Los Angeles, for appellant.

Freston & Files, of Los Angeles, for respondents Hellman Commercial Trust & Savings Bank, Bank of America of California, and Merchants' National Trust & Savings Bank of Los Angeles.

Tanner, Odell & Taft and Garratt B. Sargent, all of Los Angeles, for respondents Jenkins and Pollard.

CASHIN, Justice.

Plaintiff brought suit against defendants above named, seeking the termination of a trust, the reconveyance of certain real property which was the subject of the trust, and an accounting. Joseph Pollard appeared in the action and with his answer filed a cross-complaint. He alleged that he was originally the owner of the land subject to the trust; that he entered into an agreement with John J. Jenkins and Irving H. Hellman whereby, in consideration of their promise to pay him $100 a month for his natural life, he conveyed the land to Hellman Commercial Trust & Savings Bank, a corporation, as trustee; that it was agreed that said payments were to be a charge thereon, and further that he was to retain during his lifetime possession of a portion thereof; that according to certain escrow instructions given by him to the bank at the time of the conveyance the latter agreement was to have been made a part of the trust agreement executed by the bank; that without his knowledge the same was omitted therefrom; that the bank and plaintiff as well as Jenkins and Hellman had full knowledge of the agreement when their interests in the property were acquired. He asked that it be decreed that the bank's successor holds the title subject to said agreement and in trust for the payment of said monthly sums, and that as security therefor he has a vendor's lien thereon.

The trial court found that on February 21, 1924, a declaration of trust was executed by the bank, reciting that the real property mentioned, which was situated in San Bernardino county, had been conveyed to the bank by J. J. Jenkins to be held in trust as security for the payment of a note for $10,000 executed by Jenkins to the bank; that the bank was given power to sell, lease, or exchange the property and apply the proceeds in payment of the debt, advancements, and expenses; that the bank agreed to reconvey to Jenkins or his assigns before a sale of the property upon the payment of the indebtedness; that prior to the date of the declaration Joseph Pollard was the owner of the property and in November, 1922, while such owner, the same was purchased from him by Jenkins and defendant Hellman, a director and vice president of the bank, who as part of the purchase price agreed in writing to pay him $100 per month during his natural life; that this agreement should be a charge upon the property, and that it was further agreed in writing that he should have the possession during his life of such portion thereof as should be thereafter agreed upon by himself and Jenkins; that it was further agreed that the property be conveyed to said bank as security for the sum of $10,000 to be borrowed by Jenkins and which was to be used to pay off certain liens upon the property aggregating $4,200, and the settlement of pending litigation respecting an undivided half interest therein; that the bank should also hold the property in trust subject to Pollard's rights therein and to secure the monthly payments agreed to be made to him. The court further found that without Pollard's knowledge or consent the provisions agreed upon for the protection of his rights in the property were omitted from the trust agreement, although it was agreed between him and the bank and Jenkins, acting for himself and Hellman, that his conveyance should be subject to his rights above stated and that the bank should hold the property in trust for the additional purposes agreed upon; further, that at the time of the execution of the above declaration Jenkins and Hellman as part of the same transaction entered into the writing setting forth their agreement with Pollard as above stated, and that this was also delivered to the bank, which retains the same; that Pollard has at all times mentioned actually resided on a portion of the property described in the findings and upon which are situated his house and necessary outbuildings; that it was agreed by Jenkins and Hellman immediately after the making of the contract in November, 1922, that this should constitute the portion in which Pollard should retain a life interest; that in April, 1924, Hellman sold to plaintiff one-half of Hellman's interest in the property and beneficial interest in the trust, all subject to the obligations to Pollard and the latter's interest in the property; that prior thereto plaintiff, who was also a vice president and director of the bank mentioned, had full knowledge of the agreements with Pollard and took his interest subject thereto; that thereafter plaintiff paid from time to time his proportionate share of the monthly payments agreed to be made to Pollard and recognized the obligations due the latter. The court also found that the trustee sold portions of the property on contract and by deed; that the debt secured had not been paid from the proceeds, however, but partially by Jenkins and Hellman, and that the trust agreement was still in force and effect; that defendant Bank of America had succeeded the original trustee as such, and under the terms of the trust holds the funds, contracts, and trusts originally held by the bank first mentioned; further, that no payments contrary to the trust agreement had been made as alleged by plaintiff; that the trustee had fully accounted to the beneficiaries for all moneys received and paid out, and as a conclusion that the plaintiff was not entitled to a judgment terminating the trust, or an accounting, or an injunction which was sought restraining payments by the trustee, or other relief.

The court concluded that Pollard was entitled to a decree adjudging that the present trustee holds the property in trust to secure the monthly payments mentioned and subject to his right of possession during his life of a portion of the property, which was described in the decision and upon which Pollard resided. A judgment was entered accordingly. This judgment also provided that upon Pollard's death the property remaining should be held by the trustee subject to the trust for the benefit of plaintiff, the said Hellman, and Hazel S. Jenkins, the executrix of the estate of J. J. Jenkins, now deceased, until the purpose of the trust had terminated. No decree was made with respect to the alleged vendor's lien.

Plaintiff, who has appealed, contends that the finding that he had notice of the agreement with Pollard and that the trustee had not breached its duties are unsupported; further, that Pollard had no place in the suit; that the court was without jurisdiction to enter a decree with respect to his interest in the property; and that the finding as to the particular portion thereof in which Pollard has a life interest is also without support.

[1] As to the first finding the evidence, both direct and indirect, clearly shows that plaintiff had actual knowledge of the facts when he purchased from Hellman; moreover, Pollard was at all times in possession, and this was a relevant fact on the question of notice. 25 Cal. Jur., Vendor and Purchaser, § 282, p. 834. Under the trust agreement the trustee was authorized to lease, sell, or exchange the property and to make advancements for its care, protection, and benefit. It appears that defendant Hazel S. Jenkins, the surviving wife of J. J. Jenkins, by consent of the trustee, cared for the property and negotiated sales of portions thereof. For all her services she was paid the equivalent of a commission on such sales, and the trustee also paid sums for equipment and certain of the amounts due monthly to Pollard. The testimony shows sufficiently that the sums received by Mrs. Jenkins were not, properly speaking, commissions upon the sale of real estate, as urged by plaintiff, but were payments for her services generally, and that these sums as well as those paid for equipment were reasonably necessary for the care and protection of the property. The trustee appears to have recognized the Pollard claims and made certain of the monthly payments on the assumption that such was its duty under the trust. In view of the conclusions of the trial court, this was proper, and we are satisfied that there was no breach of duty by the trustee in any of the respects alleged by plaintiff.

Several defendants, whose names were obviously fictitious, were joined in plaintiff's complaint. Pollard was not served with summons, but nevertheless appeared, alleging that he was sued as one of these defendants, and filed an answer and cross-complaint. Plaintiff raised no objection at the time, but answered the cross-complaint, and later answered an amendment thereto. His objection was made for the first time at the trial. Plaintiff claims that he had the right to choose the parties he wished to sue, and that the court was without jurisdiction to entertain the Pollard pleadings.

[2-5] As a general rule a plaintiff has the right to select the persons whom he desires to make defendants in the action. Mercantile Trust Co. v. Stockton, etc., Co., 44 Cal. App. 558, 186 P. 1049. This, however, is subject to the right to intervene in a proper case and the power of the court to bring in parties necessary or proper to a complete determination of the controversy; and in actions of this character, where the evidence shows that a third person has an interest as a beneficiary in the subject-matter of the suit, the court may order him to be made a party. O'Connor v. Irvine, 74 Cal. 435, 16 P. 236; Alison v. Goldtree, 117 Cal. 545, 49 P. 571. The suit was one in which Pollard might properly have been allowed to intervene (Ward v. Waterman, 85 Cal. 488, 24 P. 930; Code Civ. Proc. § 387); and, in view of the evidence, the court did not err in permitting him to continue as a party thereto.

[6-8] The property subject to the trust is, as stated, situated in San Bernardino county, and the suit was brought in the county of Los Angeles. The banks make the claim that for this reason the court was without jurisdiction to entertain the same.

Section 5 of article 6 of the Constitution provides that "* * * all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, * * * is situated." In such cases, if the suit is brought in the wrong county the court is without jurisdiction, and the action must be dismissed; but the constitutional provision, being a limitation upon the jurisdiction of the court, is to be strictly construed, and its application is confined to those instances in which the complaint without reference to any pleadings by defendant states a case coming within the actions enumerated. Waters v. Pool, 130 Cal. 136, 62 P. 385; 25 Cal. Jur., Venue, § 9, p. 861; Wood v. Thompson, 5 Cal. App. 247, 90 P. 38; Miller & Lux v. Kern County Land Co., 140 Cal. 132, 73 P. 836, which case in this respect overruled Staacke v. Bell, 125 Cal. 309, 57 P. 1012. Plaintiff's action was not to recover the possession of the property or to quiet the title thereto, and no lien was sought to be enforced.

Based upon his allegations that the debt to the trustee had been paid, and that consequently the purpose for which the trust had been created had ceased, he sought a reconveyance of the property to those alleged to be the beneficiaries. In addition, upon the allegation that the trustee had misapplied funds received, he asked for an accounting of and judgment for his proportionate share of these funds.

[9, 10] As stated, the trustee had agreed to reconvey when the purposes of the trust should be fulfilled, and the action was one to enforce the trust and for an accounting; part of the relief sought being the performance of the trustee's promise to reconvey. When the purpose for which an express trust was created ceases, the estate of the trustee also ceases (Civ. Code, § 871), and a bill in equity may be maintained by those beneficially interested to extinguish it. Tyler v. Currier, 147 Cal. 31, 81 P. 319; Fletcher v. Los Angeles Trust, etc., Bank, 182 Cal. 177, 187 P. 425; Ringrose v. Gleadall, 17 Cal. App. 664, 121 P. 407. It has been held that a trust created to secure a debt is but little more than a mortgage with power to convey, and that upon payment the property revests in the trustor without reconveyance (Nilson v. Sarment, 153 Cal. 524, 530, 96 P. 315, 126 Am. St. Rep. 91), and also that the only purpose of requiring the execution of a deed of reconveyance is to make the record title clear. Sacramento Bank v. Alcorn, 121 Cal. 379, 53 P. 813; Estate of Fair, 132 Cal. 523, 60 P. 442, 64 P. 1000, 84 Am. St. Rep. 70; Montgomery v. Meyerstein, 186 Cal. 459, 199 P. 800.

A suit for specific performance and to compel a reconveyance is an action in personam (53 Cor. Jur., Reformation of Instruments, § 148, p. 992) and is not within the constitutional provision. Grocers' Fruit, etc., Co. v. Kern County Land Co., 150 Cal. 466, 89 P. 120. Nor is an action to declare a trust in real property one to quiet title. Donohoe v. Rogers, 168 Cal. 700, 144 P. 958. These provisions have no application to an action for the settlement of a trust, nor where the action is one to compel a trustee to perform his duties and close the trust. LeBreton v. Superior Ct., 66 Cal. 27, 4 P. 777; Rossi v. Caire, 174 Cal. 74, 161 P. 1161.

[11, 12] Under subdivision 1 of section 392 of the Code of Civil Procedure, actions for the recovery of real property or of an estate or an interest therein, or for a determination in any form of such right or interest, or for injuries to real property, must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial as provided by the Code; and the following cases cited by counsel were actions within the above Code provision: Baker v. Fireman's Fund Ins. Co., 73 Cal. 182, 14 P. 686; Sloss v. De Toro, 77 Cal. 129, 19 P. 233; Smith v. Smith, 88 Cal. 572, 26 P. 356; Booker v. Aitken, 140 Cal. 471, 74 P. 11; Miller & Lux v. Kern County Land Co., 140 Cal. 132, 73 P. 836; McFarland v. Martin, 144 Cal. 771, 78 P. 239; Franklin v. Dutton, 79 Cal. 605, 21 P. 964; Donohoe v. Rogers, supra; Smalley v. Peckham, 175 Cal. 146, 165 P. 438; Grocers' Fruit, etc., Co. v. Kern County Land Co., supra; Hannah v. Canty, 1 Cal. App. 225, 81 P. 1035; Bartley v. Fraser, 16 Cal. App. 560, 117 P. 683;

Reid v. Kerr, 64 Cal. App. 118, 220 P. 688; Kopke v. Carlson, 98 Cal. App. 155, 276 P. 606; Stanley v. Barney, 123 Cal. App. 139, 10 P.(2d) 1022. In a few instances the opinions in these cases contain the statement that the action was commenced as required by the constitutional provision, but an examination shows that this was not necessary to the decision, the Code section alone being applicable.

The subdivision of the Code section does not affect the jurisdiction of the court; and if the county in which the action is commenced is not under its provisions the proper place for the trial, the only remedy is a demand for a change of venue; otherwise the objection is waived. Herd v. Tuohy, 133 Cal. 55, 65 P. 139; Miller & Lux v. Kern County Land Co., supra; Grocers', etc., Union v. Kern County Land Co., 150 Cal. 466, 89 P. 120; Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 73, 99 P. 502, 22 L. R. A. (N. S.) 391. Here no objection to the venue was made; and plaintiff's action, if within the provisions of the said subdivision of the Code section, was nevertheless within the jurisdiction of the trial court, and we are satisfied from the above decisions that there was no constitutional objection to the commencement or trial of his action in Los Angeles county.

**[13, 14]** As respects the cross-complaint, in addition to the claim that a vendor's lien should be decreed—and which in effect the court denied—the gist of the action was the reformation of the trust agreement in order to make it express the real understanding which the court found was known to all the parties to the suit. While no formal decree of reformation was made, this result was reached by the findings mentioned and by adjudging that the trustee hold the property subject to Pollard's rights as therein determined.

As a rule a proceeding to reform a writing is in personam and not in rem. 23 R. C. L., Reformation of Instruments, § 52, p. 354. Nevertheless, where the writing involves the title to real property and the action would determine in some form a right or interest therein, the case is within the provisions of subdivision 1 of section 392 of the Code of Civil Procedure (Franklin v. Dutton, supra; Stanley v. Barney, supra); but as held in the cases hereinbefore cited, the requirement that such actions be tried in the county in which the land is situated—as also the objection when brought in the wrong county—may be and is waived if there is no demand for a change of venue.

Pollard did not seek to quiet the title or to recover the possession of the land; and although he claimed a vendor's lien thereon his suit was not to foreclose such lien but for a decree declaring its existence and that the trustee hold the property subject to the original agreement. For these reasons his action was not within the constitutional provision mentioned, and no demand for a change of venue having been made the superior court of Los Angeles county had jurisdiction.

The terms of the original agreement were in writing, and knowledge thereof by all concerned was shown. It is clear that some of these terms were omitted from the trust agreement by mistake. Pollard, who was an aged man, appears to have entrusted the whole matter to Jenkins, Hellman, and the bank, and, so far as shown, he received no independent advice as to the sufficiency of the bank's declaration of trust to cover the original agreement.

With respect to the portion of the property in which Pollard claimed a life estate it is contended that there was no evidence supporting the finding as to its legal description.

Pollard alleged that he made his home upon a portion of the property, and that it was agreed by the parties that he should retain possession of this portion. Plaintiff denied these allegations. The former testified that he had lived upon the property since 1905, and that the improvements thereon consisted of a house, barn, and other outbuildings; but there was no testimony or other evidence sufficient to identify or show the legal description of the portion in which he was to retain a life interest, and the plaintiff's objection to the findings and decree in this respect must be sustained. With this exception the findings and judgment are fully supported. It will be necessary therefore to remand the case in order that this portion be identified and its legal description ascertained.

That portion of the judgment which decrees that said Joseph Pollard has a life estate in that portion of the northeast quarter of the northwest quarter of the southwest quarter of section 15, township 2 north, range 6 west, S. B. B. & M., beginning at a point which is south 34 degrees 12 minutes west 43.22 feet from the northwest corner of lot 10, block 16, of tract 1905, J. J. Jenkins subdivision of Happy Jack ranch, as recorded in book 27, page 36 of Records of San Bernardino County; thence north 14 degrees 46 minutes east 75.41 feet; thence north 83 degrees 34 minutes west 117.50 feet; thence south 19 degrees 34 minutes west 53.7 feet; thence south 72 degrees 55 minutes west 120.85 feet to the point of beginning, is reversed, with directions that the identity and legal description of the portion of the property of which it was agreed that Pollard should retain possession during his life be determined. In all other respects the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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## PEOPLE v. FERGUSON.

Cr. 2180.

District Court of Appeal, Second District, Division 2, California.

Aug. 25, 1933.

Hearing Denied by Supreme Court Sept. 22, 1933.

**1. False pretenses ⚷11.**

In prosecution for grand theft based on sales of trust shares, certificates sold entitling holder to share in any profits resulting from venture of others in real estate were "personal property."

[Ed. Note.—For other definitions of "Personal Property," see Words & Phrases.]

**2. Criminal law ⚷308, 560.**

Criminal conviction cannot be based on mere suspicion, there being presumption of innocence.

**3. False pretenses ⚷41.**

In prosecution for grand theft by false pretenses in sale of trust interests, testimony as to profits and how they were arrived at *held* material.

Such testimony was material because of showing that defendant's trusts were intentionally made attractive by fraudulent method of declaring large returns on some of the trusts in order to induce the sale of interests in others.

**4. False pretenses ⚷49(3).**

Conviction of grand theft by false pretenses in sale of trust interests *held* sustained, as against contention that purchases of trust interests were made through reliance on promises of future profits.

**5. False pretenses ⚷49(1).**
**Larceny ⚷62(2).**

Evidence *held* to support conviction for grand theft by false pretenses or larceny by trick and device in sale of trust interests.

Evidence showed that defendant's trusts had been fraudulently manipulated to show very large returns, and that they had not paid except fraudulently. Defendant argued that case of false pretenses was not made because buying and selling of beneficial interests by, into, and out of the several trusts was not disclosed to the complaining witnesses, but false pretense was that defendant's trusts had made great profits and others would do the same.

**6. False pretenses ⚷49(3).**

Conviction of grand theft by false pretenses in sale of trust interests *held* sustained as against contention there was lack of corroboration.

Evidence showed purchases were made because of belief in great profits in defendant's trusts. These profits were induced by fraud amounting to false pretenses. All of this was corroborated by evidence establishing the whole structure of the scheme.

**7. False pretenses ⚷49(4).**

Conviction of grand theft by false pretenses in sale of trust interests *held* sustained as against contention that, if misrepresentations were made, defendant did not authorize them.

The evidence showed that defendant knew of misrepresentations generally and intended that they should be made for purpose of inducing sales, but, even if evidence did not directly connect defendant therewith, the circumstances were such as to make such inference as dependable as the direct testimony could itself do.

**8. False pretenses ⚷49(1).**

Conviction of grand theft by false pretenses in sale of trust interests *held* sustained, as against contention conviction could not be upheld with respect to sales to salesmen.

The point made was that such conviction could not be sustained because representations were not made to induce the complaining witness to buy, but to teach him to sell; he being one of crew of salesmen.

**9. False pretenses ⚷49(1).**

In prosecution for grand theft by false pretenses in sale of trust interests, evidence *held* insufficient to support conviction as to certain trust.

Under such count the testimony regarding the inducing representations as to payment of a dividend referred to certain trust, and the investment of money in that trust, but later witness said he invested in another trust but made no correction as to the inducing representation.

**10. Licenses ⚷18½.**

Interests of holders in trust organized to deal in real estate, whereby holders acquired merely right of participation in profits from sale of lots in real estate purchased, *held* "securities" requiring permit of corporation commissioner for their sales (St. 1917, p. 673, as amended).

[Ed. Note.—For other definitions of "Security," see Words & Phrases.]

**11. Licenses ⚷42(4).**

In prosecution for violating Corporate Securities Act in sale of trust interests, exclusion of testimony that officials of state corporation department had advised defendant that he need not get license to sell such interests *held* error (St. 1917, p. 673, as amended).

12. **Criminal law** ⚷32.

Advice of counsel or ignorance of law will not excuse offense.

13. **Licenses** ⚷40.

General rule that unlawful act knowingly and willfully done imports intent to violate law is inapplicable in case of violating Corporate Securities Act by selling securities without license (St. 1917, p. 673, as amended).

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Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Harold G. Ferguson was convicted of grand theft and of violating the Corporate Securities Act, and he appeals.

Reversed in part, and affirmed in part.

Hearing denied by Supreme Court. THOMPSON, J., deeming himself disqualified, took no part in the consideration of the petition.

Frank P. Doherty and Bourke Jones, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

STEPHENS, Justice.

The court, sitting without a jury found the appellant, Harold G. Ferguson, guilty of grand theft in counts 2 to 6, inclusive, 11, 12, 17, 18, 19, 22 to 25, inclusive, 29 and 30, and guilty of violating the Corporate Securities Act (Stats. 1917, p. 673, as amended), in counts 34 to 43, inclusive, excepting count 41, all charged in a grand jury indictment. (For convenience we use Arabic instead of Roman numerals as used in the indictment and as sometimes used in the briefs.) The issues of this appeal will be better understood after the reading of the following quoted portion of the trial court's able narrative as unfolded by the evidence:

"In the year 1927 the defendant Ferguson was engaged in the real estate business in the City and County of Los Angeles and, having handled various realty transactions through the medium of syndicate trusts, conceived the idea of a revolving trust, by means of which comparatively small investments of a relatively large number of persons would be combined in a trust organization with a banking institution acting as trustee, and Mr. Ferguson, through his alter ego, the Harold G. Ferguson Corporation, acting as trust manager. Pursuant to this plan conceived by Mr. Ferguson, a trust was organized naming the Pacific National Bank as trustee and the Ferguson Corporation as trust manager, which trust, capitalized for $250,000.00, became known as P.T. (Private Trust) No. 27. This was in the month of February. The interests of the subscribers to such trust were evidenced by documents called certificates of beneficial interest, and it is around the sale of these certificates of beneficial interest in P.T. 27 and in other revolving trusts, which were thereafter organized, that most of the charges in this case arise. The sale of such beneficial interests in P.T. 27 proceeded slowly at first.

"Mr. Ferguson has been a resident of Los Angeles for some 38 years, was educated in this state and admitted to the bar, and practiced law here, [and] occupied various official and civic positions. * * * He served with distinction during the World War and thereafter achieved an enviable and outstanding position in the community both commercially and socially. [In 1927] Mr. Ferguson acquired a controlling interest in the Wimsett System Corporation, and Mr. Luckey (a codefendant) and one Lloyd Bergman became owners in equal shares of the minority interest. Mr. Luckey acquired no interest in the Ferguson Corporation, and at no time was employed by it, although he was sometimes referred to as the manager of the finance or securities department thereof. Mr. Ferguson was made president and manager, and Mr. Bergman secretary and treasurer of the Wimsett System Corporation, and such organization began to build up a sales force for the purpose of marketing the certificates of beneficial interest in revolving trusts to be created by Mr. Ferguson. Thereafter, in October, 1927, a $1,000,000 trust, known as P.T. 50 was organized, and the following year Trust 33, a $5,000,000 trust, and Trusts 999 and 1013 were organized. Trusts 27, 50 and 33 were advertised as being organized for the purpose of buying and selling real estate in California; Trust 999 was authorized to deal in both real and personal property, and 1013 confined its activities to one particular tract of land known as a portion of the Rancho Malibu La Costa. These five trusts, which have been described, are the only ones with the sale of whose interests to the public we are directly concerned, but some of them dealt somewhat extensively in interests in certain other trusts, which it will be necessary for us to mention. Chief among the latter are S-6638, frequently referred to as the Canoga, No. 3070, known as the Palm Ranch, and Nos. 5710 and 5411. Of these * * * the Canoga, S-6638, will occupy the most prominent part in our discussion. It comprised some thirty-six hundred acres of land, situated in Los Angeles County * * * [T]he shares therein were offered and sold to the public at the rate of one thousand dollars per .08 interest, the declaration of trust, however, requiring the payment of only five hundred dollars per .08 interest to the trustee. This declaration of trust, by its own terms, declared that the interests of beneficiaries thereunder were purely personal in character and that the holders thereof acquired no interest in the lands or estates held in fee title by the trustee.

"Commencing in December, 1927, and continuing throughout practically the entire lives of Trusts 27, 50 and 33, such latter trusts were caused by the defendant, Ferguson, to purchase and sell, among other things, interests in said Canoga Trust. From its inception in 1927 until a time subsequent to March 1, 1929, the dealings of 27, so far as earning profits was concerned, were exclusively in interests in Canoga and, dealings in such interests, contributed either conclusively or substantially to dividends paid by 50 and 33. In the latter part of the year 1930 all of the revolving trusts mentioned and also 1013 apparently came into sore financial straits and in the year 1931 went into receivership.

"In connection with the sale of certificates of beneficial interest in all the revolving trusts and in 1013, representations were made that Trusts 27, 50 and 33 were organized for the purpose and object of dealing in real estate and that the form of organization and methods employed in handling the business of all of said trusts provided a high degree of safety, and much publicity was given to the dividends paid by 27 and 50 which, although paid quarterly, averaged 1 per cent per month for more than a year and a half."

There is very little, if any, important item of fact disputed in the case. The evidence demonstrates that Ferguson, the master in actual charge of the several trusts, ordered the purchase and sale of interests from one to another without regard to their market value and with regard only to the payment of unearned profits. We here set out four letters all signed in the same way, as examples of the manner in which the manipulations took place:

To Pacific National Bank under date of December 28, 1927:

"Gentlemen:

"Please be advised that Harold G. Ferguson Corporation as managing director of your Trust P.T. 27 has authorized you to purchase certain certificates of beneficial interest Trust No. S-6638, Title Insurance and Trust Company of Los Angeles, being a subdivision held by that title company.

"The purchases of such units amount to the sum of $2,300.00, representing six units of 1/800th interest in the above mentioned trust. These units were purchased in the following manner:

| | |
|---|---|
| 2 units, 1/800th interest at $1,000.... | $2,000 |
| 4 units, 1/800th interest at 75.... | 300 |
| Total .......................... | 2,300 |

"Yours very truly,
"Harold G. Ferguson Corporation,
"by Harold G. Ferguson,
"J. Murray Morgan."

Under the same date a similar letter referring to trust 50 was sent to the trustee. We quote the essential part:

"The purchase of said units amounts to the sum of $20,700.00 representing certain 34 units of 1/800's interest in the above mentioned trust. These units were purchased in the following manner.

"Twenty units of 1/800's interest at $1000.00, $20,000.00; fourteen units 1/800's interest at $50.00, $700.00, total $20,700.00."

The following letter, under date of February 29, 1928, was sent to the trustee:

"Enclosed herewith find six checks payable to yourselves totaling $2250.00 covering three sales by Wimsett System Corporation of beneficial interests in Trust S-6638, Title Insurance and Trust Company of Los Angeles, said money to be credited as follows:

"R. R. Chappell, 1/800th; Original purchase price 1/800th interest, $75.00; Net profit on sale 1/100th interest S-6638, credit profit account P.T. 27, $675.00.

"R. C. A. MacPhail, 1/800th; Original purchase price 1/800th interest, $75.00; Net profit on sale 1/800th interest S-6638, credit profit account P.T. 27, $675.00.

"Howard F. Murchie, 1/800th; Original purchase price 1/800th interest $75.00; Net profit on sale 1/800th interest S-6638, credit profit account P.T. 27, $675.00.

"Six checks enclosed as above enumerated totaling $2250.00."

Under date of June 9, 1928, the following letter was sent to the trustee:

"Under date of May 29th this corporation handed you checks for $750.00 to cover sale of beneficial interests in Title Insurance & Trust Company, Trust S-6638, to Harold G. Ferguson. Assignment form properly signed by Mr. Ferguson has also been handed you.

"You are hereby authorized and directed to make the assignment of beneficial interest in Title Insurance & Trust Co. Trust S-6638 to Harold G. Ferguson in the amount of 1/800th interest."

It would seem significant that the interests entered upon the trust books as purchased at a very low price were sold at great profit while those few purchased at par rating have never been sold.

The trial court's conclusion that this manipulation was done for no other purpose than to rate *Ferguson trusts* "interests" high in the markets is not only a reasonable one, but it would seem the only possible one. Of course, the false and forced high rate of return for money invested in them no more truly represented their value as investments than the assay of "salted" ore represented the value of a gold mine in other days. Counsel for appellant point out that their client forbade deception by the sales crew, but the evidence discloses that he personally appeared before the sales crew and delivered addresses on the subject of the business and stated to salesmen, and his lieutenants habitually did the same, that the money accumulated in the trusts from the sale of "interests" was and would be invested by the purchase of choice real estate.

[1] Appellant argues in his brief that the manipulated "interests" above referred to were interests in real estate trusts and were in fact real estate. The evidence is undisputed that the units thus purchased were in no sense titles to real estate. They were mere certificates that the holder would share pro rata in any profits resulting from the venture of others. We think these certificates are personal property. Title Ins. & Trust Company v. Duffill, 191 Cal. 629, at pages 642, 647, 649, 218 P. 14; Ward v. Waterman, 85 Cal. 506, 24 P. 930; Craven v. Dominguez Est. Co., 72 Cal. App. 717, 237 P. 821. However, we do not deem the point of decisive importance. Even were it conceded that the purchased units were real estate or were it conceded that appellant, in all good faith so regarded them, the real point remains. The transfers were not honest commercial acts. They were intentionally made to and did create an apparent but false and fraudulent income value upon Ferguson trust investments.

We cannot follow appellant's argument that the fraud cannot be imputed to him for the reason that he did not personally tell his salesmen to boost sales in one trust by representing what another trust had paid. A corps of salesmen were employed for no other purpose than to sell these "interests." Appellant's lieutenants and he himself lectured them at meetings. These lieutenants testified that they were not informed of the sale of properties. They knew of past dividends and of dividends contemplated in the future and they told these things to the sales force, who in turn told them to prospects. The witness Luckey testified as follows: "Always before a dividend period—I mean, before the trust was to pay a dividend a great many inquiries would come in as to when they were going to pay and how much they were going to pay; and those inquiries usually came into my office, both by the salesmen, the sales managers, and a great many of the clients would call in; and I never could give them any information until Mr. Ferguson had told me; and they would vary; sometimes it would be a week before a dividend was going to be paid, and sometimes the day before; and these salesmen, particularly, and a great many clients were inquiring, and I would ask Mr. Ferguson, from time to time, after those inquiries were coming in, if the trusts are going to pay a dividend and how much; that I was getting a great many inquiries in; and when the time would reach back to the time when it was going to be, Mr. Ferguson would say: 'Trust 50,' or 'Trust 27' or 'Trust 33' or whatever the trust might be, 'is going to pay a certain dividend.' The conversation led up to the time at which he announced it; and all he would say at the time was: '*Well, you can tell your salesmen, or your clients, or sales managers, that it is going to pay so much.*'" (Italics ours.) Tom Dalton, a sales manager, testified much the same as Luckey on this point.

[2] Presumption of innocence is a precious right; criminal convictions cannot be based upon mere suspicion; but society's arm to curb crime is weak indeed if logical inference which would seem next to demonstration itself in any other civilized endeavor cannot be indulged in the detection of crime. The evidence is conclusive that the purchases alleged in all of the counts upon which conviction was had, with the exception of count 3, resulted from the fact that certain Ferguson trusts had been fraudulently manipulated to show very large returns. In truth and in fact they had not paid except fraudulently and the showing made had no relation to the future possibilities of any of the Ferguson trusts. Every such sale was fraudulent. Every conviction based thereon must be sustained unless certain points raised by appellant are to be resolved in his favor. We proceed to consider them.

[3, 4] As a result of the booming of returns on 27, 50, and 33 and of the payment of heavy returns being communicated to them by salesmen, complaining witnesses in counts charging grand theft purchased interest in other Ferguson trusts. Appellant contends that these trusts were each independent of the other and that the testimony as to profits and how they were arrived at are collateral matters of no materiality in the counts of the indictment. We have already made it clear that we think the evidence supports our conclusion that *Ferguson trusts* were intentionally made attractive by the fraudulent method of declaring large returns on some of the trusts in order to induce the sale of interests in others. Appellant cannot be sustained on this point. People v. Martin, 102 Cal. 558, 36 P. 952, and People v. Weir, 120 Cal. 279, 52 P. 656.

Appellant makes the point that the conviction of grand theft by false pretenses cannot be sustained because the purchases of interests in trusts other than 27, 33, and 50 were made through reliance upon promises of future profit. This, we think, is conclusively answered by the preceding paragraph herein. People v. Wasservogle, 77 Cal. 173, 19 P. 270.

[5] Appellant argues that the case of false pretenses is not made out for the reason that the buying and selling of the beneficial interests by, into and out of the several trusts was not disclosed to the complaining witnesses and amounts to nondisclosure if anything, and therefore does not support the offense of false pretenses. The false pretense was that *Ferguson trusts* purchasing real estate had made great profits and others would do the same. The whole inducing argument was this false pretense. In our opinion the evidence is sufficient to support conviction of grand theft by false pretenses.

[6] Appellant contends there is lack of corroboration, but the facts do not support him. The evidence establishes that the purchases were made because of the belief of great profits in *Ferguson trusts*. These profits were induced by fraud, amounting to false pretenses, or, if you will, by means of trick and device. All of this is corroborated by the evidence establishing the whole structure of the scheme; the orders of Ferguson to transfer the interests; the publicity of the large returns on certain trusts; Luckey's testimony of the representations as to profit by the salesmen and Ferguson's own statements to his sales managers and crew. People v. Harrington, 92 Cal. App. 245, 267 P. 942, and cases there cited; People v. Hennessey, 201 Cal. 568, 258 P. 49.

[7] Appellant argues in his brief that even if misrepresentations were made, he did not authorize them. Whether appellant specifically authorized the representations or not is not the whole question. In People v. Epstein, 118 Cal. App. 7, 10, 4 P.(2d) 555, 556, it is said: "'The general rule is that where the crime charged involves guilty knowledge or criminal intent, it is essential to the criminal liability of an officer of the corporation that he actually and personally do the acts which constitute the offense, or that they be done by his direction or permission.' State v. Thomas, 123 Wash. 299, 33 A. L. R. 781, 212 P. 253, 254, citing cases." The evidence permits of no other conclusion than that appellant knew of the misrepresentations generally and intended that they should be made for the purpose of inducing sales. But even if the evidence does not directly connect appellant therewith the circumstances are such as to make such inference as dependable as the direct testimony could itself do.

[8] The point is made that conviction under count 12 cannot be sustained because the representations were not made to induce the complaining witness to buy but to teach him to sell. He was one of the crew of salesmen. The representations were as a seine spread to catch all who heard and believed. That one so closely associated should be deceived shows how convincing the representations were. The evidence is sufficient to show that the purchaser of interests as alleged in each count made the purchase upon representations to him by a salesman or sales manager of Ferguson interests of the large profits made on 27, 50, and 33, and that the same or similar results would follow in the other trusts formed and handled under Ferguson management for the same kind of business.

We think the evidence amply supports the convictions upon either the theory of false pretenses or larceny by trick and device. People v. Hennessey, supra.

[9] As to count 3, the testimony regarding the inducing representation as to payment of a dividend refers to trust 50, and the investment of $1,000 in that trust. Later the witness said he invested in trust 33 instead of 50, but made no correction as to the inducing representation. It would seem clear that the testimony does not support the judgment of conviction.

### The Counts of the Indictment under the Corporate Securities Act.

[10-13] As to counts 34 to 43, inclusive, charging violation of the corporate securities act, it is the position of appellant that the sale of interests in trust 1013 (Malibu) did not legally require the consent of the corporation commissioner and that even if it did technically, that appellant could not be guilty because he was advised by the commissioner that it was not legally necessary to secure permits.

The land was to be acquired by the investment of money through the medium of proportional "interests." The money received from the sale of interests was to be paid to a trust company and be used by it in conjunction with the purchase of the land, its improvement, and for certain expenses. The title to the real estate was not in the interest holders and, indeed, those investing in interests acquired little or no other right than the right of participation in profits from the sale of lots in the real estate purchased. We think the "interests" were securities under the reasoning in People v. Oliver, 102 Cal. App. 29, 282 P. 813, 817, and authorities cited therein; also under Agnew v. Daugherty, 189 Cal. 446, 209 P. 34, and People v. Leach, 106 Cal. App. 442, 290 P. 131. The "interest" in the instant case responds in every way to the definition of a "security" which we quote from the Oliver Case: "If the instrument of sale creates a present right to a present or a future participation in either the income, profits, or assets of a business carried on for profit, it is a 'security,' as defined in the Corporate Securities Act."

Upon the point that appellant was not guilty of violating the Corporate Securities Act because he had been advised in other similar cases by corporation commission deputies and by the corporation commissioner directly in this instance that no permit was necessary, counsel for appellant made an offer of proof as follows: "Mr. Doherty: We offer to prove by this witness that, beginning with the year about 1922, while he was a trust officer of the California Trust Company and thereafter in and about his business in handling and dealing in real estate and trusts, that he, as such trust officer, and as an officer of the Harold G. Ferguson Corporation, and as an individual, had occasion to use and did use trusts, declarations of trust similar in provisions and legal effect to the terms of 1013; and that during that period he, at various times, talked with officials of the corporation department of the state of California for the purpose of determining from them whether or not it was a trust which could be classified as a security or as real estate; and that he was advised by the deputy corporation commissioners and by the assistant commissioner that their construction of the act was that it was not a security, and that he need not get from the department a permit or license to sell the stock or interests, or beneficial certificates; and that as late as 1929, the then corporation commissioner, Mr. Athern, had stated that when the particular trust 1013 was executed, he had stated that his department had investigated that trust, had personally examined it, and that it was his opinion that under the act as he construed it a permit was not necessary. That is our offer of proof."

The district attorney submitted his objection that the proposed proof was immaterial and irrelevant and the objection was sustained. We think this was error. It is no doubt true that advice of counsel will not excuse the offense. It is true that "ignorance of the law excuses no man," although we are not prepared to say that this old maxim stands undefiled by exception. It is true generally that where the act is knowingly and willfully done the act imports the intent. People v. O'Brien, 96 Cal. 171, 31 P. 45, which case we had recent occasion to consider; see People v. A. L. Ferguson (Cal. App.) 18 P. (2d) 741.

However, it occurs to us that a different situation is here presented. The regulation which has not been complied with is malum prohibitum and not malum in se. It covers one of the most complicated phases of modern commercial life. The statute can be read strictly or liberally, according to the type of mind applied to it. It is under the administration of the commissioner and his decisions in most cases are final. If the appellant early in his real estate career found himself in honest doubt, notwithstanding his high education and legal accomplishments, went to the fountain head itself for information and was there advised that such organizations were not under the department's jurisdiction, and if after he had this identical organization ready to launch, he went to the corporation commissioner himself and was advised in the same manner, we cannot believe the law so inexorable as to require the brand of felon upon him for following the advice obtained. The mere statement of the facts demonstrate that such strict construction would be unconscionable and more calculated to engulf the innocent law-abiding business man than to punish the guilty or to protect the security buyer. By the very attitude of the corporation commissioner's office, assuming, of course, that the proof would have been as strong as the offer of proof, appellant was forced to sell the securities in question without a permit or not to sell them at all. Such a state of affairs is not imaginable, for, as we have seen, the sale of such securities is not malum in se.

The evidence outlined in the offer was neither immaterial nor irrelevant and should have been received. In connection with this point the fact that appellant had much business with the corporation commissioner and secured permits to sell securities in the several other trusts would seem to open the way for an explanation of why none was obtained for this particular one. After all, neither the law nor its application can be reduced to thumb rule and the application of rules should ordinarily cease where the reason back of them fails. The illegal manner in which appellant sold the securities in some of the trusts herein referred to should not be confused with the wholly legal organization of such trusts. His guilt in the one incident must not deter us from declaring his complete innocence in the other.

The case of changing a public record, as in the O'Brien Case or of the possession of metal knuckles as in the A. L. Ferguson Case, were instances of knowingly doing that which the law prohibits. In such instances the act imputes the intent. In the instant circumstance the act does not impute intent. The principle which we are here considering is variously expressed under different circumstances in the following cases: State v. Freeland, 318 Mo. 560, 300 S. W. 675; U. S. v. Jackson, 280 U. S. 183, 50 S. Ct. 143, 74 L. Ed. 361; State v. Cutter, 36 N. J. Law, 125; State v. Gardner, 5 Nev. 377; and State v.

O'Neil, 147 Iowa, 513, 126 N. W. 454, 33 L. R. A. (N. S.) 788, Ann. Cas. 1912B, 691.

It is not, we think, out of place to commend the manner in which this appeal has been handled. The points have been presented for appellant in a clear and orderly manner and have been met by the state in the same way. The case is a complicated one, with testimony extending through 4,799 typewritten pages and the able presentation here commended has been of great assistance to us.

The judgment and order denying a new trial are reversed as to counts 3 and 34 to 40, inclusive, and 42 and 43, and affirmed as to all of the other counts upon which conviction was obtained.

We concur: WORKS, P. J.; CRAIG, J.

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218 Cal. 733

## WESTERN OIL & REFINING CO. v. VENAGO OIL CORPORATION et al.

L. A. 12404.

Supreme Court of California.

Aug. 30, 1933.

Rehearing Denied Sept. 28, 1933.

**1. Mines and minerals ⇨74.**

Where lessee of oil and gas lease by unit instruments conveyed stated percentages of gross oil, gas, and other hydrocarbon substances "produced, saved and sold under lease," lessee's assignee with notice *held* bound to recognize such instruments as outstanding interests in oil produced by assignee under lease.

**2. Mines and minerals ⇨74.**

Assignee of oil and gas lease *held* charged under evidence with full notice of issuance of royalty interests for percentages of oil and gas by lessee.

> Evidence disclosed that lessee, his son, and a third person were incorporators and first directors and officers of the assignee corporation; that party acted as attorney for lessee and prepared an application to the commissioner of corporations, reciting the prior issuance of royalty interests sold by lessee; that, when lessee and his associates resigned, the attorney became a director, officer, and general manager of the assignee corporation.

**3. Assignments ⇨90.**

Transfer of right, title, and interest vests in transferee only what transferor could claim, and is subject to all defects and equities which could be asserted against transferor.

**4. Mines and minerals ⇨73.**

Lessee under oil and gas lease acquires no title to oil and gas in place as part of realty, but only right to enter upon land, drill well, and reduce oil and gas to possession.

**5. Mines and minerals ⇨73.**

Oil and gas under oil and gas lease are "personal property" only when reduced to possession, and only then does absolute title vest in lessee.

[Ed. Note.—For other definitions of "Personal Property," see Words & Phrases.]

**6. Mines and minerals ⇨73.**

Lessee who acquires right by contract to enter upon land and prospect for oil and gas has potential possession of all oil and gas which may be produced during continuance of lease, notwithstanding lease may be forfeited if well is not drilled or oil discovered within designated time.

**7. Mines and minerals ⇨74.**

Lessee of oil and gas lease who assigned percentages of oil and gas to be produced under his lease could not defeat assignment by transferring to another his right of entry to prospect for oil.

**8. Mines and minerals ⇨74.**

Where lessee conveyed percentage royalties, and then assigned his lease to another, title to undivided interest in oil produced *held* to vest in holders of royalties as though oil were produced by original lessee.

**9. Mines and minerals ⇨54½.**

Mortgagee who took percentage royalty of gas and oil to be produced as security for cash and pipes used in drilling well had title in undivided interest of oil and gas produced by lessee's assignee; doctrine of potential possession being applicable to mortgages as well as to sales (Civ. Code, §§ 2955, 2973).

**10. Courts ⇨97(1).**

Federal court's holding regarding rights under oil and gas lease *held* not binding upon California courts.

**11. Licenses ⇨39.**

Holders of percentage royalties *held* not precluded from claiming interest in oil and gas produced by lessee's assignee with notice, though issuer of royalties did not secure permit as required by statute (Gen. Laws 1931, Act 3814).

**12. Licenses ⇨39.**

Buyer of securities illegally issued is not in pari delicto, unless there is conspiracy or intent to defraud and evade act or terms of permit actually issued or other reasons making it inequitable to grant relief (Gen. Laws 1931, Act 3814).

**13. Licenses ⚷39.**

Buyers of securities issued in violation of Corporate Securities Act will be denied relief only where they are equally culpable with parties against whom relief is sought (Gen. Laws 1931, Act 3814).

**14. Mines and minerals ⚷79(7).**

Accounting of proceeds of oil sold by lessee's assignee in favor of holders of percentage royalties should be taken by judge who tried action.

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In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action in interpleader by the Western Oil & Refining Company against the Venago Oil Corporation and others. From a judgment for named defendant, the Standard Pipe & Supply Company and others appeal.

Reversed, with directions.

For prior opinion, see 16 P.(2d) 190.

Bailie, Turner & Lake, of Los Angeles, for appellant Standard Pipe & Supply Co.

George W. Nilsson, of Los Angeles, amicus curiæ, for appellant Standard Pipe & Supply Co.

Louis N. Whealton, of Long Beach, for appellants Mark Hay, Dora E. Campbell, and John Maguire.

John H. Burke and Harry A. Houser, both of Long Beach, for appellants J. N. Campbell, Harold A. Wallace, Edward Rumfo, H. V. Mahon, Robert W. Stewart, George M. Tietjen, Emma C. Osborne, Eva H. Holbrook, Mabel E. Hotchkiss, W. E. Wilson, B. G. Wallace, and Fritz Ziebarth.

Medler & Wood, of Los Angeles, for appellant C. M. Dunham.

Wallace Collins, of Los Angeles, for appellants McDonnell.

Arthur G. Baker, of Los Angeles, for respondent Western Oil & Refining Co.

W. L. Engelhardt, G. J. Oppegard, and Mark F. Jones, all of Los Angeles, for respondent Venago Oil Corporation.

Hanna & Morton, of Los Angeles, amici curiæ, for respondents.

SEAWELL, Justice.

Plaintiff Western Oil & Refining Company brought this action in interpleader to determine conflicting claims to money due and owing from it for crude oil purchased from defendant and respondent Venago Oil Corporation. Defendant Standard Pipe & Supply Company and the defendants referred to herein as Campbell and associates have filed separate appeals from the judgment, which decreed that Venago Oil Corporation was entitled to the entire sum of $44,563.42 then due, and that appellants had no interest therein, or in any amounts which might thereafter become due from plaintiff in interpleader for future deliveries of crude oil under its existing contract with Venago Oil Corporation. Both appeals involve the same issues and may be disposed of in a single opinion.

The facts necessary to a decision of the appeals herein are in the main undisputed. In November, 1928, one F. M. Miller, by assignment, became the owner of an oil and gas lease covering property in the Signal Hill district, county of Los Angeles. In the months of December, 1928, and January and February, 1929, he sold for cash and materials percentage units, commonly designated royalty interests, in the oil, gas, and other hydrocarbon substances to be "produced, saved and sold" under his lease. The appellants referred to herein as Campbell and associates are either purchasers of said units, or assignees of purchasers thereof. The funds derived from the sale of units were used by Miller in drilling a well on the property. Appellant Standard Pipe & Supply Company furnished pipe used by Miller in developing said well, under a contract dated February 1, 1929, by which said company leased pipe to Miller for a specific term in consideration of a cash rental and in further consideration of the assignment to the supply company of 2 per cent. of all oil, gas, and other substances to be produced under Miller's lease. As security for payment of the cash rental, Miller assigned to the company 10 per cent. of the gas, oil, and other substances to be produced. He had not procured a permit from the commissioner of corporations for the issue of royalty interests.

By March, 1929, the well had been drilled to a depth of over 4,500 feet, but had not produced oil, and Miller was having difficulty in financing further drilling operations. On March 13, 1929, Miller, his son, and a third person organized the Venago Oil Corporation under the laws of this state, and each subscribed to one qualifying share of stock. On March 22, 1929, Miller transferred the oil lease to a third party, who was acting as a dummy in the transaction, and it was subsequently transferred to the Venago Oil Corporation. Sixteen days after formation of the corporation Miller and the other two incorporators resigned as officers and directors, and assigned their qualifying shares to three other persons, who have since continued to be officers and directors. No other shares of corporate stock have ever been issued.

The conclusion is inescapable that said three persons represent and are acting on behalf of the Du Cal Company, Inc., to which Miller was indebted for money loaned, and that it had been agreed at least as early as March 22, if not prior to organization of the

Venago Oil Corporation, that control should pass from Miller to the Du Cal Company. Miller, however, continued in charge as superintendent of the well. The Venago Corporation paid bills previously incurred by Miller. On August 15, 1929, the well was brought into production at 7,289 feet, and deliveries of crude oil were made to Western Oil & Refining Company under a contract of August 12, 1929, for purchase of the entire crude oil production from Venago Oil Corporation for a period of five years. The trial court by the judgment appealed from has decreed that appellants, as holders of royalty interests issued by Miller, have no interest in the proceeds of oil produced by Venago Oil Corporation after Miller had assigned his lease to said corporation.

**[1]** Postponing our consideration of the effect of Miller's failure to procure a permit for issuance of royalty interests, and assuming that the units as issued by him were valid, we are of the view that respondent Venago Oil Corporation was bound to recognize them as outstanding interests in the oil produced by it. We cannot accede to the trial court's view that the instruments were merely personal undertakings of Miller to pay appellants percentages of the proceeds of oil produced by him individually. By the terms of the unit instruments Miller "assigns, transfers and conveys" stated percentages of all gross oil, gas and other hydrocarbon substances "produced, saved and sold *under the terms of a certain lease*," describing the lease held by him. The oil was produced under said lease, notwithstanding Miller assigned it to the Venago Oil Corporation.

**[2, 3]** The Venago Oil Corporation is charged with full notice of the issuance of said royalty interests. Miller, his son, and a third person were the incorporators and first directors and officers of the corporation. Mark F. Jones acted as attorney for Miller and prepared an application to the commissioner of corporations, reciting the prior issuance of royalty interests sold by Miller. Jones was vice president of the Du Cal Company, Inc. As Miller and his associates resigned, Jones became a director, officer, and general manager of the Venago Oil Corporation, and has continued in office at all times since. Furthermore, the instruments through which Venago Oil Corporation succeeded to the oil lease and the oil to be produced were all transfers of the assignor's right, title, and interest. A transfer of right, title, and interest vests in the purchaser only what the transferor could claim, and is subject to all defects and equities which could have been asserted against the transferor. O'Sullivan v. Griffith, 153 Cal. 502, 505, 95 P. 873, 96 P. 323; Lombardi v. Sinanides, 71 Cal. App. 276, 277, 235 P. 455.

**[4, 5]** It is settled law that the lessee under an oil and gas lease acquires no title to the oil and gas in place as part of the realty, but only a right to enter upon the land, drill wells, and reduce the oil and gas to possession. When reduced to possession, the oil and gas are personal property, and only then can absolute title vest in the lessee. Black v. Solano Co., 114 Cal. App. 170, 299 P. 843; Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 99 P. 483, 20 L. R. A. (N. S.) 211; Brookshire Oil Co. v. Casmalia, etc., Co., 156 Cal. 211, 103 P. 927; Taylor v. Hamilton, 194 Cal. 768, 230 P. 656; Richfield Oil Co. v. Hercules Gasoline Co., 112 Cal. App. 431, 297 P. 73. Appellants invoke the doctrine of potential possession of personal property as applied to sales and mortgages of future crops and unborn young of animals, which they contend is by analogy applicable to sales and mortgages of oil and gas to be produced under an existing lease. Under this doctrine the seller or mortgagor who holds an interest in land is deemed to have potential possession of unplanted and future crops to be grown thereon, and the owner of animals to have potential possession of unborn young, which it is held may be the subject of a present sale or mortgage as distinguished from an executory contract to sell or mortgage. Arques v. Wasson, 51 Cal. 620, 21 Am. Rep. 718; Lemon v. Wolff, 121 Cal. 272, 53 P. 801; Hall v. Glass, 123 Cal. 500, 56 P. 336, 69 Am. St. Rep. 77; Sun-Maid Raisin Growers v. Jones, 96 Cal. App. 650, 274 P. 557; Merriman v. Martin, 113 Cal. App. 167, 298 P. 95. In the so-called present sale or mortgage of future goods such as crops, title to, or a lien on, the crop as personal property vests in the purchaser or mortgagee eo instante upon the crop being harvested and severed from the realty. Such title is paramount to the rights of those who claim an interest therein acquired between the date of the sale and the harvest, or thereafter.

**[6-8]** The doctrine of potential possession has been recognized by the courts of this state as applicable to sales of oil and gas to be produced under an existing lease. Black v. Solano Co., 114 Cal. App. 170, 299 P. 843; Jones v. Pier, 124 Cal. App. 444, 12 P.(2d) 646; Merrill v. California Petroleum Corporation, 105 Cal. App. 737, 288 P. 721. The operating lessee who has acquired the right by contract to enter upon land and prospect for oil and gas has potential possession of all oil and gas which may be produced during the continuance of the lease, and this is so notwithstanding the oil lease may provide for forfeiture in the event the lessee shall fail to drill a well within a designated time, or fail to discover oil. Leases of farm lands commonly provide for forfeiture for nonpayment of rent or other breaches of the lease, yet such provisions have never been thought to render the doctrine of potential possession inapplicable to crops grown while the lease is in full force and effect, and has not been forfeited or terminated. It follows that when, as in the instant case, the operating lessee has assigned percentages of the oil, gas, and other substances to be produced, saved, and sold *under his lease*, he cannot defeat the assignment by voluntary transfer to another of his right of entry to prospect for and recover oil. Title to an undivided interest in the oil produced will vest in the holders of percentage interests in like manner as if the oil had been produced by the original lessee.

[9] The doctrine of potential possession is applied to mortgages as well as to sales. Arques v. Wasson, supra; Lemon v. Wolff, supra; Hall v. Glass, supra. Appellant Standard Pipe & Supply Company holds an assignment of 10 per cent. of the gas and oil to be produced as security for cash rental for pipe supplied to Miller. Although section 2955, Civil Code, does not expressly authorize a mortgage on oil to be produced, it is provided in section 2973, Civil Code, that a mortgage of personal property other than that mentioned in section 2955, Civil Code, is valid between the parties and those who take with notice.

Royalty interests are very generally created by instruments similar in form to those we are here considering. Although persons purchasing royalty interests in oil may be making a highly speculative investment, it is certainly not within their contemplation that they are paying over their funds in return for a mere personal and conditional covenant of the lessee, which he may render absolutely worthless as to purchasers of royalty interests by a voluntary assignment of his lease. Respondent Venago Oil Corporation contends that Miller was faced with the necessity of abandoning the well for want of further funds, and that the well was deepened and brought into production with funds furnished after control had passed from Miller. Miller had drilled the well to a depth of over 4,500 feet, and the funds of appellants had been used in this development. The well was brought into production at 7,289 feet. The funds of appellants, or of their assignors where the units have been assigned, and the pipe supplied by appellant Standard Pipe & Supply Company contributed to the completed development of the well. The persons who acquired control of the Venago Oil Corporation had notice of the royalty interests issued by Miller. That they were not misled as to the rights of the Miller unit holders is indicated by the fact that Mark F. Jones, an attorney and one of the three persons who succeeded Miller in control of the corporation, had prepared an application to the commissioner of corporations on March 22, 1929, for leave to issue units of the corporation to the persons to whom Miller had issued units. This application was withdrawn, as Jones and his associates assumed control on March 29.

Respondent Venago Oil Corporation relies on the recent decision of the federal Circuit Court of Appeals in the case of In re Lathrap, 61 F.(2d) 37, which arose in California. That case involved the rights of creditors represented by the trustee in bankruptcy of the operating lessee of an oil well. The court was of the view that persons purchasing royalty interest are coadventurers and coinvestors in a business enterprise, in a similar position to the purchasers of stock in a corporate enterprise, whose chance of gain involves a corresponding risk of loss, and that accordingly their rights in the proceeds of oil produced should be subordinated to the rights of creditors of the enterprise represented by the trustee in bankruptcy of the operating lessee. Considering the nature of royalty interests, it may well be that this court would also reach the conclusion that by necessary implication it is an incident of the contract and status of unit holders that in a proper case their rights must be subordinated to those of general creditors. This question we do not decide in the case herein. The Venago Oil Corporation does not appear as a creditor of an operating lessee claiming the right to reach the proceeds of oil produced by him to an extent necessary to satisfy a debt. Rather, it claims the entire output of the well as assignee of the operating lessee, on the theory that the royalty interests issued by Miller created no rights in oil not produced by him personally.

[10] The decisions of the courts of this state cited by the federal court in the Lathrap Case sustain that court's conclusion that neither the owner of oil lands nor the lessee thereof has an absolute title to oil and gas in place as part of the realty, but only a right to prospect for oil and reduce it to possession as personal property. People v. Associated Oil Co., 211 Cal. 93, 294 P. 717; Bandini Petroleum Co. v. Superior Court, 110 Cal. App. 123, 293 P. 899. But we do not find that the recent decisions of the courts of this state repudiate the doctrine of potential possession as applied to sales of royalty interests in oil and gas to be produced. The holding of the federal court, although entitled to respect and careful consideration, is not binding or conclusive on the courts of this state. Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley (Cal. Sup.) 20 P.(2d) 940.

In Black v. Solano Co., 114 Cal. App. 170, 299 P. 843, 845, the appellate court, in considering the nature of the interest of purchasers of percentage units of oil "produced, saved and sold," said: "The oil was, however, potential personal property and so the subject of a sale (as distinguished from an executory contract to sell). 'In such case, the sale is absolute and perfect when made, vesting the property in the purchaser the moment it comes into existence.' [Citing cases.]

"In view of these principles, it is necessary to conclude that there was nothing more than a present sale of potential personal property accomplished by the transfer on which plaintiff relies."

In the recent decision in Jones v. Pier, 124 Cal. App. 444. 12 P.(2d) 646, 648, is the following statement:

"By the terms of his assignment of April 3, 1923, the plaintiff acquired an undivided 1 per cent. interest * * * in all oil, gas, or other hydrocarbon substances produced from the land therein described, for the term of twenty years from the date of the original lease *regardless of who produced the same.* The lease created a vested right in property even though it was not accompanied by actual physical possession of the subterranean deposit of gas or oil. * * *

"The plaintiff is therefore entitled to have quieted in him his undivided 1 per cent. of all oil, gas, and other hydrocarbon substances which may be developed or produced from the property during the term prescribed in the original lease *or until that instrument is lawfully terminated.*" (Italics supplied.)

In Merrill v. California Petroleum Corporation, 105 Cal. App. 737, 288 P. 721, 723, is the following statement:

"While the oil in its natural deposit was a part of the land, it was in actual existence as part of the land, and was potentially personal property under the terms of the lease, and actually became personal property to the extent of the amount thereof involved in this action when the lessee exercised his right to extract it. * * *

"By the sale to the plaintiff [purchaser of royalty interest], he and Lake [operating lessee] became tenants in common in the oil produced."

The decision in Richfield Oil Co. v. Hercules Gasoline Co., 112 Cal. App. 431, 297 P. 73, is not in conflict with our conclusion herein. In that case the plaintiff was not an investor who had purchased a percentage royalty of gas and oil to be produced, saved, and sold, but an oil company engaged in the business of refining and distributing oil, which had contracted for actual delivery of the crude oil production of the operating lessee under an executory contract of sale.

There remains to be considered the effect of Miller's failure to procure a permit from the commissioner of corporations for sale of royalty interests. Appellants contend that those provisions of the Corporate Securities Act (Deering's Gen. Laws 1931, Act 3814) which require a permit for the sale of rights to share in undeveloped oil, gas, and other hydrocarbon substances, are unconstitutional, in so far as they purport to require an individual to procure a permit for the sale of fractional interests in oil and gas to be produced from an oil lease owned by him, citing People v. Pace, 73 Cal. App. 548, 238 P. 1089. Appellants further contend that, if the pertinent provisions of the act are constitutional as applied to sales by an individual under such circumstances, nevertheless the purchasers of such securities are not in pari delicto with the individual issuing them, by virtue of which the issuer of the securities cannot raise the defense that they were issued without a permit. In support of this contention, appellants rely on our recent decision in Eberhard v. Pacific Southwest L. & M. Corp., 215 Cal. 226, 9 P.(2d) 302, 303.

The question as to the constitutionality of the provisions of the act which require an individual to obtain a permit for the issuance and sale of instruments evidencing the right to participate in oil and gas, or the proceeds thereof, to be produced under a lease owned by him, is pending before this court in the case of People v. Craven, Crim. No. 3660. Said case is before us upon order of transfer after decision of the Appellate Court, Second District, Division One, 21 P.(2d) 459, sustaining the right to sell without procuring a permit. For the purpose of the appeals herein we need not determine this issue, since under our decision in the Eberhard Case, supra, even if a permit should have been obtained, this defense is not available to Miller and his assignee with notice, Venago Oil Corporation.

In the Eberhard Case an action was brought to foreclose a mortgage securing a note held by plaintiff, which was one of a series of notes secured by mortgage and issued by the mortgagor. In defense of the foreclosure action the corporation mortgagor alleged that the notes and mortgages composing the series were all securities within the language of the Corporate Securities Act, and having been issued and sold without the permit of the corporation commissioner were void, wherefore defendant prayed judgment against plaintiffs, declaring that plaintiffs take nothing, and that said note and mortgage be declared null and void. In sustaining the judgment of the trial court ordering foreclosure of the mortgage, this court said:

"If, however, for the purposes of this opinion, the necessity for a permit be conceded, there is nothing whatsoever to show that plaintiffs are anything more than the innocent victims of appellant, which now seeks to profit by its own deliberate wrong.

"The inhibitions of the Corporate Securities Act (Deering's Gen. Laws, 1923, Supp. 1927, 1929, p. 3287, Act 3814) against sales of securities to the public without permits are meant to protect the public from imposition and deception—not primarily to benefit the seller. The seller and the purchaser are therefore in no sense in pari delicto where this provision is violated. The fact that the transaction may be void at the behest of the purchaser, is not to allow a premium for real wrong done by the seller. The fundamental maxim that 'no one can take advantage of his own wrong' (section 3517, Civ. Code), and other kindred principles, immediately recur to the mind. The above is but a recast of the doctrine abundantly supported by authority and applied in cases involving this very act done under similar circumstances. [Citing cases.]"

The decision in the Eberhard Case was followed in Braunstein v. Title Guarantee & Trust Co., 216 Cal. 780, 17 P.(2d) 104, wherein the securities were not sold without a permit, but in violation of the terms of the permit.

Respondent Venago Oil Corporation contends that the Eberhard Case is distinguishable from the instant case. It has uniformly been held that the purchaser, not being in pari delicto with the seller, may recover the consideration paid for the securities, and where judgment is allowed on a promissory note, this is the extent of the recovery, respondent states. The cases cannot be so distinguished. In the Eberhard Case the action was brought to foreclose the mortgage securing the note, and not solely to obtain a money judgment for the amount advanced. The action was based, and the judgment awarded, on the terms of the instruments, which it was contended had been issued in violation of the act, rather than on a rescission and disaffirmance of said instruments.

[11] The Corporate Securities Act was designed to protect purchasers from worthless securities. In the case herein the units proved to be valuable, notwithstanding they were issued without a permit. If the issuer of securities, or the assignee of his lease with notice, were permitted to defeat the sale of fractional interests of oil and gas to be produced, the anomalous situation would exist that the issuer of fractional interests in oil and gas to be produced who violated the law by failing to procure a permit would be in a better position than the individual who complied with the law. The owner who sold units without a permit would be enabled to retain the entire production of the well and reap a large profit, and this, although the act was enacted for the benefit of purchasers.

Respondent Venago Oil Corporation contends that the rule of the Eberhard Case does not protect appellant Standard Pipe & Supply Co., for the reason that it appears to be in pari delicto with Miller, who issued the securities. This contention cannot be sustained in the light of recent decisions. The terms of the contract for rental of the pipe to Miller were agreed on and the pipe delivered to him and immediately put to use the latter part of January, or the early part of February, 1929. Said contract was reduced to written form by said appellant about February 1. Two instruments dated February 1 evidencing the 2 per cent. assignment and the 10 per cent. assignment as security were delivered to Miller about that date. They bear Miller's acknowledgment dated March 7, and he claims that he did not sign them until that date, and between February 1 and March 7 informed appellant several times that he was unwilling to sign because he had not obtained a permit. The appellant was of the view that no permit was required for the transaction. Miller admits that appellant was not informed of the absence of a permit until after the pipe had been delivered.

[12, 13] Recent decisions indicate that the purchaser will not be held to be in pari delicto unless there is a conspiracy or intent to fraud and evade the act, or the terms of a permit actually issued, in which the purchaser participates, or other reasons making it inequitable to grant relief. In Walker v. Harbor R. & Dev. Corp., 214 Cal. 46, 3 P.(2d) 557, the purchaser was held entitled to recover, although she was an incorporator and director of the corporation issuing stock and had attended directors' meetings. In Olds v. Simmons, 123 Cal. App. 275, 11 P.(2d) 36, the appellate court, relying on our decision in the Walker Case, granted relief, although plaintiff's assignor to whom the stock was issued was employed to promote formation of the corporation and assist in selling stock. In our recent decision in Randall v. California Land Buyers' Syndicate, 20 P.(2d) 331, 332, we stated the rule as follows: "Although the parties seeking affirmative relief, i. e., the buyers of such stocks, may be in some degree guilty with the parties against whom the relief is sought, they will be denied relief only where the record shows that they are equally culpable (Campbell v. Julian Merger Mines, 111 Cal. App. 649, 295 P. 1040); and, considering the object and purpose of the Corporate Securities Act, mere knowledge of the terms of the permit, or of the fact that no permit has been issued, may not alone be sufficient to raise the guilt of the purchaser or subscriber to that degree"—citing In re Builders' Finance Ass'n (D. C.) 26 F.(2d) 123; Walker v. Harbor R. & Dev. Corp., supra; Olds v. Simmons, supra.

The federal court in Cecil B. De Mille Productions, Inc., v. Woolery (C. C. A.) 61 F.(2d) 45, which arose in California, reached a conclusion contrary to that we here state as to the rights of purchasers of royalty interests where the permit of the commissioner of corporations has not been obtained. The federal court relied on decisions of the courts of this state decided prior to our final decision in Eberhard v. Pacific Southwest L. & M. Corp., supra. In so far as said decisions are in conflict with the Eberhard Case they have been overruled.

[14] The appellants prayed for an accounting to determine the amounts which they were respectively entitled to receive of the proceeds from the sale of oil by Venago Oil Corporation to Western Oil & Refining Com-

pany, plaintiff in interpleader. In view of the trial court's conclusion that appellants had no interest in the sums due or to become due from Western Oil & Refining Company, no computations were made by said court as to the amounts to which said appellants would severally be entitled had the validity of their interests been upheld. As a result of our conclusion upholding said units as a matter of law, an accounting is necessary. Certain of the royalty interests were subject to deduction to share in the operating costs of the well, and there are numerous other computations required to be made before the exact amount to which the appellants are severally entitled can be determined. Therefore, the judgment is reversed as to the appealing defendants, with directions to the court below to proceed to take an accounting, to be based upon the evidence taken upon the trial herein, and to take additional evidence, if upon the accounting it appears that further evidence is needed to accurately calculate the share of each appellant. Said accounting should be taken by the judge who tried the action herein. Hughes v. DeMund, 96 Cal. App. 365, 274 P. 405; DeMund v. Superior Court, 213 Cal. 502, 2 P.(2d) 985.

It is so ordered.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.

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218 Cal. 784

## WESTERN OIL & REFINING COMPANY, Plaintiff and Respondent, v. VENAGO OIL CORPORATION (a Corporation), Defendant and Respondent; J. N. Campbell, Dora E. Campbell et al., Defendants and Appellants.

L. A. 12415.

Supreme Court of California.
Aug. 30, 1933.

Rehearing Denied Sept. 28, 1933.

In Bank.

Appeal by defendants from a judgment of the Superior Court of Los Angeles County, Leon R. Yankwich, Judge, in an action in interpleader to determine title to certain money.

Reversed, with directions.

Bailie, Turner & Lake, of Los Angeles, for appellant Standard Pipe & Supply Co.

George W. Nilsson, of Los Angeles, amicus curiæ, for appellant Standard Pipe & Supply Co.

Louis N. Whealton, of Long Beach, for appellants Mark Hay, Dora E. Campbell, and John Maguire.

John H. Burke and Harry A. Houser, both of Long Beach, for appellants J. N. Campbell, Harold A. Wallace, Edward Rumfo, H. V. Mahon, Robert W. Stewart, George M. Tietjen, Emma C. Osborne, Eva H. Holbrook, Mabel E. Hotchkiss, W. E. Wilson, B. G. Wallace, and Fritz Ziebarth.

Medler & Wood, of Los Angeles, for appellant C. M. Dunham.

Wallace Collins, of Los Angeles, for appellants McDonnell.

Arthur G. Baker, of Los Angeles, for respondent Western Oil & Refining Co.

W. L. Engelhardt, G. J. Oppegard, and Mark F. Jones, all of Los Angeles, for respondent Venago Oil Corporation.

Hanna & Morton, of Los Angeles, amici curiæ for respondents.

PER CURIAM.

The appeal herein is a separate appeal taken from the judgment reviewed in Western Oil and Refining Company v. Venago Oil Corporation (L. A. No. 12404, Cal. Sup.) 24 P. (2d) 971, this day decided, by Campbell and other persons referred to on appeal as Campbell and associates. All questions involved upon the appeal herein are determined by our decision in L. A. No. 12404. On the authority of said case, the judgment is reversed as to appellants herein; with directions to the trial court to take an accounting, as ordered in L. A. No. 12404.

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136 Cal.App.Supp. 789

## BAY DISTRICT CLAIM SERVICE, Limited, v. JONES et ux.

No. 385.

Appellate Department, Superior Court, City and County of San Francisco, California.
Aug. 25, 1933.

1. **Husband and wife** ⚿19(6).

Husband is liable for necessaries furnished wife living apart under separation agreement, where husband fails to comply with covenant therein to make payments to wife for her support (Civ. Code, § 175, as amended).

2. **Statutes** ⚿212.

It is presumed that amendment to statute is made with cognizance of previous adjudication on subject-matter.

Appeal from Municipal Court, City and County of San Francisco; Frank T. Deasy, Judge.

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Action by Bay District Claim Service, Limited, against Henry M. Jones and wife. From an adverse judgment, named defendant appeals.

Affirmed.

Manson & Allan, of San Francisco, for appellant.

Leon A. Blum, of San Francisco, for respondent.

JOHNSON, Presiding Judge.

The plaintiff instituted the action as the assignee of Raphael Weill & Co., a corporation operating the department store known as the White House in San Francisco. The defendants, Henry M. Jones and Anna (otherwise known as Zona C.) Jones, are husband and wife, who have been living apart under a separation agreement dated June 16, 1915. In the agreement Mr. Jones agreed to pay his wife for her maintenance and support the sum of $200 a month.

In September, 1931, Mrs. Jones bought a fur coat at the White House for $372.50 on which she paid $104, leaving unpaid at the time of suit $268.50. At about the same time certain other articles of clothing were purchased on credit for which there was owing $37.50. The goods purchased were all charged to Mrs. Jones personally.

In the year 1931, and particularly at the time of the purchases, Mr. Jones was not fully complying with the agreement to pay his wife $200 a month; and in December, 1931, Mrs. Jones instituted an action against her husband to recover the amount of $2,975 in arrears, together with accrued interest, and obtained a judgment by default for $3,460.03. On March 29, 1932, after that judgment was entered, Mr. and Mrs. Jones made a new or supplemental agreement modifying their original agreement, and among other things providing for satisfaction of said judgment. This later agreement was, however, almost immediately repudiated by Mrs. Jones, and nothing was received by her under it. Her judgment also remained unpaid.

In the present action the trial court gave judgment in favor of plaintiff against the defendant Henry M. Jones for $306, the full amount of the claim, and said defendant has appealed from that judgment.

[1] The question presented is whether a husband is liable for necessaries furnished to his wife, when the two are living apart under a separation agreement, wherein the husband covenants to make stipulated payments to the wife for her support, but fails of compliance with his stipulation.

Section 175 of the Civil Code provides: "Nor is he liable for her support when she is living separate from him, by agreement, unless such support is stipulated in the agreement."

The appellant contends that when such an agreement exists between husband and wife, then, irrespective of whether the stipulated payments are made or not, a person supplying necessaries to the wife on credit may not recover therefor from the husband, but the remedy is an action by the wife herself to enforce the delinquent payments under the separation agreement.

The question is a new one in this state, but in our research we have found a few precedents in other jurisdictions. The earliest reported case dealing with a similar situation is Nurse v. Craig, 2 Bos. & P. (N. R.) 148, decided in 1806. In that case various decisions are cited wherein it had been held that if the separate maintenance was regularly paid the husband was exempt from liability for the wife's debts. Such would certainly be the effect of the language of section 175 of our Civil Code; but if the husband defaults in his payments, then the ground for the exemption fails. In the case cited, Justice Heath reasons as follows (pp. 156–158): "As to the principle, it is the duty of the husband to provide necessaries for the wife. The question is, whether he discharges that duty merely by entering into a covenant with a trustee for payment of an allowance? If he refuse to perform the covenant, the wife may be starved before redress can be obtained. The common law does not relieve any man from an obligation on the mere ground of an agreement to do something else in its place, unless that agreement be performed. Accord without satisfaction is no plea. * * * The agreement could have no operation in destroying the husband's liability by transferring the credit to the wife, unless accompanied by payment; she cannot be in a worse condition than if she cohabited with her husband. * * * But if such a covenant as this, without payment, be sufficient to exempt the husband from his liability, it would have the same effect as a general prohibition. At common law the wife may have resource to any friend for necessaries if the husband refuse her, and the husband is bound to pay for them; for when the law imposes a duty, it raises a promise on the part of the person upon whom it is imposed to discharge it. * * * To suppose that a woman who is parted from her husband under an agreement for a separate maintenance is not by law entitled to charge her husband with payment of her necessaries, when he withholds the stipulated allowance, shocks my humanity and revolts my reason."

On the authority of Nurse v. Craig, supra, it was held in 1829 in Hunt v. De Blaquiere, 5 Bing. 550, that where husband and wife were separated by a divorce a mensa et thoro for the husband's fault, with an order for alimony in favor of the wife, the husband was liable for necessaries furnished to the wife in case the alimony were not paid. As was there said, "It is not the decree or the deed that discharges the husband, but the observance of it."

And in Johnston v. Sumner, 3 H. & N. 261, 268, Pollock, Chief Baron, in 1858, said that where the husband did not pay the allowance, "it was not unreasonable to imply that he meant, if he did not pay it, his wife might pledge his credit."

See, also, Beale v. Arabin, 36 L. T. (N. S.) 249, decided in 1877.

The question first arose in this country for consideration in 1811 in New York in Baker v. Barney, 8 Johns. 72, 5 Am. Dec. 326, where the husband and wife had parted by consent, with a promise on the part of the husband to provide money for the wife's maintenance. There being no proof that the allowance was punctually paid, the court, following the rule applied in Nurse v. Craig. supra, held the husband liable for necessaries supplied to the wife after the separation, saying, "If the husband was from that time to be discharged from responsibility for necessaries, the wife might have been left to subsist on charity."

So in Fredd v. Eves, 4 Har. 385, 387, the rule was laid down in Delaware in 1846 in these words: "Where husband and wife separate by their mutual agreement, and live apart by mutual consent, the husband is still liable for necessaries supplied to the wife, unless he has provided for her, an allowance for necessaries, suitable to his pecuniary means and condition in life, and regularly pays such allowance. If he has not provided such allowance, or does not pay it regularly, he is not discharged from the liability which the law imposes upon him of supporting his wife."

See, also, Kemp v. Downham, 5 Har. (Del.) 417, 418.

And at about the same time, in Brown v. Brown. 5 Gill (Md.) 249, the court, speaking of a separation deed and citing Nurse v. Craig and Baker v. Barney, supra, said (page 255): "This deed, so long as the terms of it are complied with on the part of the husband, exonerates him from the obligation to support his wife, and is a protection against any claim which can be made upon him for supplying her even with necessities."

The latest case which we find is McKinney v. Guhman, 38 Mo. App. 344, decided in 1889, where the rule is very clearly enunciated in the following language (page 347): "Where there has been a mutual separation between husband and wife, two things are necessary to relieve the husband from the payment of debts contracted by the wife for necessaries: First. The husband must make an allowance to the wife for her support, and the amount so allowed must be reasonably sufficient to furnish the wife with necessaries. The word 'necessaries' would include board, washing, suitable clothing and medical attendance. Second. The allowance must be regularly paid. The mere agreement of the husband to pay the allowance does not relieve him of his legal obligations; nothing short of actual performance will suffice."

[2] When section 175 of the Civil Code was amended in 1874 (Code Amdts. 1873–74, p. 193), by the addition of the clause relieving the husband of obligation to support the wife, if living apart from him by agreement, unless such support is stipulated in the agreement, it is to be presumed that the amendment was made with cognizance of the previous adjudications on the subject, and with no intention of exempting the husband from liability for the wife's necessaries by a mere promise without fulfillment. As was said by Justice Heath in Nurse v. Craig, supra: "The law does not relieve a man from obligation on the mere ground of the agreement to do something else in its place, unless that agreement be performed." The husband's stipulation may legally be interpreted, therefore, as carrying with it his implied consent that the wife may supply her needs at his expense, if his money is not forthcoming to her as agreed.

Some question is raised by the appellant as to the sufficiency of proof that the station in life of the parties justified the purchase of the fur coat in question. Both the original and the supplemental agreement between Mr. and Mrs. Jones were introduced in evidence; and from the terms of the later document dated March 29, 1932, even if the original agreement is left out of consideration, we think the trial court could readily draw the inference that, as fashions go nowadays, Mr. Jones' means and condition in life were such as to justify his wife in providing herself with a fur coat of the character purchased. The judgment is affirmed.

CONLAN and GOODELL, JJ., concur.

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